

**THE HISTORY OF THE OCCUPATION OF LAND IN THE
CAPE COLONY AND ITS EFFECT ON LAND LAW AND
CONSTITUTIONALLY MANDATED LAND REFORM**

by

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Declaration

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Summary

In this thesis I investigate the manner in which land was occupied in the Cape Colony by pastoral indigenous communities, colonial governments and non-indigenous settlers, and the significant role these patterns of occupation played in the development of land law in the colony until the end of the nineteenth century.

This investigation shows that pastoral indigenous communities had customary law rights in the land they occupied as grazing in terms of their customary law systems long before the colonial period commenced. These communities were gradually dispossessed of these rights during the colonial period. Non-indigenous persons occupied and obtained rights in land in terms of the domestic law system that was developing in the colony. They dispossessed indigenous communities of their customary law rights in land used as grazing when they occupied it for agricultural purposes. However, their rights in land used as grazing were very similar to the customary law rights of indigenous communities in such land. Consequently, a system of overlapping occupation of land used as grazing developed, particularly in the Northern Cape.

The domestic land law system of the Cape Colony was gradually abolished by reforms introduced by the British colonial government after 1813. These reforms were aimed at transforming land in the entire Cape Colony into an asset that could be exploited for the benefit of the British Empire. By introducing the English common law doctrine of tenures the British colonial government could claim all waste land as private law property of the Crown. The actual dispossession of land used as grazing by pastoral indigenous communities was caused by legislation adopted in the colony during the nineteenth century. Under the present constitutional dispensation this type of legislation is regarded as racially discriminatory.

The purpose of this thesis is to show that to address and reverse the effect of dispossession of the customary law rights in land of pastoral indigenous communities the constitutional land reform programme must be extended to include measures to rectify the dispossession of such rights. This approach ensures that

colonial dispossession of land is also addressed, not only dispossession caused by apartheid legislation.

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Part 1

Introduction and determination of study area

1 Introduction

1.1 Purpose

When the remarks of academic writers,¹ South African courts² and politicians³ about dispossession of land in South Africa are considered, it is interesting to note that the words colonialism and apartheid are often used together when dispossession of land is discussed. This creates the impression that the dispossession of land under these two systems is regarded as similar in nature and therefore equally reprehensible. However, it is clear that the drafters of the Constitution of the Republic of South Africa, 1996 ('Constitution') did not regard dispossession of land under the colonial system in the same light as dispossession of land under apartheid. The dispossession of the customary law rights in land of indigenous communities⁴ during the colonial period⁵ is not addressed in terms of the constitutional land reform

¹ See R Hall 'Land restitution in South Africa: Rights, development, and the restrained state' (2004) 38 *Canadian Journal of African Studies / Revue Canadienne des Études Africaines* 654; L Ntsebeza 'Land redistribution in South Africa: The property clause revisited' in L Ntsebeza & R Hall (eds) *The land question in South Africa: The challenge of transformation and redistribution* (2007) 108; M Spierenburg & S Brooks 'Private game farming and its social consequences in post-apartheid South Africa: Contestations over wildlife, property and agrarian futures' (2014) 32 *Journal of Contemporary African Studies* 155.

² *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 1 SA 530 (CC) 565 ('Mkontwana'); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 3 SA 454 (CC) 545; *Daniels v Scribante and Another* 2017 4 SA 341 (CC) 349.

³ See for example RA Trollip's proposed 'Legislative Proposal to ensure full individual security for people living under communal land tenure' submitted to a Parliamentary Committee on 15 May 2012. <https://pmg.org.za/committee-meeting/14383/> (accessed 12 September 2018).

⁴ The contentious issue of who may be regarded as indigenous people in South Africa is not addressed in this thesis. What is discussed, is the conflict between the rights in land recognised in terms of Western legal systems brought to South Africa by non-indigenous persons and the rights in land under the customary law systems that the inhabitants of South Africa had before 1652 and subsequently during the period before and after the extension of sovereignty over their territory by a colonial government. For the sake of convenience I will refer to the persons and communities that qualify as holders of rights in land under the customary law systems as indigenous people or indigenous communities. Western legal systems had their origins in Europe and include the international law rules that applied during the colonial period.

⁵ The phrase 'colonial period' refers to the period from 6 April 1652 when the Dutch East India Company established a refreshment station in Table Valley to 31 May 1910 when the Union of South Africa came into existence.

programme provided for in section 25(5) to (7) of the Constitution.⁶ Section 2(1)(d) of the Restitution of Land Rights Act⁷ provides that communities dispossessed after 19 June 1913⁸ ('cut-off date') will be entitled to restitution of their rights in land. This means that communities dispossessed of their rights in land before the cut-off date must rely on the redistribution of land in terms of section 25(5) of the Constitution to gain access to the land their ancestors occupied and lost before the cut-off date. Hall explains the differences between redistribution and restitution as provided for in section 25(5) and (7) of the Constitution respectively as follows:⁹

While the land redistribution programme is discretionary, restitution is a rights based programme in that eligible claimants have the right to restoration of, or compensation for, land of which they were dispossessed.

These remarks point to the fact that although the indigenous communities whose ancestors were dispossessed of their rights in land before the cut-off date may gain access to land in terms of the redistribution sub-programme of the constitutional land reform programme it will not necessarily be their ancestral land. In my opinion this is because section 25(5) and (6) of the Constitution does not provide that customary law rights in land may be taken into account in the redistribution of land. In this thesis I contend that the different remedies provided for addressing the dispossession of rights in land before and after the cut-off date create a situation which is inherently unfair.¹⁰

⁶ See also in this regard the following remarks contained in the recommendation regarding a proposed National Land Reform Framework Bill:

A major controversy has emerged about the parameters of land restitution, and the wide array of potential claims that fall outside the ambit of the Act, especially due to the cut-off date of 19 June 1913. Clearly, due to the manner in which colonial conquest and dispossession proceeded across the country, this prejudices the interests of those descended from the communities dispossessed earliest, especially in what are now the Northern Cape and Western Cape. Simply put, due to the vagaries of history and colonial interests, their claims cannot be addressed within the current law. However, the Restitution of Land Rights Act empowers the Minister to address such claims – that are legitimate but not valid in terms of the eligibility criteria of the Act – by giving them priority within the land redistribution programme. There is no evidence that any mechanism exists through which this can be done, nor that the Minister has done so to date.

'Report of the high level panel on the assessment of key legislation and the acceleration of fundamental change' November 2017 225.

⁷ 22 of 1994.

⁸ 19 June 1913 is the date on which the Natives Land Act 27 of 1913 entered into force.

⁹ Hall (n 1 above) 656.

¹⁰ The following remarks of Van Wyk show that the descendants of pastoral indigenous communities who were dispossessed of their rights in land during the colonial period attach the same value to land as other indigenous communities who were dispossessed of their rights in land during that period and after the cut-off date:

... since the 1994 Land Restitution Act excludes land dispossession prior to 1913, any Khoisan claims to the land that was confiscated from them prior to this point have not been taken in hand. Such loss of land is hugely significant in any consideration of the contemporary identity of a group with strong ties to land as part of their traditional way of life, and therefore continued displacement from traditional land

In *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* ('*Mkontwana*') the Constitutional Court ('CC') remarks as follows:¹¹

[81] The property clause must therefore be interpreted in a manner which seeks to establish a balance between the need to protect private property, on the one hand, and to ensure that property serves the public interest, on the other. *This balance will need to be struck in the light of our history.* The inclusion in s 25 of the provisions of ss (5) to (9) emphasises the importance, in particular, of the need for land reform and the importance of security of tenure on land. These provisions highlight the inequities of land distribution in South Africa, as a result of the processes of colonial and apartheid dispossession. As this Court has emphasised on many occasions, our Constitution is a document committed to social transformation. *It insists that the deep injustices of our past characterised by racial dispossession and exclusion be addressed and reversed.* The Constitution's commitment to the protection of property rights must be interpreted in a manner consonant with that vision. (Emphasis added.)

The purpose of this thesis is to determine whether the dispossession of the customary law rights in land of the pastoral indigenous communities in the study area,¹² who were the first indigenous communities to be dispossessed of their rights in land in South Africa,¹³ can be 'addressed and reversed' as contemplated by the CC in *Mkontwana*.

cannot help but have an impact on Khoisan identity. This is a major concern of many contemporary Khoisan leaders, and a case for the recognition of Khoisan land claims was in fact brought to the government in Pretoria in February 2012. The struggle for Khoisan ancestral lands continues in 2015.

B van Wyk 'Indigenous rights, indigenous epistemologies, and language: (Re)construction of modern Khoisan identities' (2016) 4 *Knowledge Cultures* 39. Van Wyk positions himself as a Khoisan researcher who 'live(s) and practice(s) Khoisan traditions' and therefore writes from the perspective of indigenous communities who were dispossessed of their rights in land before the cut-off date. Van Wyk (above) 35.

¹¹ *Mkontwana* (n 2 above) 565-566.

¹² For the purposes of this thesis 'pastoral indigenous communities' means indigenous communities that only kept livestock and did not cultivate the land.

¹³ Pienaar remarks that the restitution sub-programme of the constitutional land reform programme provided for in section 25(7) of the Constitution 'never set out to achieve a total reconstruction of property related issues and relations'. She also remarks that it is not the aim of this sub-programme to 'redistribute or broaden access to land', but that it is aimed at benefitting a 'limited number of beneficiaries, linked to strict legal requirements within a set time frame'. JM Pienaar *Land reform* (2014) 515-516. In this thesis I contend that the pastoral indigenous communities have been marginalised by the approach adopted in the constitutional land reform programme. For the purposes

As these pastoral indigenous communities lived in the regions which are now the Western Cape Province and parts of the Northern Cape Province and Eastern Cape Province, the study area for this thesis is also limited to these regions.¹⁴

In view of Hall's remarks that the restitution sub-programme of the constitutional land reform programme is a rights based programme, I contend that the descendants of the dispossessed pastoral indigenous communities must be placed in a position where they can again exercise their customary law rights in land on the land their ancestors occupied. This approach means that I must determine who the indigenous communities are who still exercise such customary law rights and what the nature of these rights are. To accomplish these goals, I study the manner in which the indigenous communities and non-indigenous persons¹⁵ who arrived after the middle of the seventeenth century occupied the land in the study area.

It is only relatively recently that historians and legal historians acknowledged that in terms of their own customary law systems, nomadic pastoral indigenous communities had rights in the land their livestock occupied as grazing.¹⁶ Although these customary law systems are older than the Western legal systems of non-indigenous persons, the rights in land obtained in terms of the last mentioned systems have been studied for a much longer time. As a result more information is available about the international law and private law rights in land of non-indigenous

of this thesis, 'South Africa' means the territory of the Republic of South Africa as it exists today. Depending on the context in which the expression is used it can also mean the state.

¹⁴ The study area is described in more detail in section 1.2 and in Chapter 2.

¹⁵ The phrase 'non-indigenous persons' refers to natural and legal persons who cannot be regarded as indigenous people as contemplated in note 4 and who acquired their rights in land in terms of the domestic law of the Cape Colony. The legal persons contemplated are persons like the Dutch East India Company and the colonial government.

¹⁶ Gilbert remarks that prior to the Internal Court of Justice's advisory opinion in *Western Sahara, Advisory Opinion* I.C.J. Reports 1975 the general approach in international law was that the use and occupation of territories by nomadic peoples had no standing, did not need to be respected and could not constitute a source for ownership or use of the land.

J Gilbert 'Nomadic territories: A human rights approach to nomadic peoples' land rights' (2007) 7 *Human Rights Law Review* 688. In a South African context Fagan remarks that the Roman-Dutch law as introduced at the Cape was one of the factors that led to the 'complete exclusion of Khoikhoi law' from the law of South Africa. E Fagan 'Roman-Dutch law in its South African historical context' in R Zimmermann & D Visser (eds) *Southern Cross: Civil law and common law in South Africa* (1996) 40.

persons. The description of how they obtained rights in land at the Cape¹⁷ and the interior of the Cape Colony¹⁸ by occupying it, is correspondingly extensive, taking up Parts 2 and 3 of the thesis. This is one of the reasons why the chronological order in which I discuss how the inhabitants of the study area occupied the land at the Cape is inverted. However, a more important reason is that by placing the discussion of the nature of the customary law rights in land of indigenous communities and how such rights were obtained in Part 4, continuity is ensured with the line of reasoning that I adopt in Part 5, which deals with the possible restoration of such rights in terms of the Constitution.

The discussion in sections 1.2 to 1.5 highlights the main themes of Parts 1 to 4 of the thesis, namely the manner in which—

- (i) non-indigenous persons obtained rights in land and appropriated land from indigenous communities; and
- (ii) pastoral indigenous communities obtained rights in the land they occupied and were gradually dispossessed of these rights.

Section 1.6 deals with Part 5 of the thesis in which the focus shifts to the northern part of the study area where the descendants of the original pastoral indigenous communities are still occupying land in terms of the customary law systems of their ancestors.

¹⁷ I use the phrase 'the Cape' to refer to the Cape Peninsula and Table Valley, that are separated from the interior of the country by a large flat area of sand commonly referred to as the Cape Flats, and a small area along the west coast up to Saldanha Bay. For the purposes of this thesis, the Table Valley encompasses the area north of Table Mountain and Devil's Peak up to the seashore and east of Lion's Head and Signal Hill. In this thesis, if the location and name of a place referred to in contemporary sources of the seventeenth and eighteenth centuries are still known and still used, I use the modern name as referred to in PE Raper et al *Dictionary of Southern African place names* (2014). I use the English spelling of the name as given in Raper except where no English spelling is given.

¹⁸ In this thesis I use the phrase 'interior of the Cape Colony' to refer to the areas beyond the permanent settlement areas of the Cape and the district of Stellenbosch and Drakenstein. These areas comprise the arid areas north and north-east of the Cape, the coastal area that was later the district of Swellendam and the district of Graaff-Reinet. The phrase 'permanent settlement areas' means the areas where there were colonial government buildings and non-indigenous settlers' houses, like the area where Cape Town was starting to develop and areas where the non-indigenous settlers had farms.

1.2 Part 1: Introduction and determination of study area

Chapter 2 forms part of the Introduction to this thesis and describes the method that I use to define the study area of the thesis. I describe how indigenous communities occupied land for centuries and how non-indigenous persons occupied land during the colonial period. By making the manner in which the last mentioned persons occupied land at the Cape the focus of Parts 2 and 3, the important question of dispossession of land from indigenous communities, specifically in the Northern Cape,¹⁹ is discussed against the background of the different ways of occupation of land under the Dutch East India Company ('Company') and the British Crown. The focus on occupation of land makes it possible to—

- (a) advance the theory that the rights in land of indigenous communities and non-indigenous persons developed over a long period of time in terms of their respective legal systems; and
- (b) explore the phenomenon of overlapping occupation of land²⁰ by indigenous communities and non-indigenous settlers²¹ during the colonial period.

The existence of overlapping occupation of land forms the background for some of the suggestions I make in Part 5 with regard to legislative measures that may ensure the survival of the customary law systems of pastoral indigenous communities.

As the manner in which pastoral indigenous communities occupied land is the determinant of the extent of the study area, I discuss the concepts of pastoralism and nomadic orbits²² in Chapter 2. The discussion of the occupation of land by pastoral indigenous communities using nomadic orbits makes it clear that the extent of the land occupied was not defined by physical boundaries. Consequently, the study area is not a precisely defined geographical area. The western part of the study area is formed by the land between the Atlantic Ocean coast and the mountains in the east that form the escarpment stretching south from the Gariep River to the Cape Peninsula. The southern part of the study area is formed by the

¹⁹ In this thesis the phrase 'Northern Cape' does not refer to the Northern Cape Province but to the part of the study area that stretches north from the Olifants River along the West Coast to the Gariep River. Thus for the purposes of this thesis the largest part of the Northern Cape forms part of the region that has been known as Namaqualand almost from the start of the colonial period.

²⁰ Overlapping occupation of land in the study area is discussed in section 2.5 of Chapter 2.

²¹ I use the phrase 'non-indigenous settlers' for persons who left the service of the Company to conduct farming operations for their own account, and their descendants, as well as non-indigenous immigrants, like the French Huguenots, who were not employees of the Company.

²² The meaning of the phrase 'nomadic orbit' is discussed in section 2.4.1.2 of Chapter 2.

land between the Atlantic and Indian Oceans and the mountains in the north forming the escarpment stretching from the Cape Peninsula east up to modern day Port Elizabeth.

1.3 Part 2: Rights in land of colonial governments

In Part 2 (Chapters 3 to 7) I contend that the Company did not have any private law rights in the land at the Cape or in the interior of the Cape Colony²³ apart from the rights that it obtained in the demarcated land that it occupied,²⁴ public land²⁵ or land that it bought from other non-indigenous persons. In other words, although the Company exercised sovereign powers over a huge territory at the end of its reign, it had no rights in the land occupied by other non-indigenous persons or in waste land.²⁶ This contention is based on the arguments advanced in Part 2 that—

- (a) in terms of seventeenth century international law rules—
 - (i) the Company acquired the territory at the Cape by occupation and had by 1700 effectively occupied this territory;
 - (ii) the Company did not acquire the territory in the interior of the Cape Colony by occupation or by any other accepted method of acquisition of territory;
 - (iii) non-indigenous settlers who appropriated the land in the interior of the Cape Colony acted independently and not on behalf of the Company and could therefore not acquire the land for the Company by occupation;
 - (iv) the Company eventually occupied the interior of the Cape Colony effectively,²⁷ because it exercised control over the non-indigenous

²³ When I use the phrase 'Cape Colony' in this thesis it does not necessarily mean the Cape Colony as it existed when the Union of South Africa was formed in 1910. When I speak of the Cape Colony the meaning of the phrase is determined by the period that I am dealing with at that stage

²⁴ The principles in terms of which the Company obtained ownership of the land it occupied are discussed in section 5.4.3 of Chapter 5.

²⁵ The phrase 'public land' refers to land such as public streets and other public facilities that were owned by the Company but to which members of the public had free access and which were used for the benefit of the whole community.

²⁶ The phrase 'waste land' in this thesis means all land before it was occupied in any manner by non-indigenous persons.

²⁷ In section 3.3.3.2.1 of Chapter 3 I contend that the manner in which the Company occupied the interior of the Cape Colony is a modification of the international law principle of effective occupation.

- settlers by establishing the offices of landdrosts and heemraden in the interior; and
- (v) the British government as successor of the Company only acquired the rights in land that the Company had, which meant that although they conquered the Cape Colony they could not obtain more private law rights in land than the rights that the Company had;
 - (b) the limitation on the private law rights of the Company in the land of the Cape Colony in comparison with the other colonies of the Company and the colonies of the Dutch West India Company was the result of unique circumstances including the fact that the Cape was acquired by occupation;
 - (c) the States-General as sovereign of the Dutch Republic did not have the power, like the British sovereign, to confer private law rights on the Company in the land that it acquired by occupation at the Cape.

My contention that the Company did not have private law rights in the land at the Cape makes it necessary to argue that non-indigenous settlers acquired their private law rights in land not by grant but by occupation.²⁸ The fact that the Company was unable to transfer ownership of land, as contemplated in Roman-Dutch law, to non-indigenous settlers is the reason why I contend that their rights in land were based on the domestic law of the Cape Colony²⁹ and not on Roman-Dutch law alone. An example of a Cape Colony domestic law principle is discussed in Chapter 5, where I contend that the rights that the first non-indigenous settlers obtained in the

²⁸ Non-indigenous settlers obtained ownership of land by occupation in terms of the same principles as the Company as discussed in section 5.4.3 of Chapter 5. However, as they were the subjects of the Company, they could only occupy land that had been surveyed and demarcated on a diagram and for which they had received authority to do so in terms of the contracts referred to in note 30.

²⁹ The phrase 'domestic law' is used to differentiate the law used in the Cape Colony from international law but also as a substitute for the more familiar concept of Roman-Dutch law that forms a part of the common law of South Africa. I am of the opinion that there is a difference between the common law of the Cape Colony in the colonial period and the law that is today known as the common law of South Africa. I do not contend that Roman-Dutch law was not introduced in the Cape Colony in 1652 or that it was not the basis of property law in the Cape Colony. My contention is that as the Cape Colony developed, Roman-Dutch law of property principles were applied in situations that were familiar to the colonial government and non-indigenous settlers. However, the colonial government was confronted with circumstances relating to the occupation of land in which conventional Roman-Dutch law principles could not be applied. Consequently, the colonial government adopted measures to address these circumstances that gradually became customs in the Cape Colony, or published *plakate* ('local laws') to address the problem. In my opinion these customs and *plakate* formed part of the legal system that I refer to as the domestic law of the Cape Colony.

land they were given in 1657 were personal contractual rights.³⁰ Such a right cannot be equated with the right of ownership in land that was accepted by the courts and academic handbook writers as the law of the Cape Colony and South Africa during the nineteenth and twentieth centuries.

The argument that the Company was not the private law owner of waste land at the Cape or in the interior of the Cape Colony is supported by the fact that the colonial government never regarded such land as an asset that it could sell to the non-indigenous settlers. The British colonial government, however, had a clear interest in converting waste land in the Cape Colony into a revenue producing asset. This had a profound effect on how land was occupied in the interior of the Cape Colony under British rule. In 1814, the formal cession of the Cape Colony by the king of the Netherlands to the British king paved the way for the introduction of ownership of land used as grazing in the interior of the Cape Colony. This radical change relating to waste land was made possible by the introduction of the English common law doctrine of tenures into the domestic law of the Cape Colony. The introduction of this doctrine in the Cape Colony has engendered very little interest amongst legal historians. However, in this thesis I consider it an important event, because by applying the doctrine of tenures to land in the Cape Colony, the British colonial government treated all land that was not owned in terms of ownership transactions³¹ as Crown land. Crown land included—

- (a) land occupied by non-indigenous settlers in terms of the domestic law of the Cape Colony, such as loan places;

³⁰ The Company derived its power to enter into this type of contract with the non-indigenous settlers from the provision in its charter that it must adopt the measures necessary for the good government of its trading posts. I discuss these contracts in section 5.5 of Chapter 5. In section 10.2.1 I discuss the rights they could transfer after having occupied the land. The contracts concluded between the first non-indigenous settlers and the Company are referred to as 'land cultivation transactions', as they were concluded with the purpose of increasing the settlement's ability to raise crops. My contentions regarding the contracts that were concluded are contrary to the generally accepted approach to ownership of land used for agricultural purposes, which is based on the assumption that the Company was the private law owner of the land at the Cape. Carey Miller remarks as follows in this regard:

The form of tenure could be seen to bear a certain relationship to the classic feudal type with the vassal's obligation to render military service substituted by an obligation to provide produce. DL Carey Miller & A Pope *Land title in South Africa* (2000) 4. The contention that the States-General or the Company was the owner of the land at the Cape in terms of feudal law is considered and rejected in section 5.3.2.3 of Chapter 5.

³¹ Ownership transactions are discussed in section 10.1 of Chapter 10.

- (b) land occupied by indigenous communities in terms of their customary law systems; and
- (c) waste land not occupied by indigenous communities.

Furthermore, the British colonial government enacted legislation in terms of which the Crown land referred to in paragraphs (b) and (c) above was surveyed and sold or leased.³²

1.4 Part 3: Dual system of rights in land in terms of the domestic law of the Cape Colony

In Part 3 (Chapters 8 to 10) the focus of the thesis shifts from colonial governments' rights in land to the control measures adopted by the colonial governments that led to the development of a unique dual system of rights in land used for agricultural purposes and land used as grazing. Jan van Riebeeck, the first Commander of the Company's settlement at the Cape, was convinced that the land was very fertile, but experience taught him that successfully raising crops was a very difficult task.³³ In contrast, raising livestock on the seemingly limitless expanse of grazing available at the Cape was comparatively easy.

During the seventeenth century the Company had herds of cattle and livestock in order to provide the Company's fleets with a supply of meat.³⁴ In order to meet the demand the colonial government made sure that the best grazing at the Cape was reserved for its livestock. With the release of the first non-indigenous settlers in 1657, the colonial government also made sure that they were not given permanent use of specific parts of the land used as grazing at the Cape. However, as the non-indigenous settlers' herds and flocks increased, the colonial government had to establish measures to control the available grazing at the Cape. As the non-

³² I refer to this practice as the 'survey and sale system'. The land in paragraph (a) was surveyed but not sold, as loan places were converted in terms of the Perpetual Quitrent Proclamation into perpetual quitrent land. The conversion of these places had the same effect of dispossessing indigenous communities of their customary law rights in land as the survey and sale system.

³³ L Guelke 'Blanke boere en grensbewoners 1652-1780' in H Gillomee & R Elphick (eds) *'n Samelewing in wording: Suid Afrika 1652-1840* (1990) 70-74. As an example of Van Riebeeck's miscalculation regarding the viability of the Cape for the growing of crops Guelke points out that after 10 years of the existence of the settlement, only 15 farms were actually producing crops in an area that Van Riebeeck initially estimated as being able to support 'thousands' of non-indigenous agriculturists. Guelke (above) 72.

³⁴ D Sleigh *Die buiteposte: VOC-buiteposte onder Kaapse bestuur 1652-1795* (2007) 9.

indigenous settlers had to maintain herds of working cattle³⁵ near their agricultural³⁶ land and did not have enough land to use as grazing on their farms, the colonial government was compelled to ensure that the non-indigenous settlers had adequate grazing for their working cattle. The facts that the Company was not the private law owner of waste land at the Cape and that the colonial government³⁷ had to control the land used as grazing make it necessary to determine who the owner of the land concerned was.

The land that was used as grazing on a communal basis by the livestock of the Company and the non-indigenous settlers could not be the subject of private law ownership, as it was not a demarcated piece of land and was therefore not a thing as contemplated in the Roman-Dutch law Law of Things. As the land used as communal grazing in the Netherlands had owners, Roman-Dutch law did not develop principles to classify land that could not be owned and that was used for communal purposes like grazing. Consequently, I consider Roman law principles relating to common things (*res omnium communes*) and public things (*res publicae*) to come to the conclusion that grazing used by the colonial government and non-indigenous settlers may be classified as a public thing owned by the Company.³⁸

I discuss the different control measures that the colonial government used to regulate the manner in which non-indigenous settlers occupied land used for agricultural purposes and the land used by their livestock as grazing in Part 3. When

³⁵ I use the phrase 'working cattle' to refer to the oxen and breeding stock that had to be kept by non-indigenous settlers who were engaged in grain farming and viticulture. The phrase is used to distinguish between the cattle kept by such farmers and the cattle of livestock farmers.

³⁶ In this thesis the words 'agriculture' and 'agricultural' are used in their original sense of 'cultivating the soil to produce crops'. The *Oxford English Dictionary* defines 'agriculture' amongst other meanings as follows: 'Originally: the theory or practice of cultivating the soil to produce crops; an instance of this (now rare)'. 'agriculture, n.' *OED Online*. Oxford University Press, December 2016. <http://www.oed.com.uplib.idm.oclc.org/view/Entry/4181?redirectedFrom=agriculture#eid> (accessed 7 February 2017).

³⁷ The distinction that I make between the Company and the colonial government is that the Company, as a legal person, had rights in the land at the Cape and was the owner of livestock and certain types of land. Therefore, I refer to the Company when referring to rights in land and ownership of certain things. However, when dealing with the activities of the government at the Cape, I refer to the 'colonial government'.

³⁸ My contention in section 8.5 of Chapter 8 that the land used as communal grazing by the livestock of the Company and non-indigenous settlers was a public thing owned by the Company has important implications for the transfer of rights from the Company to the British government in 1795, which is discussed in section 3.3.4 of Chapter 3. It supports my contention that the British government did not become the private law owner of the land used as communal grazing but had the same rights in such land as they had in the other public amenities in the Cape Colony.

section 5.4 of Chapter 5 is considered together with the discussion of these control measures, the main distinguishing feature of the dual system becomes apparent. This is that rights in land used for agricultural purposes were obtained in terms of ownership transactions and were permanent, while rights in land used as grazing were subject to continuous renewal.³⁹

Fagan gives the following description of the status of Roman-Dutch law in the Cape Colony when the Company's rule ended in 1795:⁴⁰

Taken as a whole, it is true to say that '[b]y the time the Cape was taken over by the British at the end of the eighteenth century the law showed few marks of its prolonged sojourn in South Africa. Such changes as there were (not many or very important ones) had been made in the Netherlands, not in South Africa or Batavia'.

I am of the opinion that as far as the law of property⁴¹ is concerned the remarks of Fagan can only be accepted if the time reference is changed from the eighteenth century to the nineteenth century. In Chapter 10 the different ways in which non-indigenous settlers occupied land in the Cape Colony during the seventeenth and eighteenth centuries and the rights that they obtained in such land are discussed. These rights were obtained in terms of the domestic law of the Cape Colony, which at that stage contained many features that never formed part of Roman-Dutch law.⁴² However, most of the unique features of the domestic property law of the Cape Colony were abolished during the nineteenth century. Therefore, although it may be accepted that by the end of the nineteenth century the domestic property law of the Cape Colony consisted of Roman-Dutch law as it was adopted in the Cape Colony in the seventeenth century this was not the case at the end of the eighteenth century.

³⁹ It is customary to refer to permanent rights in land, such as ownership, as being secure rights. However, as rights in agricultural land could be taken away if the non-indigenous settler did not cultivate the land, it would not be correct to refer to ownership in terms of the domestic law of the Cape Colony during the seventeenth and eighteenth centuries as secure rights in land.

⁴⁰ Fagan (n 16 above) 40.

⁴¹ In contradistinction to other fields of law where English common law principles were imported into South African common law during the nineteenth century, this was not the case with the law of property. See JE Scholtens 'Law of property' in HR Hahlo & E Kahn (eds) *South Africa: The development of its law and constitution* (1960) 571; CG van der Merwe 'Things' in WA Joubert (ed) *Law of South Africa Volume 27 - Second Edition Volume* paragraph 6.

⁴² See in this regard Milton's remarks that the loan place was 'a unique indigenous type of tenure of obscure legal provenance developed from the peculiar customs and practices of the colony'. JRL Milton 'Ownership' in R Zimmermann & D Visser (eds) *Southern Cross: Civil law and common law in South Africa* (1996) 664. The discussion of the 1714 control measures in sections 9.3.1.3 and 9.3.2.2.2 of Chapter 9, in my opinion, renders the 'legal provenance' of loan places less obscure.

At that stage domestic property law contained many features that were not based on Roman-Dutch law principles.

In Part 3 I illustrate that the rights in land of non-indigenous settlers at the Cape and in the interior of the Cape Colony developed over a long period of time and were not a system imposed in 1657 by the Company and the colonial government based exclusively on Roman-Dutch law as practised in the Netherlands. The unique dual system of rights in land used for agricultural purposes and rights in land used as grazing played a role in how indigenous communities were dispossessed of their customary law rights in land.

1.5 Part 4: Evolution of customary law systems in the study area

South African writers addressing the question of rights in land at the Cape in the seventeenth and eighteenth centuries have divergent views of the rights of pastoral indigenous communities. Changuion remarks as follows with regard to the indigenous communities' right to ownership of land at the Cape:⁴³

The Khoi and San did not 'own' land - not because they did not want to own land but simply because owning land was not part of their culture and they therefore did not recognise and respect this custom. In their culture, a region with unclear borders belonged communally to the tribe. These undefined borders were continually adjusted as the need dictated.

Another approach adopted by writers is to negate the possibility that the pastoral indigenous communities living at the Cape during the early part of the colonial period retained their customary law rights in land, or that any existing indigenous community may still be occupying land in terms of customary law systems of pastoral indigenous communities.⁴⁴ These views have in common that the writers concerned did not consider the possibility that pastoral indigenous communities obtained customary law rights in the land their livestock occupied as grazing. However, in Part

⁴³ L Changuion & B Steenkamp *Disputed land The historical development of the South African land issue, 1652-2011* (2012) 16. It may be noted that Changuion cites no sources that substantiate this statement.

⁴⁴ TW Bennett 'African land - a history of dispossession' in R Zimmermann & D Visser (eds) *Southern Cross: Civil law and common law in South Africa* (1996) 66; G Devenish 'South Africa from pre-colonial times to democracy: A constitutional and jurisprudential odyssey' (2005) *Tydskrif vir die Suid-Afrikaanse Reg* 548.

4 (Chapters 11 to 13) I adopt the approach that indigenous communities did in fact obtain customary law rights in the land that was occupied by their livestock.

As the nomadic orbits described in section 2.4.1.2 of Chapter 2 were the manner in which indigenous communities occupied various areas at the Cape and in the interior of the Cape Colony, these communities' rights in land developed within these areas. Within these nomadic orbits there were specific areas that were used as grazing during different times of the year. The location of these specific areas was determined by a variety of factors such as the availability and palatability of grazing and the availability of adequate open water resources.⁴⁵ In order to ensure that customary law rights in land are not equated to Western legal concepts like ownership of a surveyed and demarcated piece of land, I use the phrase 'communal land use unit' to describe the physical spaces that were occupied by the livestock of a group⁴⁶ within its nomadic orbit.

Indigenous communities at the Cape were nomadic and did not establish permanent homesteads. Therefore, their rights in land came into existence when they obtained livestock that occupied land used as grazing at or near a water resource. Although livestock was owned by individual members of the indigenous community, the owners combined their livestock into communal herds or flocks that occupied the communal land use units.⁴⁷ This meant that when indigenous sub-groups severed their ties with a group they only lost their rights in their communal land use unit within the nomadic orbit of that group. Such a sub-group could establish its own nomadic orbit and occupy new communal land use units as long as the members of the sub-group were the owners of livestock.⁴⁸ Therefore, the customary law rights in land that sub-groups had were not dependent on membership of a specific group or being the subjects of a specific ruler. The rulers

⁴⁵ In this thesis the phrase 'open water resource' refers to water that can be used by humans or animals or both and which is accessible without having to dig for it or extract it by mechanical means.

⁴⁶ In Chapter 11 I use the word 'group' (instead of tribe), which consisted of a number of 'sub-groups' ('clans'), to refer to the specific indigenous communities that occupied the nomadic orbits in the study area. This terminology is derived from Hattingh who uses the term 'groups' instead of the usual term 'tribes'. L Hattingh 'Die Kaapse Koina' in C de Wet et al (eds) *Die VOC aan die Kaap 1652-1795* (2016) 270. The phrase 'indigenous communities' is used in this thesis to describe all the indigenous inhabitants of the study area, but specific groups occupied nomadic orbits.

⁴⁷ I Schapera *The Khoisan peoples of South Africa: Bushmen and Hottentots* (1930) 293.

⁴⁸ Hattingh (n 46 above) 270.

and groups did not have customary law rights in land that they could allocate to sub-groups or individuals.

The use of the concept of communal land use units to describe the spaces where groups exercised their customary law rights in land is necessary, because as the encroachment on the indigenous communities' territories increased, nomadic orbits shrank and ceased to exist. During the eighteenth century some of the independent sub-groups⁴⁹ in the study area who owned livestock, continued to occupy a communal land use unit although they no longer occupied a nomadic orbit.

The mission stations that were established in the study area at the end of the eighteenth century and during the nineteenth century by various missionary societies played an important role in the manner in which the indigenous communities were able to continue exercising their customary law rights in land. In the south-western and southern part of the study area the mission stations became places of refuge for members of sub-groups who did not want to be absorbed into the labour system of the Cape Colony. However, the personal freedom that indigenous persons retained by joining mission stations had the effect that they lost the customary law rights in land that they were able to exercise as members of a sub-group. Although they still owned livestock that used the available grazing at mission stations, their use of the grazing and water resources was made subject to the rules of the missionary society. Therefore, I conclude that occupation of land used as grazing in terms of customary law systems came to an end in the South-Western and Southern Cape during the nineteenth century. This conclusion shifts the focus of the thesis to the occupation of land in the northern part of the study area during the nineteenth century.

The northern part of the study area, especially north of the Olifants River, receives much less rainfall than the South-Western and Southern Cape. Consequently, the encroachment on their land experienced by indigenous communities was less than in the abovementioned areas. The mission stations in

⁴⁹ In this thesis the phrase 'independent sub-group' means a sub-group who lived in an encampment and whose members owned livestock that occupied land as grazing and had access to an open water resource.

this area were not primarily regarded as places of refuge by the indigenous communities who, notwithstanding the intrusion of non-indigenous settlers, were able to keep on occupying land in terms of their customary law systems as independent groups or sub-groups. However, these groups and sub-groups found it to their benefit to be under the protection of the missionaries at the mission stations established in the Northern Cape. The missionaries interceded with the British colonial government on behalf of the groups and sub-groups concerned and were instrumental in safe-guarding these groups' and subgroups' right to occupy land as grazing and for residential and agricultural purposes at or near the mission stations. In this regard, the British Governor issued Tickets of Occupation (ToO's) that included a diagram or a description of the land around certain mission stations that was reserved for the exclusive use of the indigenous residents of the mission stations.

This thesis is concerned with the dispossession of rights in land and specifically the dispossession of the customary law rights in land of indigenous persons living in the Northern Cape during the colonial period.⁵⁰ In my opinion this dispossession of rights in land of indigenous persons must be remedied by identifying the actions of colonial governments and non-indigenous settlers that led to the dispossession and considering legal measures that may rectify its effects.

The introduction of the survey of land at the Cape, with the purpose of identifying the land that the non-indigenous settlers could occupy for agricultural purposes, had the effect of dispossessing the indigenous communities of their rights in land as they could not continue to use such land as grazing.⁵¹ During the period of

⁵⁰ By dealing with dispossession in this very specific way I consciously refrain from discussing the approach to dispossession of land from indigenous communities that is reflected in the following remarks of Dladla:

The "negotiated settlement" that brought into being the not-so-new South Africa, after all upheld the philosophical doubt that the African is not a rational animal by agreeing to purchase back stolen land and resources. What we mean by this is that if the moral basis for the dispossession of land was that the African's humanity was defective, then surely to purchase the object of dispossession is to concede to the validity of this reasoning.

N Dladla 'Racism and the marginality of African philosophy in South Africa' (2017) 18 *Phronimon* 227-228. I do not deny the validity of Dladla's approach to dispossession or the need that exists to consider his arguments, but I am of the opinion that the consideration of these arguments falls within the field of legal philosophy.

⁵¹ The land that was surveyed for agricultural purposes could also be used for residential purposes while land in urban areas was surveyed for residential purposes.

Company rule land used for agricultural purposes was mostly limited to the South-Western Cape. Land used as grazing by non-indigenous settlers was not surveyed during this period. However, with the introduction of perpetual quitrent tenure in 1813 by the Conversion of Loan Places to Perpetual Quitrent Proclamation, non-indigenous settlers who chose to convert their loan places into perpetual quitrent places had to have the land they used as grazing surveyed. The introduction of the survey and sale system by the British colonial government was the main cause of dispossession of the customary law rights in land used as grazing by the indigenous residents of the mission stations.⁵²

In addition to the demarcated territories referred to in ToO's, where the rights in land of the indigenous residents of mission stations were protected against encroachment by non-indigenous settlers, these residents were also still occupying land outside the demarcated areas in terms of their customary law systems.⁵³ The demarcated territories referred to in the ToO's were not fenced and the residents of the mission stations migrated with their livestock outside the boundaries of the demarcated territory. The British colonial government's failure to acknowledge the existence of the customary law rights in land used as grazing of the residents of the mission stations, in combination with the survey and sale system, had the effect that other persons obtained ownership of such land. Therefore, I contend that the residents of the mission stations were dispossessed of their customary law rights in land as a result of colonialism as implemented by the British colonial government in the Northern Cape.

The demarcated territories in terms of the ToO's granted in the nineteenth century still exist and the descendants of the residents of the mission stations who were dispossessed of their customary law rights in land in the nineteenth century still live there. In Chapter 13 I discuss the fact that throughout the twentieth century and

⁵² Other causes of the dispossession of the rights in land of the residents of the mission stations, such as wars waged by the Company against pastoral indigenous communities, the grants and concessions made to mining companies in the Northern Cape and unauthorised and illegal seizure of land by non-indigenous settlers from groups and sub-groups, are discussed fully in Chapter 12.

⁵³ Land used as grazing inside the demarcated territories was also occupied in terms of the customary law systems of the residents.

up to the present, residents of these Reserves⁵⁴ who own livestock have been using the grazing on the Reserves in accordance with the customary law systems that were used by their ancestors. In other words, I contend that the customary law systems that are used by the residents of the Reserves who occupy land used as grazing within the Reserves, fall within the following definition of customary law given by Herbst:⁵⁵

African customary law in the modern sense of the word (i.e., with Western influence): denotes all those legal systems originating from African societies as part of the culture of particular tribes or groups that have been maintained, supplemented, amended and or superseded in part by:

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

As the residents of the Reserves who own livestock are still able to utilise the rights in land of which their ancestors were dispossessed, I contend that the Northern Cape is a region where rights in land dispossessed during the colonial period can successfully be reinstated.

1.6 Part 5: Preserving the customary law rights in land of pastoral indigenous communities

The arid nature of the environment in the Northern Cape makes it ideally suited to be used as grazing for livestock on a seasonal rotation basis where livestock is moved between different rainfall zones. This was the system that was used by the residents of the Reserves and the non-indigenous settlers even after the land at mission stations was demarcated in terms of ToO's and land used as grazing was surveyed and sold. However, as time progressed, the fencing of privately owned land sold in terms of the survey and sale system limited the area within which livestock migration could take place, until the residents of the Reserves were unable to migrate with their livestock outside the boundaries of the Reserves. In Chapter 14 I give the reasons why, in my opinion, the residents of the Reserves have the same

⁵⁴ See note 51 of Chapter 12 for the meaning of the word 'Reserves'.

⁵⁵ M Herbst & W du Plessis 'Customary law v common law marriages: A hybrid approach in South Africa' (2008) 12 *Electronic Journal of Comparative Law* 3.

entitlement to have the land dispossessed from their ancestors restored to them as have the indigenous communities who were dispossessed in terms of overt racially discriminatory laws and practices after the cut-off date.

In spite of being confined to the limited amount of grazing within the boundaries of the Reserves, livestock owners have persisted in occupying this land on a communal basis. What is more, the stock post system that is used on the communal land of Leliefontein⁵⁶ shows remarkable similarities with the communal land use units that were occupied in terms of customary law systems by the residents of the Reserves in the nineteenth century.

The constitutional land reform programme is applied in the Northern Cape and the Transformation of Certain Rural Areas Act⁵⁷ ('Transformation Act') will make a significant contribution to ensuring the security of tenure in land of the residents in the Reserves once the Rural Areas Act (House of Representatives)⁵⁸ is repealed. However, the constitutional land reform programme does not provide for the protection of the customary law systems of the residents of the Reserves. I contend that the negative reaction of the majority of livestock owners on the Reserves to the ongoing movement to transform the communal land used as grazing on the Reserves into fenced areas controlled by individuals, is a clear indication that these livestock owners believe that their rights in land are best protected by a communal system of occupation of land used as grazing. In other words, the majority of the livestock owners are of the opinion that occupying land on the Reserves in terms of customary law systems provides more security for their rights in land than does a system where rights are conferred in terms of an ostensibly more secure tenure system like private ownership or lease of land used as grazing.

I am of the opinion that, if I am correct that the majority of livestock owners prefer a communal system of occupation of land used as grazing on the Reserves,

⁵⁶ I limit my comments here to the communal land on Leliefontein because I discuss the use of the stock post system on Leliefontein in Chapter 13. However, in Part 5 I contend that on any of the Reserves where communal land is still occupied in terms of the stock post system, the livestock owners are exercising customary law rights in land.

⁵⁷ 94 of 1998.

⁵⁸ 9 of 1987.

the Transformation Act must be amended to ensure that the rights in land of this majority are protected. I also contend that from an environmental perspective and to ensure that all livestock owners are guaranteed adequate access to grazing for their livestock, the communal use of grazing on the Reserves must be protected by the amendments that I suggest should be made to the Transformation Act.

The suggested amendments to the Transformation Act may ensure that the customary law systems of the residents of the Reserves are preserved, but such amendments will not make it possible for the residents to claim back the right to exercise their customary law systems on the land outside the boundaries of the Reserves. Section 12.3.3 of Chapter 12 and section 14.4.1 of Chapter 14 identify the areas that must be acquired by the state in order to make it possible for the residents of the Reserves to again exercise their customary law rights on the land where their ancestors did so.⁵⁹ In the conclusion of this thesis I contend that the right to exercise customary law rights in land outside the boundaries of the Reserves can only be provided for if legislation is made in terms of section 25(8) of the Constitution, that provides for the restitution of rights in land dispossessed from indigenous communities during the colonial period. I also contend that the last mentioned legislation must be aligned with the amended Transformation Act to ensure that the owners of livestock on the Reserves will be able to exercise their customary law rights in land used as grazing on the land acquired outside the Reserves.

⁵⁹ The state is authorised in terms of section 25(2)(a) and (4)(a) of the Constitution to expropriate land for this purpose.

2 History of the occupation of land in the Cape Colony

2.1 Introduction

In this thesis I consider the rights in the land used as grazing of the indigenous communities and of non-indigenous persons in the Cape Colony. The logical starting point for this discussion is an overview of the history of the occupation of land in the Cape Colony. The grazing land at the Cape had been occupied for a long time by indigenous communities before Jan van Riebeeck arrived to establish a refreshment station for the Dutch East India Company ('Company').¹ In 1652 the newcomers failed to realise that the land at the Cape suitable for grazing was already occupied by the indigenous communities. In this chapter the discussion of the meaning of the phrase 'occupation of land' is necessary to make the study of the history of occupation of land used as grazing possible.

The reason why the history of the occupation of land has not been addressed in the debate concerning the dispossession and restitution of land in South Africa is considered in section 2.2. I also explain why I deem it important that the history of the occupation of land should be studied.

In section 2.3 the meaning of the phrase 'occupation of land' is considered. In this thesis occupation of land is given a specific definition so that a clear distinction can be made between this concept and the dispossession of land that is discussed in subsequent chapters.² The definition given to occupation of land also has the effect that certain indigenous communities who were dispossessed of their land are excluded from consideration in the thesis.

The different processes of occupation of land by the pastoral indigenous communities that lived at the Cape and in the interior of the Cape Colony, the Xhosa indigenous communities³ and the non-indigenous persons, are discussed in section

¹ L Hattingh 'Die Kaapse Koina' in C de Wet et al (eds) *Die VOC aan die Kaap 1652-1795* (2016) 269-270

² See section 12.2 of Chapter 12 for the definition of dispossession as it is used in this thesis.

³ In this thesis I use the phrase 'Xhosa indigenous communities' as a collective name for the indigenous communities living in the vicinity of the Great Fish River and the area to the east and the north of the said river who engaged in mixed farming.

2.4. From this discussion I established the framework contained in the Table below to serve as guideline for defining the limits of the study area.

Community	Purpose of occupation of land	Process of occupation of land
Pastoral indigenous communities	Residential and grazing for livestock ⁴	Temporary encampments and nomadic orbits were used to ensure the best grazing was obtained for livestock.
Xhosa indigenous communities	Residential, grazing for livestock and agriculture ⁵	Homesteads were established for residential purposes where subsistence agriculture was practised. Seasonal availability of grazing determined occupation of land used as grazing. Mixed farming was practised.
Non-indigenous persons	Residential, agriculture, grazing for livestock, buildings for defence, administration and trade	The Company built fortifications and used land for agriculture and as grazing. Non-indigenous settlers built houses and established farms. Mixed farming and exclusive agriculture were practiced.

⁴ The word 'livestock' is used in this thesis as a collective name for herds of cattle and flocks of sheep and goats. In this thesis the word 'grazing' is used as a general term while the word 'pasture' is used for grazing that was controlled by the Company for the benefit of non-indigenous persons.

⁵ The words 'agriculture' and 'agricultural' are used in their original sense of 'cultivating the soil to produce crops'. The *Oxford English Dictionary* defines 'agriculture' amongst other meanings as follows: 'Originally: the theory or practice of cultivating the soil to produce crops; an instance of this (now rare)'. 'agriculture, n.' *OED Online*. December 2016. Oxford University Press.

<http://www.oed.com.uplib.idm.oclc.org/view/Entry/4181?redirectedFrom=agriculture#eid> (accessed 7 February 2017).

Due to the different ways in which the different communities contemplated in the first column of the Table occupied land, conflict would inevitably arise between them. The pastoral indigenous communities at the Cape were the most vulnerable to encroachment on their land by non-indigenous persons as they were nomadic communities that did not demarcate the territory they occupied. The non-demarcation of territory is explained by Elphick's remarks that for the pastoral indigenous communities land without livestock was of relatively little value.⁶ In other words, indigenous communities apparently attached less value to land as a commodity than non-indigenous persons. However, it is now generally accepted that the indigenous communities had rights in the land they occupied.⁷ As these rights in the land used as grazing and the rights of non-indigenous persons are the focus of this thesis, the effect of the different methods of occupation of land is considered in section 2.5. In that section I consider a system which I refer to as overlapping occupation of land. In essence overlapping occupation of land occurred where non-indigenous persons and indigenous communities used the same grazing.

In section 2.6, the facts relating to the occupation of land as discussed in sections 2.4.1 and 2.4.2 and the facts relating to overlapping occupation of land as discussed in section 2.5 are used to determine the extent of the study area of this thesis.

2.2 Study of the history of dispossession of land in South Africa

In South Africa the debate about the dispossession of land is often based on an argument that it began on 6 April 1652 when the Company established a refreshment station in Table Bay.⁸ Walker identifies the key elements of what she

⁶ R Elphick & VC Malherbe 'Die Khoisan tot 1828' in H Giliomee & R Elphick (eds) *'n Samelewing in wording: Suid Afrika 1652-1840* (1990) 17.

⁷ In Chapter 11 the customary law rights in land of indigenous communities are discussed. From that discussion it is clear that Elphick's statement is also correct from a legal viewpoint. It was only the indigenous communities that owned livestock that obtained rights in the land that they occupied as grazing. With regard to the rights in land of pastoral indigenous communities see paragraph [26] of *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 6 SA 104 (SCA) 118.

⁸ R Verbuyst 'Claiming Cape Town: Towards a symbolic interpretation of Khoisan activism and land claims' (2016) 39 *Anthropology Southern Africa* 90; C Twala 'The African National Congress (ANC) and the impact of the land restoration process in democratic South Africa since 1994: Socio-ecological challenges to poverty alleviation?' (2013) 44 *Journal of Human Ecology* 48; AJ Christopher 'Land restitution in South Africa, 1991-94' (1995) 12 *Land Use Policy* 270; SF Khunou 'The legal crisis

describes as an overarching narrative of dispossession that existed and was used in 1994.⁹ Of the seven elements she identifies, two relate to the effect that colonialism had on the process of dispossession of land. The well-known fact that 87% of the land in South Africa came to be owned by 15% of the population is ascribed, amongst other things, to 'colonial wars of dispossession'. The other relevant element is that before the arrival of Europeans the indigenous communities had 'lived in peace and harmony with their neighbours, with nature, with the ancestors'.¹⁰ In the narrative of dispossession discussed critically by Walker, no distinction is made between the different indigenous communities that were dispossessed of their land or the regions where the dispossession took place.¹¹ In this narrative the emphasis is on the dispossession of land that occurred during the twentieth century. With regard to the dispossession that took place in the colonial period the narrative merely mentions the fact that the dispossession took place and does not refer to how it took place. In Chapter 14 of this thesis I contend that for indigenous communities dispossessed of their land before 19 June 1913,¹² the process of dispossession of their rights in land is of cardinal importance.

In order to change the focus from the fact of dispossession to the process of dispossession,¹³ study of the history of occupation of land in South Africa is

of land restitution in South Africa: A critical analysis' (2015) 18 *Recht in Afrika - Law in Africa - Droit en Afrique* 155.

⁹ These 'key elements' form part of what she refers to as the 'overarching narrative of dispossession' which is a summary of the history of dispossession of land in South Africa before 1994. C Walker *Landmarked: land claims and land restitution in South Africa* (2008) 36.

¹⁰ Walker (n 9 above) 36.

¹¹ Walker (n 9 above) 38. Walker points out that the 'actual political and social geography' of South Africa is made irrelevant in the narrative of dispossession she discusses. She also points out that this approach has the effect that important factors like—

- (a) the huge disparities in population between the end of the colonial period and now;
- (b) the fact that the economic relationship to land in pre-industrial Europe and southern Africa was non-commoditised;
- (c) the diffuse nature of settlement, power and conflict in the area that comprises South Africa; and
- (d) the long period between the measures instituted by Van Riebeeck with regard to land and the measures instituted by the National Party government in the twentieth century,

are not taken into account in the narrative.

¹² 19 June 1913 is the date on which the Natives Land Act 27 of 1913 entered into force. It is also the date, determined in the Restitution of Land Rights Act 22 of 1994 ('Restitution Act') and confirmed in section 25 of the Constitution of the Republic of South Africa, 1996, ('Constitution') after which the dispossession of land must have taken place for the purposes of restitution of such land in terms of the Restitution Act.

¹³ Nell calls this an 'uneven' process in order to convey that the different places where and different times when dispossession took place must be studied, rather than accepting that

necessary. This approach addresses one of the reasons given in the *White paper on South African land policy April 1997* ('*White paper*') why dispossession of land before 19 June 1913 is not addressed in terms of the Restitution Act. The *White paper* states that the fact that the same land has been occupied by different communities over time may create overlapping claims for restitution of such land.¹⁴ I am of the opinion that the existence of overlapping claims to land should not prevent certain indigenous communities from reclaiming the land of which they were dispossessed. By studying the manner in which land was occupied during the colonial period, I determine the nature of the rights in land that were obtained by the different communities in the study area. By determining the nature of these rights I am able to consider whether such rights are mutually exclusive.

2.3 Meaning of 'occupation of land'

In general, in the debate on the dispossession of land in South Africa, the role that the manner in which land was occupied by different communities might have played in how the dispossession took place is not taken into account. In this thesis I contend that the fact that some indigenous communities in the study area only used land as grazing and not for permanent settlement and agriculture, meant that non-indigenous persons regarded such land as unoccupied in terms of their own legal system. The occupation of land was therefore considered from different perspectives by the indigenous communities and non-indigenous persons.

2.3.1 Meaning of occupation

The *Oxford English Dictionary* defines the verb 'occupy' as, amongst other things, '[t]o hold possession of; to have in one's possession or power... To take possession of (a place), esp. by force; to take possession and hold of (a building)'.¹⁵ It defines the verb 'possess' as, among other things, '[t]o own, to have or gain ownership of; to have (wealth or material objects) as one's own; to hold as property... Law. To have

dispossession took place 'at the moment of colonial conquest'. D Nell "Treating People as Men': Bastard land ownership and occupancy in the Clanwilliam district of the Cape Colony in the nineteenth century' (2005) 53 *South African Historical Journal* 124.

¹⁴ *White paper on South African land policy April 1997* 78
<http://www.ruraldevelopment.gov.za/phocadownload/White-Papers/whitepaperlandreform.pdf>
 (accessed 7 May 2017).

¹⁵ 'occupy, v.' *OED online*. March 2017. Oxford University Press.
<http://www.oed.com.uplib.idm.oclc.org/view/Entry/130189?redirectedFrom=Occupy> (accessed 8 April 2017).

possession of, as distinct from ownership... esp. to hold or occupy as a tenant, to lease'.¹⁶ These dictionary definitions do not give an explanation of the actions of a person when he occupies land. Definitions of 'occupation' in legal dictionaries also do not give an explanation of the process of occupation.¹⁷ The definition of possession in legal dictionaries gives the word a technical legal meaning that does not explain the process of physical occupation of land.¹⁸

To illustrate the problem of using dictionary definitions to describe the process of occupation of land I use an example from the time of the first settlement of the Company at the Cape. The indigenous community that lived in Table Bay in April 1652 was the Goringhaicona (also referred to as Strandlopers) under the leadership of Autshomao (also known as Herry),¹⁹ who did not own livestock during that period. They were a small community who depended on the ocean as their main source of food.²⁰ They did not erect permanent dwellings, but lived in an encampment that could be moved from location to location.²¹ In addition, the Goringhaiqua indigenous community under the leadership of Gogosoa and the Corachouqua indigenous community under Choro used the grazing at the Cape for their livestock. The

¹⁶ 'possess, v.' *OED Online*. March 2017. Oxford University Press. <http://www.oed.com.uplib.idm.oclc.org/view/Entry/148345?redirectedFrom=possess> (accessed 8 April 2017).

¹⁷ Bell defines 'occupation' amongst other meanings, as follows:

The legal apprehension or taking of corporeal things, which are common (*res communes*) by the *jus gentium*, with the intention to acquire the ownership thereof ; and by this such things as belong to no one in particular (*res nullius*) go to the first occupier, by natural reason

WHS Bell *South African legal dictionary* (1910) 396. Claassen defines it as, amongst other things, '[t]he legal apprehension or taking of corporeal things, which are common (*res communes*)' RD Claassen *Dictionary of legal words and phrases* (June 2016) electronic edition without page numbers.

¹⁸ Bell refers to Maasdorp's definition of possession which provides as follows:

...a compound of a physical situation and of a mental state, that is, of the physical holding or detention of a corporeal thing by a person and of the mental state of that person towards the thing. In other words, it is the physical detention of a corporeal thing by a person, whether with or without any claim or right, with the intention of holding it as his own, to which the law has given its sanction by interposing certain legal remedies or interdicts for its protection, in case of its being interfered with by other persons. But it is essential to the existence of possession that there should at one time or another have been both such detention or occupation and such intention present together at one and the same time (Maasdorp's Institutes, vol. 2, p. 13).

Bell (n 17 above) 433-434; see also Claassen (n 17 above). The process of physical occupation of land in the South-Western Cape is discussed in section 3.3.2 of Chapter 3.

¹⁹ The indigenous name of this leader has been rendered in many different ways. I use the spelling of his name that is used in one of the most recent sources on the early history of the Cape. C de Wet et al (eds) *Die VOC aan die Kaap 1652-1795* (2016) 270.

²⁰ GM Theal *History of South Africa under the administration of the Dutch East India Company [1652-1795] Vol I* (1897) 13, N Worden et al *Cape Town: The making of a city* (1998) 21; Hattingh (n 1 above) 271.

²¹ N Worden 'Space and identity in VOC Cape Town' (1998) 25 *Kronos* 75; PD Glatigny et al 'Inter se nulli fines: Representations of the presence of the Khoikhoi in early colonial maps of the Cape of Good Hope' (2008) 23 *South African Journal of Art History* 304-305.

Goringhaiqua and Corachouqua were nomadic indigenous communities who were not at the Cape when the Company arrived in April 1652.²² Apart from the encampment of the Goringhaicona, the Company did not find any signs in the Table Valley that the land was occupied by an indigenous community.²³ If the dictionary definition of ‘occupy’ is used to describe this situation it cannot be contended that the Goringhaiqua and Corachouqua were occupying the Cape.

In the *Western Sahara, Advisory Opinion*²⁴ (‘*Western Sahara*’), the International Court of Justice (‘ICJ’) considered the manner in which the nomadic communities of Western Sahara occupied land. It appears that these nomadic communities had livestock that needed grazing, and that they also practised agriculture.²⁵ The ICJ advised that where nomadic communities are ‘socially and politically organized’ the territory they occupy cannot be regarded as uninhabited (*terra nullius*).²⁶ The ICJ’s opinion makes it clear that for the purposes of international law, the dictionary definition of occupation cannot be made applicable to the manner in which nomadic communities occupy land. Furthermore, the positive law of South Africa as reflected in court cases provides that indigenous communities that have livestock and a nomadic lifestyle, occupy the land that they use as grazing for their livestock.²⁷ It must therefore be accepted that notwithstanding the fact the Goringhaiqua and Corachouqua were not physically in possession of the land at the Cape when the Company arrived, they were occupying the land in a legal sense.

When the Company had completed its fortification (‘the Fort’) and the Company servants had planted vegetables, grain and fruit trees on the land that became the Company’s gardens it was clear that it had occupied such land. The

²² Theal (n 20 above) 13; Hattingh (n 1 above) 272.

²³ See the discussion of Van Riebeeck’s remarks in this regard in section 8.2.1.1 of Chapter 8.

²⁴ I.C.J. Reports 1975, p. 12.

²⁵ *Western Sahara* (n 25 above) 64.

²⁶ *Western Sahara* (n 25 above) 39.

²⁷ In *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 3 SA 1293 (LCC) 1321-1326, 1349 the Land Claims Court (‘LCC’) remarked that the transhumant Richtersveld community occupied the land that it used as pasture for its livestock. I am of the opinion that these remarks of the LCC are also applicable to the nomadic indigenous communities who used the land in Table Valley and its vicinity as pasture in 1652. The *Oxford English Dictionary* defines ‘transhumance’ as ‘[t]he seasonal transfer of grazing animals to different pastures, often over substantial distances’. ‘transhumance, n.’ *OED Online*. March 2017. Oxford University Press. <http://www.oed.com/uplib.idm.oclc.org/view/Entry/204785?redirectedFrom=transhumant> (accessed 29 May 2018). See also note 50.

dictionary definition of 'occupy' describes these actions of the Company perfectly.²⁸ However, the Company also used land as grazing for their livestock and the forests for wood. There are two reasons why it is not clear that the Company occupied the land where these activities took place. In the first place, the seasonal use of grazing made it difficult to identify a specific area that was used and therefore occupied as contemplated in the dictionary definition of occupy. In the second place, the grazing in the Table Valley and adjacent areas was used communally by the livestock of the Company and the indigenous communities for a number of years.²⁹ The wood resources that were used by the Company in the forest areas became depleted, which meant that the physical occupation of the forest land was suspended or ceased.³⁰

The physical occupation of the land by non-indigenous persons with permanent buildings, gardens and grain fields was the action that the indigenous communities initially regarded as detrimental to their interests, not the use of land for grazing. This is evidenced by their protests against the erection of the Fort and later against the establishment of the non-indigenous settlers' farms along the Liesbeek River.³¹ Consequently, I contend that from a historical viewpoint not all the actions of the non-indigenous persons at the Cape had the immediate effect that the indigenous communities were physically dispossessed of their land.³² Occupation of

²⁸ For the facts regarding this occupation see Theal (n 20 above) 14-22; Worden (n 20 above) 17-18.

²⁹ Theal (n 20 above) 29, 50; Worden (n 20 above) 21-23. See also section 8.2.1.1 in Chapter 8.

³⁰ Theal (n 20 above) 161; Worden (n 20 above) 39.

³¹ Worden (n 20 above) 21-23; HCV Leibbrandt *Precis of the archives of the Cape of Good Hope: Letters despatched from the Cape 1652-1662 Volume III* (1900) 128. Van Heerden provides the following contemporary view with regard to the actions of the Company in 1652:

It was Jan van Riebeeck who first started building fixed structures at the Cape in order to accommodate the passing ships on their way to the East. The local Khoi and San people, who up to this point graciously had agreed that the settlers could use some of the land for their purposes but never agreed to fixed structures, questioned this and became the first martyrs to fall at the barrel of the gun.

O van Heerden 'Land expropriation: Legislation was used to dispossess us, now we must use it for redress' 6 March 2018 *Daily Maverick* <https://www.dailymaverick.co.za/opinionista/2018-03-06-land-expropriation-legislation-was-used-to-dispossess-us-now-we-must-use-it-for-redress/> (accessed 24 September 2018).

³² This statement is made in the light of the 'overarching narrative of dispossession' discussed in section 2.2. This thesis is aimed at filling in the historical facts that are missing from this narrative. It is not the purpose of the thesis to find historical facts that disprove that dispossession of the land of indigenous communities took place. Walker comments that the narrative had 'dramatic authenticity' and 'moral and political power'. It therefore worked very well to mobilise support against apartheid in South Africa and abroad. She also remarks that the narrative is a 'political fable'. Walker (n 9 above) 36. I am of the opinion that after more than 20 years of democracy, historical facts relating to the occupation of land, rather than a 'political fable', should be important in formulating a new policy with

land by non-indigenous persons was a gradual process that unfolded as more and more land was appropriated for agricultural and residential purposes. Only when grazing became scarce did the Company institute control over it, which led to physical occupation. The occupation of grazing took place in cases where the colonial government exercised its sovereign power to identify land for use as pasture³³ exclusively by non-indigenous persons.³⁴

In view of the discussion of occupation of land in this section I contend that land at the Cape was occupied in the following manner:

- (a) The nomadic indigenous communities that had livestock, occupied the land that was used as grazing by their livestock.
- (b) Non-indigenous persons occupied the land they used for government buildings, residential purposes, agricultural purposes and public purposes like roads.
- (c) When grazing became scarce at the Cape, the Company occupied, as public property, the land that was used communally as grazing by the livestock of the Company and the non-indigenous settlers. This occupation was achieved by informing the indigenous communities that they were prohibited from using certain land as grazing and ensuring that the said communities complied with the prohibition.

2.3.2 Meaning of land

In the case of the word 'land' the *Oxford English Dictionary's* definition is of more practical use for the purpose of this thesis than it is in the case of the words 'occupy' and 'possess'. It defines land as, amongst other meanings, '[g]round or soil, esp. as having a particular use or properties. Often with defining word, as **arable land, corn-land, plough-land, stubble land**'.³⁵ In this thesis I use the word 'land' in this sense.

regard to the restitution of the land of indigenous communities dispossessed of their land in the Cape Colony before 19 June 1913. Occupation of land was one of the elements of dispossession. Dispossession is discussed in Chapter 12.

³³ In section 8.5 of Chapter 8 the classification of pasture as a public thing and the ownership of pasture are discussed.

³⁴ I discuss the actions that the colonial government took to prevent the indigenous communities from using the pasture at the Cape in sections 8.2.1.2, 8.2.2.1 and 8.2.2.2 of Chapter 8.

³⁵ 'land, n.1' *OED Online*. March 2017. Oxford University Press.
<http://www.oed.com.uplib.idm.oclc.org/view/Entry/105432?rskey=cm3wVK&result=1> (accessed 12 April 2017).

This definition is in line with my approach that non-indigenous persons and indigenous communities occupied land for specific purposes. I also contend that in order to occupy land a community or person must conduct activities that have an effect on the land. In the context of occupation of land by indigenous communities, the grazing used by their livestock was exhausted or became unpalatable, which meant that they had to migrate, while the activities of hunter-gatherer indigenous communities did not have this kind of effect on land.

The use of this definition of land means that hunter-gatherer indigenous communities at the Cape and in the interior of the Cape Colony are excluded from the field of study of this thesis. To be able to study the physical occupation of land by a community, it must be possible to identify the extent of land that was occupied. Since they did not own livestock, the nomadic hunter-gatherer lifestyle of indigenous communities like the Goringhaicona, meant that the physical extent of the land they used would not have been ascertainable. Also, the extent of the area within which they hunted and gathered could not be determined.³⁶

2.4 Different histories of occupation of land that must be studied

South Africa was the meeting place of different indigenous and non-indigenous communities that each had its own process by which it occupied land. In this section I discuss these processes of occupation of land.

³⁶ The exclusion of nomadic hunter-gatherer indigenous communities from this study does not mean that I contend that such communities were unable to occupy land. Gilbert makes it clear that anthropologists and sociologists have discredited the approach adopted in international law that nomadic communities cannot occupy territory effectively. These anthropological and sociological studies prove that nomadic communities established strong ties with their territories. These ties were spiritual and social but also had a physical-spatial dimension. However, the spatial aspect of the territories was not determined by physical boundaries but by 'organised agreements' between such indigenous communities. J Gilbert 'Nomadic territories: A human rights approach to nomadic peoples' land rights' (2007) 7 *Human Rights Law Review* 691. It must be noted that occupation by non-indigenous communities of the land of hunter-gatherer communities that did not leave physical evidence of their relationship with and use of the land also took place in other locations like Australia. JD Leshy 'Indigenous peoples, land claims and control of mineral development: Australian and U.S. legal systems compared' (1985) 8 *New South Wales Law Journal* 292.

2.4.1 Occupation of land by the indigenous communities of the Cape Colony

The meaning assigned to the phrase 'occupation of land' in this thesis makes it necessary to consider the different ways in which indigenous communities physically occupied land at the Cape and in the interior of the Cape Colony. In this section I discuss the way in which the land was occupied by indigenous communities other than the nomadic hunter-gatherer indigenous communities.

2.4.1.1 Pastoralism

Some of the indigenous communities of the Cape and the interior of the Cape Colony engaged only in the herding of livestock and did not practise agriculture. Different reasons are advanced for this phenomenon. Smith is of the opinion that the indigenous communities in the South-Western Cape were pastoralists, because the region falls within the winter rainfall zone while the cereals that were traditionally planted by indigenous communities in Africa are all summer rainfall crops.³⁷ Elphick is of the opinion that due to cultural factors these communities had a 'positive aversion to cultivation'.³⁸ The reason why indigenous communities preferred not to produce crops, but only to keep livestock like cattle, sheep and goats is not important for the purposes of this thesis. The important fact is that, because the indigenous communities were nomadic and were pastoralists, they occupied land in a manner that made it difficult for newcomers, like the Company, to recognise that the land was occupied.³⁹

Gilbert contends that European people appropriated the land of indigenous people, because they believed that nomadic indigenous people were not civilised enough to occupy land productively.⁴⁰ To substantiate this contention, he remarks that European colonisers used the 'agricultural argument', which was based on writings of eighteenth century philosophers and political scientists, that only cultivation of land can be accepted as proper occupation of land. According to the

³⁷ AB Smith 'Environmental limitations on prehistoric pastoralism in Africa' (1984) 2 *The African Archaeological Review* 99. It must however be borne in mind that there were other pastoralist indigenous communities who lived in areas that were not within the winter rainfall zone. See also E Boonzaier et al *The Cape herders: A history of the Khoikhoi of Southern Africa* (1996) 29; NJ Jacobs 'Latitudes and longitudes: Comparative perspectives on Cape environmental history' (2003) 29 *Kronos* 9.

³⁸ R Elphick *Kraal and Castle: Khoikhoi and the founding of white South Africa* (1977) 177.

³⁹ Glatigny (n 21 above) 301-302.

⁴⁰ Gilbert (n 36 above) 688.

'agricultural argument' the indigenous people who did not cultivate the land that they occupied were unable to contend that they had legitimate title to such land. Consequently, their occupation of the land could be disregarded by the European settlers who occupied the land by erecting buildings on it and cultivating it.⁴¹ Gilbert's contention explains why the rights of nomadic pastoralists were until recently disregarded in terms of international law concepts relating to acquisition of territory and the creation of nation states.⁴² I am of the opinion that in the seventeenth century when Europeans settled in areas where the indigenous communities were nomadic pastoralists they regarded the land as unoccupied, because they could not see any physical sign that indicated the contrary. It is highly unlikely that they occupied the unoccupied land because they relied on theories developed by philosophers. In other words, the process of occupation of land by Europeans was governed by the circumstances that prevailed in the newly settled area and not by theories that were developed at a later stage to try to justify such occupation.

In sections 3.2.2.1 and 3.2.2.2 of Chapter 3, I discuss the fact that it was the physical occupation of the land by non-indigenous persons for agricultural and residential purposes that eventually led to the outbreak of hostilities with the indigenous communities. The Company was aware that the indigenous communities were opposed to their using the land in the Liesbeek Valley for agricultural purposes. This did not deter the Company from establishing the farms of the non-indigenous settlers in the Valley.⁴³ The indigenous communities that used the Valley did not leave any physical barrier to prevent the use and occupation of the land concerned. Van Riebeeck remarked to the indigenous communities that there was enough grazing available in other places for them to use and that he could therefore not perceive any reason not to occupy the land.⁴⁴ Due to the absence of physical signs of occupation, the possibility that the indigenous communities had obtained rights in the land concerned did not occur to Van Riebeeck. It appears that the attitude adopted by Van Riebeeck and the Company when allocating land to the first non-

⁴¹ Gilbert (n 36 above) 685, 686.

⁴² Gilbert (n 36 above) 687.

⁴³ HB Thom *Journal of Jan van Riebeeck Volume II 1656-1658* (1954) 80, 89.

⁴⁴ Thom (n 43 above) 89.

indigenous settlers in 1657 was also adopted by the non-indigenous settlers who occupied land in the interior of the Cape Colony.⁴⁵

2.4.1.2 Nomadic orbits

The basic needs of livestock are adequate grazing and open water resources.⁴⁶ Beinart remarks that the changing of seasons, and moving from drylands to wetlands, highlands to lowlands or winter to summer rainfall regions were factors that caused livestock to be moved in a fairly regular pattern.⁴⁷ These were the factors that determined the manner in which land was occupied by pastoral indigenous communities in the Cape Colony. Therefore, in this chapter, I use the nomadic orbits that were created by the seasonal movement of livestock as a factor that determines the limits of the study area of this thesis.⁴⁸ The nature of the nomadic orbits differed in the various regions of the Cape Colony where pastoral indigenous communities lived.⁴⁹

2.4.1.2.1 *South-Western Cape*

According to Elphick, the nomadic orbits of indigenous communities in the South-Western Cape were completed annually or over a period of two years. He also

⁴⁵ The occupation of land in the interior of the Cape Colony by non-indigenous settlers is discussed in sections 9.2.1 and 9.2.2 of Chapter 9. See also TW Bennett 'Redistribution of land and the doctrine of Aboriginal title in South Africa' (1993) *South African Journal on Human Rights* 462.

⁴⁶ Glatigny (n 21 above) 304.

⁴⁷ W Beinart 'Transhumance, animal diseases and environment in the Cape, South Africa' (2007) 58 *South African Historical Journal* 19.

⁴⁸ The writers who deal with these patterns in the Cape Colony use the term transhumance in combination with the terms pattern, orbit or cycle. Elphick (n 38 above) 58; Smith (n 37 above) 104; N Penn *The forgotten frontier: Colonist and Khoisan on the Cape's northern frontier in the 18th century* (2005) 31; L Webley 'Archaeological evidence for pastoralist land-use and settlement in Namaqualand over the last 2000 years' (2007) 17 *Journal of Arid Environments* 630. From the description of transhumance given by Beinart (n 47 above) 17 and the definition of transhumance in the *Oxford English Dictionary* (see note 27 above) it appears that this is a term that does not necessarily mean that the communities that practise transhumance are nomadic. Therefore, I use the phrase 'nomadic orbit,' as the pastoral indigenous communities who lived in the study area were nomadic. Gilbert describes a nomad community as follows:

The Oxford English Dictionary traces the origins of the word 'nomad' back to the Greek *nemein* meaning 'to pasture', and defines a nomad as 'a member of a people continually moving to find fresh pasture for its animals and having no permanent home'. One central aspect of this definition is the link between a people on the move and the reason behind such movement, which is to find fresh pasture

Gilbert (n 36 above) 683.

⁴⁹ In this chapter the word 'region' is not used to indicate a clearly demarcated area. The different regions are determined by the areas within which the nomadic indigenous communities living there migrated. For example, based on the remarks of Smith (n 37 above) and Elphick (n 38 above) the South-Western Cape is an area that comprises the territory along the west coast of the Cape Colony from the Vredenburg Peninsula in the north to the Cape Peninsula.

remarks that some indigenous communities remained in particularly well-watered areas of this region for an entire year without migrating.⁵⁰ These remarks seem to indicate that nomadic orbits came into existence when the water resources of an area were not sufficient to sustain an indigenous community through the summer and winter. However, Smith remarks that the rainfall and open water resources in the South-Western Cape were more than adequate to sustain livestock and that availability of water was not the reason for seasonal movement in this region.⁵¹ According to Smith, these nomadic orbits were in fact determined by the quality of the grazing that was available during the different seasons of the year.⁵²

The nomadic orbits of the various indigenous communities living in the South-Western Cape did not necessarily conform to the area that was regarded as the territory of that community.⁵³ It appears that, although the different communities generally respected their respective territorial claims, there were many unauthorised encroachments on each other's territories.⁵⁴ In November and December of 1661 the indigenous community whose territory was situated near Saldanha Bay visited the Cape with their livestock. This caused a major disruption among the indigenous communities whose territory was at the Cape. They were forced to move their livestock onto the pasture used by the non-indigenous settlers who in turn had to move their livestock to the vicinity of the Fort.⁵⁵ The Company was also powerless to protect the newly planted trees and fence that were supposed to demarcate the Company's territory.⁵⁶ From this incident it is clear that as far as the occupation of land used as grazing is concerned, the indigenous community that possessed the largest herds and flocks was the most powerful as its livestock could monopolise the grazing of other communities, including that of the Company and the non-indigenous

⁵⁰ Elphick (n 38 above) 58. The area behind the Tygerberg is used as an example by Elphick.

⁵¹ Smith (n 37 above) 100. In this thesis the phrase 'open water resource' refers to water that can be used by humans or animals or both and which is accessible without having to dig for water or extract it by mechanical means.

⁵² Based on the theory that nomadic orbits were determined by the quality of pasture in different seasons, Smith constructed a hypothetical nomadic orbit for the community whose territory was in the Saldanha Bay area. This orbit was in a north to south and south to north direction between the Vredenburg Peninsula and the Cape Peninsula. Smith (n 37 above) 100-104. See also Penn's remarks with regard to nomadic orbits of specific indigenous communities. Penn (n 48 above) 32-33.

⁵³ Boonzaier (n 37 above) 68; Glatigny (n 21 above) 304.

⁵⁴ Hattingh (n 1 above) 271.

⁵⁵ HB Thom *Journal of Jan van Riebeeck Volume III 1659-1662* (1958) 436-437; Elphick (n 38 above) 123.

⁵⁶ Thom (n 55 above) 437.

settlers. It can also be deduced that the extent of an indigenous community's orbit was determined by the size of its herds and flocks.⁵⁷

2.4.1.2.2 *Southern Cape*

For the purposes of this chapter, the area that stretches from the Hottentots Holland Mountains east to the Sundays River is regarded as the Southern Cape. Elphick remarks that the nomadic orbits of indigenous communities that lived in this region stretched to the seashore in the south, but that it is not known what the northern limits of these orbits were.⁵⁸ From the number of encampments that non-indigenous travellers found from time to time in this region, it appears that it was more densely populated than the South-Western and Northern Cape regions.⁵⁹ Within this region the nomadic orbits of the indigenous communities overlapped, but not to the same extent as was the case in the South-Western Cape.⁶⁰ Arthur advances the theory that the indigenous communities of the Southern Cape did not migrate in a single group, but followed a pattern of aggregation and dispersal. According to this theory, groups within an indigenous community dispersed during winter, some to the mountains in the north and others to the coast in the south.⁶¹ However, his analysis of the environmental data relating to the suitability and availability of grazing, leads to the conclusion that a narrow corridor of land between the southern coastal plain and the mountains in the north was most frequently occupied by the indigenous communities of the region.⁶²

During the seventeenth century the indigenous communities that lived in the central part of this region were regarded as those with the largest supply of livestock.⁶³ It is also possible that one of the indigenous communities in the eastern part of this region practised a rudimentary form of cultivation by planting dagga.⁶⁴

⁵⁷ D Sleigh *Die buiteposte: VOC-buiteposte onder Kaapse bestuur 1652-1795* (2007) 63.

⁵⁸ Elphick (n 38 above) 138.

⁵⁹ Elphick (n 38 above) 139; HC Bredekamp 'Khoikhoi-Hollander-kontak buite die Kaapse Skiereiland tussen 1662 en 1679' (1979) 1 *Kronos* 13.

⁶⁰ Elphick (n 38 above) 138.

⁶¹ CI Arthur 'The Khoekhoen of the Breede River Swellendam: An archaeological and historical landscape study' unpublished Masters dissertation, University of Cape Town, 2008 60.

⁶² Arthur (n 61 above) 66.

⁶³ Elphick (n 38 above) 139; Bredekamp (n 59 above) 12-13.

⁶⁴ Elphick (n 38 above) 68; Bredekamp (n 59 above) 9, 11.

There is, however, no indication that this form of cultivation influenced the nomadic orbit of the community concerned.

2.4.1.2.3 *Northern Cape*

Mitchell remarks that nomadic orbits developed in the Olifants River valley about 2000 years ago. She postulates that the pastoral indigenous communities living in that area would have gathered in the mountainous areas on both sides of the Olifants River in the late summer months and would have moved to the Sandveld and Karoo from early winter through to spring.⁶⁵

The Namaqua was the most important indigenous community living in the area along the west coast of the Cape stretching north from the Olifants River to the Gariiep River. Although this is an arid region, the Namaqua had substantial flocks and herds, which included goats.⁶⁶ Webley remarks that the nomadic orbit of the Namaqua was mainly between the Kamies Mountains and a coastal region just south of the Olifants River that is known as the Sandveld. The Namaqua occupied the Kamies Mountains during the summer and moved south to the Sandveld in the winter to avoid the cold weather in the mountains. As the Sandveld falls within the winter rainfall region its small streams served as a water resource during the winter. She also remarks that there was a nomadic orbit during the late summer months towards the east. The western part of the region known as Bushmanland, which falls in the summer rainfall region, offered good grazing when there were good rains in the area.⁶⁷

2.4.1.3 *Mixed farming*

In section 2.4.1.1 I remarked that one of the possible reasons why only pastoralists were found in the regions discussed above is that these regions fall within the winter rainfall zone. The winter rainfall zone includes the west coast of the Cape from near the mouth of the Berg River and covers the south-western corner of South Africa to Mossel Bay. East of Mossel Bay the area between the escarpment and the coast

⁶⁵ LJ Mitchell 'Traces in the landscape: Hunters, herders and farmers on the Cedarberg frontier, South Africa, 1725-95' (2002) 43 *The Journal of African History* 434-435.

⁶⁶ Elphick (n 38 above) 136-137; Hattingh (n 1 above) 277; Webley (n 48 above) 630. The pastoralist indigenous communities in the other regions did not have any goats.

⁶⁷ Webley (n 48 above) 630.

receives rain throughout the year.⁶⁸ The pastoral indigenous communities living in the area between the Gamtoos River and the Great Fish River met and interacted with Xhosa indigenous communities.⁶⁹ In this area, although the rainfall was more favourable for grazing, it was also possible to plant summer crops.⁷⁰ This was also where assimilation between the pastoral indigenous communities and the Xhosa indigenous communities took place.⁷¹

2.4.1.3.1 *Assimilation of the pastoral indigenous communities with Xhosa indigenous communities*

Social and economic disruption in the area between the Gamtoos River and the Great Fish River during the first part of the eighteenth century hastened the assimilation between the pastoral indigenous communities and the Xhosa indigenous communities.⁷² A crisis, like a severe drought, which led to a reduction in the herds and flocks of the indigenous communities in the region, naturally had a greater impact on the pastoral indigenous communities than on the Xhosa indigenous communities who had been engaged in agriculture for a long time. Whereas the Xhosa could sustain themselves with the yield from their crops while their herds and flocks were regenerated, the pastoral communities had to enter into a client relationship with the Xhosa to sustain themselves or return to a hunting and gathering lifestyle.⁷³ A third option was for such an indigenous community to adopt the practice of producing crops. By producing crops the community could sustain itself while the lengthy process of rebuilding its herds and flocks took place.⁷⁴ However, the main productive activity of these communities remained herding of livestock and they did not become sedentary due to the production of crops.⁷⁵ Ross is of the opinion that over a period of a century the pastoral indigenous communities in this area adopted the production of crops as an additional form of food production

⁶⁸ Although the area north of the mouth of the Berg River is also within the winter rainfall zone it receives very little rain. Information obtained from the website of OpenStax CNX. http://cnx.org/contents/2y5A1_mb@1/Rainfall (accessed 2 May 2017).

⁶⁹ R Ross 'Ethnic identity, demographic crises and Xhosa-Khoikhoi interaction' (1980) 7 *History in Africa* 260, 261.

⁷⁰ D Denoon 'Dependence and interdependence: Southern Africa from 1500 to 1800' in BA Ogot (ed) *General history of Africa, V: Africa from the sixteenth to the eighteenth century* (1992) 688.

⁷¹ JS Marais *The Cape Coloured people* (1968) 110.

⁷² Ross (n 69 above) 261; Denoon (n 70 above) 688; Marais (n 71 above) 110.

⁷³ Ross (n 69 above) 266-267.

⁷⁴ Ross (n 69 above) 261, 267.

⁷⁵ Ross (n 69 above) 261.

and were eventually incorporated into the Xhosa indigenous communities.⁷⁶ It is accepted that after the assimilation process of the pastoral indigenous communities into the Xhosa indigenous community was completed, they no longer occupied land by nomadic orbits.

2.4.1.3.2 *Mixed farming of the Xhosa indigenous communities*

The herding of cattle played a central role in the culture of the Xhosa indigenous communities.⁷⁷ However, agriculture was the principal source of subsistence as cattle was more highly prized as a possession than as a source of food.⁷⁸ Consequently, the Xhosa indigenous communities developed a system of occupation of land that provided for homesteads where agriculture was practised and a transhumant cycle that provided for the seasonal movement of cattle.⁷⁹

Although the Xhosa indigenous communities preferred that their cattle should be pastured in the vicinity of the homestead, the nature of the grazing at the homesteads did not always allow this. If the homestead was situated in the sourveld it was only during the summer months that good grazing could be found there. This meant that during the winter months the cattle was moved to sweetveld in river valleys where there was sufficient grazing and water.⁸⁰

2.4.2 **Occupation of land by non-indigenous persons**

Elphick sketches the growth of the settlement at the Cape as a process of different kinds of frontiers created by non-indigenous persons that extended into the interior. This expansion had a profound and mostly negative impact on the indigenous communities of the Cape.⁸¹ In this section I use the process described by Elphick as a framework to describe the occupation of land by non-indigenous persons.

⁷⁶ Ross (n 69 above) 267; Denoon (n 70 above) 267.

⁷⁷ M Shaw 'Material culture' in WD Hammond-Tooke (ed) *The Bantu-speaking peoples of Southern Africa* (1974) 94-95.

⁷⁸ Shaw (n 77 above) 94.

⁷⁹ Shaw (n 77 above) 85, 91, 96; SL Hall 'Pastoral adaptations and forager reactions in the Eastern Cape' (1986) 5 *Goodwin Series* 44.

⁸⁰ Hall (n 79 above) 42, 44. Sourveld and sweetveld are references to pasture that is only nutritious for cattle in the summer (sourveld) and pasture that is nutritious in the winter (sweetveld).

⁸¹ Elphick (n 6 above) 6. They identify a trade, agricultural and livestock farming frontier.

2.4.2.1 Occupation of land by the Company for the purposes of trade

The first permanent building at the Cape, the Fort, served as the headquarters of the Company at the Cape. Establishing sound trade relationships with the indigenous communities to ensure an adequate supply of fresh meat to the Company's ships was one of the main functions of the Company servants.⁸² The land for the Fort was therefore not only occupied for the purposes of defence and service provision to ships, but it was also a permanent trade centre with the indigenous communities. During the seventeenth century the Company prohibited trade in livestock between the non-indigenous settlers and the indigenous communities.⁸³ Therefore, during that period it was only the Company that needed to occupy land for the purposes of trade. Initially the Fort was conveniently situated to be a trade centre with the indigenous communities, but as the communities near the Fort (and later the Castle) became poorer and lost their livestock, the main trade activities were relocated to the Company outposts.⁸⁴ Even when the colonial government ceased to cultivate the land at an outpost and to use the pasture in its vicinity for the Company's livestock, it sometimes retained its function as a trading post.⁸⁵ The use of outposts as trading posts was important for the economic welfare of the Company, but did not play a major role in the occupation of land by the Company.

2.4.2.2 Occupation of land by non-indigenous persons for the purposes of agriculture.

In the period before 1657 the Company was the only supplier of fresh vegetables to the Company's ships. Van Riebeeck's second concern, after commencing the construction of the Fort, was the preparation of land to plant vegetables. The Company therefore occupied land for the purposes of agriculture. It was soon clear to Van Riebeeck that the Company gardens in the Table Valley were too exposed to the south-easterly winds to successfully produce crops like wheat. Consequently, the

⁸² Elphick (n 6 above) 8-9.

⁸³ Sleight (n 57 above) 64.

⁸⁴ Sleight (n 57 above) 65, 421, 501, 554, 576.

⁸⁵ An example of such a case is the Hottentots Holland outpost where the Company's agricultural business and flock of sheep were leased to the non-indigenous settlers while a Company servant was retained at the outpost to conduct trade with the indigenous communities when possible. Sleight (n 57 above) 158, 163.

Company's agricultural enterprises were relocated to areas outside the Table Valley at Rondebosch and in the Liesbeek Valley.⁸⁶

When the Company decided that the Cape should become self-sufficient by providing for its own staple foods, it released the non-indigenous settlers to occupy land as agriculturalists in the Liesbeek Valley.⁸⁷ The Company decided that title deeds would be issued for the land given to the non-indigenous settlers for agricultural purposes. These title deeds were entered into a deeds register.⁸⁸ In the first years of occupation of agricultural land by non-indigenous settlers they were given land next to or near rivers and streams to ensure easy access to enough water.⁸⁹ Walker provides a list of farms used for agricultural purposes whose title deeds were registered in the period from 1685 to 1714 and the map on which the locations of these farms are indicated.⁹⁰ From this list and map it appears that—

- (a) when the Cape was extended to Stellenbosch and beyond, the pattern of giving agricultural land to non-indigenous settlers next to perennial rivers was repeated;
- (b) the area from the mouth of the Eerste River to Stellenbosch had 37 registered farms;
- (c) the area along the Berg River, at Franschhoek, Drakenstein and where modern day Paarl and Wellington are situated, had 136 registered farms;
- (d) the area west of Stellenbosch, which Walker refers to as Bottelary, De Kuylen and Tygerberg,⁹¹ had 50 registered farms;
- (e) the only area that is regarded as being in the interior of the Cape Colony for the purposes of this thesis, and where seven farms had been registered, was in the Land van Waveren.⁹²

⁸⁶ Sleigh (n 57 above) 174-175.

⁸⁷ Elphick (n 6 above) 10.

⁸⁸ G Denoon 'The development of methods of land registration in South Africa' (1943) 60 *South African Law Journal* 179.

⁸⁹ EA Walker *Historical atlas of South Africa* (1922) 7-8; L Guelke 'Blanke boere en grensbewoners 1652-1780' in H Giliomee & R Elphick (eds) *'n Samelewing in wording: Suid-Afrika 1652-1840* (1990) 75. See also 'Figuur 2.3 Patrone van grondbesit in Stellenbosch en Drakenstein, 1680-1700' 77.

⁹⁰ Walker (n 89 above) 8-9, Map 5.

⁹¹ Walker (n 89 above) 8.

⁹² The settlement of non-indigenous settlers in the Land van Waveren is discussed in section 9.2.1 of Chapter 9.

As agriculture was dependent on animal power to cultivate the land and for transport, the occupation of land for agricultural purposes went hand in hand with occupation of land as pasture near the farms of the non-indigenous settlers. This meant that land that could potentially be cultivated was reserved to be used as communal pasture by the non-indigenous settlers in the areas referred to in paragraphs (b) to (e) above.⁹³

Elphick remarks that the occupation of land for agricultural purposes did not have a big impact on the indigenous communities in the interior of the Cape Colony.⁹⁴ Since the roads from the Cape to the interior of the Cape Colony were in such a poor condition that agricultural products could not be transported cost effectively, the main focus of the non-indigenous settlers in the interior of the Cape Colony was livestock farming.⁹⁵ Land was only cultivated to provide for the subsistence of the family and workers. The process of occupation of land in the interior of the Cape Colony was therefore the opposite of what it was in the more densely populated areas.⁹⁶

2.4.2.3 Occupation of land used as grazing by non-indigenous persons

Shortly after the Company arrived in Table Valley it realised that it could not rely on the indigenous communities to supply it with sufficient livestock to provide fresh meat for the Company's ships.⁹⁷ The colonial government therefore had to establish its own herd of cattle and flock of sheep, which occupied land used as grazing in the Table Valley.⁹⁸ Up to 1700, when the Company decided to no longer keep livestock but to lease the contract for the supply of meat to one of the non-indigenous settlers, it used the pasture in the vicinity of the Fort and at its outposts for its own livestock.⁹⁹ After 1700 the Company's need to use the pasture in the South-Western Cape was limited to providing for the cattle needed for transport in the Cape Colony.¹⁰⁰

⁹³ Guelke (n 89 above) 74-75; P J van der Merwe *Die trekboer in die geskiedenis van die Kaapkolonie 1657-1842* (1938) 65-66.

⁹⁴ Elphick (n 6 above) 6.

⁹⁵ C de Wet 'Die vryburgergemeenskap' in C de Wet et al (eds) *Die VOC aan die Kaap 1652-1795* (2016) 341.

⁹⁶ Van der Merwe (n 93 above) 72.

⁹⁷ HB Thom *Journal of Jan van Riebeeck Volume I 1651-1655* (1952) 113.

⁹⁸ The process of occupation of land used as pasture by the Company and the non-indigenous settlers is discussed in Chapter 8.

⁹⁹ D Sleight 'Die Kaapse diensstasie: 'n Ondersoek na produksiestelsels en dienslewering' in C de Wet et al (eds) *Die VOC aan die Kaap 1652-1795* (2016) 38; Sleight (n 57 above) 494.

¹⁰⁰ Sleight (n 99 above) 42.

The occupation of land used as grazing in the interior of the Cape Colony can be regarded as a two-stage process. The first stage was the informal occupation of land based on authorisation given by the colonial government to non-indigenous settlers to let their livestock use the grazing far away from their farms in the interior of the Cape Colony. This gave the agriculturists of the Cape, Stellenbosch and the Berg River Valley the opportunity to let their working animals and breeding herds use the best grazing available.¹⁰¹ The second stage of occupation commenced when non-indigenous settlers who did not own farms also obtained authorisations to use grazing in the interior of the Cape Colony for their livestock. Van der Merwe postulates that once this type of settler occupied land to use as grazing, they also started to use the land for other purposes like producing crops for the subsistence of their households and erecting permanent residences.¹⁰² As this second stage of occupation of land developed the colonial government adopted measures to try to control it. After 1714 an annual payment of a recognition fee was instituted, payable when non-indigenous settlers obtained their yearly authorisation to occupy the land that came to be known as loan places.¹⁰³ By 1795 most of the land in the Cape Colony was occupied in terms of the loan place system of occupation.¹⁰⁴ However, at the end of the eighteenth century there was land that could be used as grazing inside and outside the boundaries of the Cape Colony that was not permanently occupied by non-indigenous settlers. Such grazing was used on a seasonal basis by the non-indigenous settlers when the grazing at their loan places was depleted.¹⁰⁵

The occupation of land by the Xhosa indigenous community in terms of the mixed farming system discussed in section 2.4.1.3.2 and the occupation of land by the non-indigenous settlers in terms of the loan place system show similarities on a very elementary level. As far as the occupation of land is concerned, the homestead of the Xhosa indigenous community can be compared with the permanent home and

¹⁰¹ Van der Merwe (n 93 above) 68-69.

¹⁰² Van der Merwe (n 93 above) 69-72. See also the discussion in section 4.2.1 of Chapter 4 of the environmental factors that played a role in the manner in which the non-indigenous settlers occupied the interior of the Cape Colony.

¹⁰³ LC Duly *British land policy at the Cape, 1795-1844: A study of administrative procedures in the Empire* (1968) 15. See section 9.3.2.2.2 of Chapter 9 for a discussion of the loan place system.

¹⁰⁴ Duly (n 103 above) 15.

¹⁰⁵ PJ van der Merwe *Trek: Studies oor die mobiliteit van die pioniersbevolking aan die Kaap* (1945) 101. See also the discussion of the outstation system in section 10.5.3 of Chapter 10.

agricultural land of the non-indigenous settlers. Also, the transhumant system of migrating with livestock between winter and summer grazing was practised by both the Xhosa indigenous communities and the non-indigenous settlers.

2.5 Overlapping occupation of land

When the Company established its settlement at the Cape in 1652, the land at the Cape and in the interior of the Cape Colony was occupied by the pastoral indigenous communities in the manner described in section 2.4.1. The process of occupation of land by non-indigenous persons (as described in section 2.4.2) that started in 1652 disrupted the pattern of occupation of the indigenous communities at the Cape and in the interior of the Cape Colony.

When non-indigenous persons occupied land by erecting buildings and ploughing the land for agricultural purposes, the indigenous communities permanently lost the use of such land. Similarly, the indigenous communities were permanently deprived of grazing at the Cape in the cases where the Company reserved certain areas of the territory as pasture for its own or the non-indigenous settlers' livestock. However, due to the practice of occupying land by nomadic orbits, the indigenous communities could adapt their occupation of land to the settlement patterns established by the buildings, agricultural activities and reserved pasture of non-indigenous persons.¹⁰⁶ Therefore, it must be accepted that due to the large size of the regions considered in sections 2.4.1.2.1 to 2.4.1.2.3 and the relatively small number of inhabitants, there were areas in these regions that were used as grazing by both the non-indigenous settlers and the indigenous communities.¹⁰⁷ I refer to such use of grazing as 'overlapping occupation'. Overlapping occupation of grazing occurred in a region while there were independent indigenous communities that kept livestock in a region.

In the following sections, the manner in which the overlapping occupation of land used as grazing took place in different regions is considered.

¹⁰⁶ Elphick (n 6 above) 17.

¹⁰⁷ Guelke (n 89 above) 87.

2.5.1 Overlapping occupation of land in the South-Western Cape

The existence of nomadic orbits as a method of occupation of land means that in the cases where an encampment of an indigenous community with livestock is recorded in a region, it is accepted that the community occupied land as grazing in that region. In the first 10 years after the establishment of the settlement by the Company, the indigenous communities living at the Cape maintained their independence and there are numerous references to the presence of indigenous communities' encampments and livestock.¹⁰⁸ The indigenous communities were disadvantaged by the fact that the non-indigenous settlers occupied more and more of the available grazing in the region and denied them the opportunity to increase the number of their livestock.¹⁰⁹ During this period the position of the indigenous communities at the Cape started to deteriorate and their encampments became smaller, as did their herds and flocks.¹¹⁰ Elphick ascribes the final demise of the indigenous communities of the region to various factors, but identifies the loss of their livestock as the most detrimental factor.¹¹¹

Elphick remarks that the worsening of the economic position of the indigenous communities at the Cape was a gradual and cumulative process.¹¹² Notwithstanding the reduced status of the indigenous communities, the practice of nomadic orbits had the effect that as long as there was sufficient land available between the farms established by the non-indigenous settlers, the indigenous communities could keep on occupying land in the South-Western Cape.¹¹³ The colonial government acknowledged that there remained independent indigenous communities at the Cape and tried to ensure that they would have sufficient grazing for their livestock. This is evidenced by a clause that was included in the contracts to buy land from the leaders of two of the indigenous communities at the Cape in 1672. This clause provided that the indigenous communities could remain with their livestock in the

¹⁰⁸ Elphick (n 38 above) 92, 188-189.

¹⁰⁹ Elphick (n 38 above) 173.

¹¹⁰ Elphick (n 38 above) 188.

¹¹¹ Elphick (n 38 above) 237-238.

¹¹² Elphick (n 6 above) 11.

¹¹³ Elphick (n 6 above) 17; L Guelke & R Shell 'Landscape of conquest: Frontier water alienation and Khoikhoi strategies of survival, 1652-1780' (1992) 18 *Journal of Southern African Studies* 813.

territory that they had sold and also use the grazing.¹¹⁴ Similarly, in 1679 when non-indigenous settlers were granted the right to use pasture east of the Eerste River, the grant was made subject to the condition that the indigenous communities may not be disturbed in their peaceful use of the grazing in that region.¹¹⁵ I contend that as long as there were livestock-owning independent indigenous communities living in the South-Western Cape, there was overlapping occupation of land in the said region.

2.5.2 Overlapping occupation of land in the Southern Cape

The indigenous communities in the Southern Cape were better able to resist the encroachment of non-indigenous settlers on their grazing and water sources than their counterparts in the South-Western Cape. Although settlement by non-indigenous settlers east of the Hottentots Holland Mountains started in the decade after 1700, the colonial government only found it necessary to impose more direct control in the region in 1745 with the establishment of the Swellendam district.¹¹⁶ The gradual spread of non-indigenous settlers in the area gave the indigenous communities more time to adapt to the change in circumstances and the effect on them was therefore less damaging.

According to Viljoen, the indigenous communities tried to ensure their independent existence in the region by entering into client relationships with the non-indigenous settlers. Among indigenous communities, clientship¹¹⁷ was a well-known practice. An indigenous community or family often entered the service of a more powerful community in order to replenish its own herds or flocks. When independent

¹¹⁴ HC Bredekamp 'Die grondtransaksies van 1672 tussen die Hollanders en die Skiereilandse Khoikhoi' (1980) 2 *Kronos* 8. These transactions are discussed in section 3.2.2 of Chapter 3 and section 4.4.2 of Chapter 4.

¹¹⁵ *Resolutions of the Council of Policy of Cape of Good Hope* C. 14, pp. 78–79. The difference between grazing and pasture as contemplated in this thesis is illustrated by this example. The fact that the non-indigenous settlers concerned had to get authorisation from the colonial government to use the grazing east of the Eerste River means that the government controlled such grazing for the benefit of the non-indigenous community as a whole and that it must therefore be regarded as pasture.

¹¹⁶ Arthur (n 61 above) 67, 68.

¹¹⁷ The *Oxford English Dictionary* defines 'clientship' as 'The status or position of a dependant or client (client *n.* 1); the relation between such a client and his or her patron. Also: an instance of this'. 'clientship, *n.*' *OED Online*. June 2018. Oxford University Press. <http://www.oed.com.uplib.idm.oclc.org/view/Entry/34290?redirectedFrom=clientship> (accessed 10 June 2018).

indigenous communities entered into clientship with non-indigenous settlers they had the same purpose in mind.¹¹⁸ Viljoen contends that the indigenous communities that entered into clientship with non-indigenous settlers were guaranteed 'unrestricted access to highly contested pastures and water'.¹¹⁹

However, Viljoen notes that due to mutual distrust and dishonesty, the indigenous communities often lost their independence and had to remain in the employ of the non-indigenous settler.¹²⁰ It was, however, only in the last quarter of the eighteenth century that independent indigenous communities were starting to disappear from the scene in the Southern Cape region.¹²¹ As was the case earlier in the South-Western Cape, the independent indigenous communities used the grazing that was not occupied by non-indigenous settlers and the grazing made available, by entering into client relationships. I am therefore of the opinion that there were areas in the Southern Cape region where there was overlapping occupation of land used as grazing by the non-indigenous settlers and the indigenous communities.

2.5.3 Overlapping occupation of land in the Northern Cape

Penn remarks that the movement of the non-indigenous settlers into the areas north and east of the Bokkeveld Mountains initially met with little resistance from the indigenous communities of the area. He is of the opinion that the large extent of land that was available in this region lessened the negative impact of the non-indigenous settlers that established loan places there.¹²² Due to the harsh environmental circumstances the non-indigenous settlers were more interested in their own survival as livestock farmers than in displacing the indigenous communities of the region. The non-indigenous settlers saw greater advantage in employing indigenous people

¹¹⁸ R Viljoen 'Aboriginal Khoikhoi servants and their masters in colonial Swellendam, South Africa, 1745-1795' (2001) 75 *Agricultural History* 31-32.

¹¹⁹ Viljoen (n 118 above) 32. Clientship is also discussed in section 14.2.3 of Chapter 14.

¹²⁰ As above.

¹²¹ Arthur (n 61 above) 70-72; D Webb "The war took its origins in a mistake": The Third War of Dispossession and resistance in the Cape of Good Hope Colony, 1799-1803' (2014) 42 *Scientia Militaria, South African Journal of Military Studies* 57, 58. Viljoen remarks that prior to an insurrection planned for 25 October 1788 in the Swellendam district, the insurgents gathered at an indigenous community's encampment in the Breede River region and another at Riviersonderend. From these remarks it is clear that such encampments still existed in the Southern Cape in the second half of the eighteenth century. R Viljoen "Revelation of a revolution!: The prophecies of Jan Parel, "alias Onse Lieweheer", a Khoisan prophet and Cape rebel' (1994) 21 *Kronos* 11.

¹²² Penn (n 48 above) 81.

to act as herders and to learn from them about keeping livestock in such an arid environment. During the time that the non-indigenous settlers cooperated with the indigenous communities of the region in this manner, the indigenous persons sometimes kept their own livestock under the protection of their non-indigenous employers.¹²³

As was the case in the other regions discussed, it appears that in the Northern Cape contact between the indigenous communities and non-indigenous settlers also meant that the indigenous communities inevitably were dispossessed of their land. However, in the Northern Cape region the environmental circumstances had the effect that not all the land in the region could be occupied. The non-indigenous settlers obtained loan places in that part of the region where they were able to utilise the winter and summer rainfall zones as grazing for their livestock. In the summer rainfall zone the non-indigenous settlers had to move to the areas where the rain had actually fallen. Although the grazing was good when there was rain there were no permanent water sources. There was also no guarantee that the same region would again have good rain in the following season. Consequently, there was no permanent settlement by non-indigenous settlers in the summer rainfall region during the eighteenth century.¹²⁴

It seems likely that the indigenous communities of the region that had livestock, utilised the grazing in the same manner as the non-indigenous settlers.¹²⁵ Consequently I am of the opinion that overlapping occupation of grazing occurred in this region.

2.6 Determination of the study area

In sections 2.3 and 2.4 I explore the fact that the manner in which different communities living at the Cape and in the interior of the Cape Colony occupied land was different in nature. Although the rights of these different communities in the land

¹²³ Penn (n 48 above) 94.

¹²⁴ Penn (n 48 above) 84-85.

¹²⁵ In fact, Penn remarks that the non-indigenous settlers probably followed the example of the indigenous communities who also moved their livestock between the winter and summer rainfall zones. Penn (n 48 above) 84. I could find no evidence that independent indigenous communities were prevented from continuing with this practice.

they used as grazing for their livestock are only considered in subsequent chapters, it must be noted at this stage that the rights of pastoral indigenous communities in such land play an important role in this thesis. Consequently, the extent of the study area of this thesis is limited to the area which pastoral indigenous communities occupied.

Sections 2.4.1.2.1 to 2.4.1.2.3 give a broad overview of the regions in which pastoral indigenous communities occupied land. The discussion in sections 2.5.1 to 2.5.3 shows that, notwithstanding the encroachment of non-indigenous persons on the land occupied by indigenous communities, they continued to exercise their communal rights in land in the regions concerned during the colonial period.¹²⁶ The description of the study area in section 1.2 of Chapter 1 gives more precise details of these regions, but is based on the discussion in this chapter.

2.7 Conclusion

This thesis is concerned primarily with legal questions regarding the rights of the various colonial governments, the non-indigenous settlers and the indigenous communities in land used as grazing in the study area. However, there is a lack of scholarship on the role of the history of occupation of land in determining the nature of the rights in land of different communities. The study of the history of occupation of land used as grazing by non-indigenous persons and pastoral indigenous communities makes it possible to determine regions where overlapping occupation of grazing occurred.

¹²⁶ From the discussion of the dispossession of the rights in land of indigenous communities in Chapter 12 it will be clear that in some regions the indigenous communities were able to retain their rights in land through the whole colonial period, while others lost their rights in land over time during this period.

Part 2

Rights in land of colonial governments

3 The Company's rights in land in terms of international law rules

3.1 Introduction

The legal principles that must be taken into account when considering the Company's rights in land in the Cape Colony fall into two categories, namely international law rules¹ and the applicable rules of the domestic law of the Cape Colony. I contend that when the British colonial government started its investigation into the land tenure system of the Cape Colony early in the nineteenth century, the colonial officials misinterpreted or ignored the international law rules that governed the transfer of rights in land between sovereign nations.² In this chapter I discuss the international law rules that should have been taken into consideration during this investigation.

The first step to determine the Company's rights in land in terms of international law rules is to ascertain whether the Cape was acquired by occupation or by conquest. The validity of the transactions between the Company and two indigenous leaders at the Cape in terms of which territory was bought by the Company is also considered. These questions are approached from the viewpoint of the members of the family of nations³ of the seventeenth century. Taking into

¹ In this chapter the phrase 'international law rules' means the rules that applied amongst the members of the family of nations. See note 3 for the meaning of 'family of nations'.

² In Chapter 6 I discuss the investigation into the land tenure system of the Cape Colony under the rule of the Company by British colonial government officials. In section 6.5.4 of Chapter 6 I conclude that in line with the advice of JA Truter, the British colonial government made certain assumptions about the Crown's rights in land without taking into account the legal principles that generally governed rights in land in the Cape Colony. The transfer of rights that took place between the British government and the Batavian Republic in 1803 and 1806 is discussed in section 3.4. With some minor variations these were the same rights that were transferred to the British by the Company in 1795.

³ L Oppenheim *International law a treatise Volume I Peace* (1912) 107 gives a description of the concept of a family of nations and defines the members of the family of nations as 'every State which belongs to the civilised States'. Civilised states are those that considered themselves bound by the law of nations as developed by mainly European jurists. Oppenheim (above) 60. I chose to use the 1912 edition of Oppenheim's work because it is an authoritative exposition of international law as it was prior to the major changes that took place in international law in the twentieth century. (With regard to the status of the 1912 edition of Oppenheim's work, see the remarks in A Anghie 'Finding

account that in April 1652 only the nomadic Goringhaicona⁴ were living at the Cape, the way was clear for the Company to occupy the Cape in terms of the international law rules of the seventeenth century.⁵

The settlement of the Cape by the Company and the subsequent expansion of the colony together constituted a two-stage process. In the period from 1652 to 1700 the Cape was established as a refreshment station and was gradually expanded by the colonial government as was deemed necessary by the Company.⁶ The establishment of the district of Stellenbosch and Drakenstein and the expansion into the Land van Waveren were initiatives of the colonial government.⁷ In the period after 1700 the expansion into the interior of the Cape Colony was no longer initiated by the colonial government, but by the non-indigenous settlers who moved into the interior looking for better grazing for their livestock.⁸

It is important to bear in mind that international law rules remained applicable to the territory of the Cape Colony after the initial occupation of the Cape. The territory in the interior of the Cape Colony could, in terms of international law rules, only be lawfully acquired by the Company if it was occupied effectively.⁹ The purpose of section 3.3.3 is to show that the Company had a legitimate claim, in terms of the international law rules of the eighteenth century, to having acquired the territory of the interior of the Cape Colony by occupation. However, none of the traditional modes of acquisition of territory in terms of the international law rules of the eighteenth century can be made applicable to the actions of the colonial government in the interior of the Cape Colony.¹⁰ I contend that a modified version of the principle of effective occupation must be applied to the actions of the colonial government in the said territory. The modification that had to be applied to the circumstances in the interior of the Cape Colony was that the Company could claim

the peripheries: Sovereignty and colonialism in nineteenth-century international law' (1999) 40 *Harvard International Law Journal* 9 footnote 19).

⁴ See section 2.3.1 of Chapter 2.

⁵ See section 3.2.

⁶ See section 3.3.2 and section 8.4.1 of Chapter 8.

⁷ See section 9.2.1 of Chapter 9.

⁸ See sections 9.2.1 and 9.2.2 of Chapter 9.

⁹ See section 3.3.1.

¹⁰ See section 3.3.3.1.

effective occupation of the territory occupied by the non-indigenous settlers by exercising effective control over them.¹¹

The first time that the international law rules relating to the acquisition of territory by conquest became applicable to the Cape Colony was in 1795. When the Cape Colony was transferred by the Company to the British government in terms of the Articles of Capitulation, the British government became the successor to the rights of the Company.¹² The international law rules of state succession provide that when territory is ceded, the public property of the ceding state is transferred to the successor state.¹³ It further provides that the question regarding which things constitute public property is answered in terms of the domestic law of the ceding state. The Articles of Capitulation did not provide for the transfer of the unspecified public property of the Company to the British government. I discuss the land at the Cape and in the interior of the Cape Colony that was used communally by the colonial government and the non-indigenous settlers that had to be classified as public property. This was the only land that became the property of the British government in terms of international law rules.¹⁴ The land under the individual control of the non-indigenous settlers in the interior of the Cape Colony was not public land and did not become the property of the British government.

¹¹ See sections 3.3.3.2.1 to 3.3.3.2.4. If the colonial government did not exercise effective control over the non-indigenous settlers, they may have been regarded as individuals acting in their own interests. As such they could not be regarded as persons in terms of international law and could not occupy territory in terms of international law rules. Oppenheim (n 3 above) 362. The Cape Colony would then, in terms of international law rules, have consisted of the territory as it was in 1700. Any other nation that could gain the allegiance of the non-indigenous settlers in the interior of the Cape Colony and establish effective control over them would then have been able to claim effective control of the territory concerned. The movement of non-indigenous settlers in North America from the initial settlement on the Atlantic seaboard to the area west of the Appalachian Mountains was similar in nature to that of the non-indigenous settlers in the Cape Colony. However, the colonial governments in North America and its successor, the United States government, insofar as international law rules are concerned, relied on the doctrine of discovery as formulated in the famous Supreme Court case *Johnson and Graham's Lessee v William M'Intosh* 21 US 543 (*Johnson*) to justify the government's proprietary rights in the land occupied by the non-indigenous settlers. From the way in which Chief Justice Marshall defined the doctrine in *Johnson* (at 572-573) it is clear that the doctrine could never be applicable in the Cape Colony, as it is common cause that the Cape was not discovered by the Company. The American process of expansion by non-indigenous settlers can therefore not be used as a precedent for the rights obtained by the Company in terms of international law rules in the interior of the Cape Colony.

¹² The Articles of Capitulation were signed on 16 September 1795 at Rustenburg. GM Theal *Records of the Cape Colony from February 1793 to December 1796* (1897) 127-130

¹³ CK Uren 'The succession of the Irish Free State' (1929) 28 *Michigan Law Review* 156; Oppenheim (n 3 above) 131.

¹⁴ See sections 3.3.3.2 to 3.3.3.4.

The same international law principles that applied in 1795 were applicable to the return of the Cape Colony to the Batavian Republic in 1803 and its conquest by British forces in 1806. The only new factors that I consider are whether the Cape Colony was ever ceded to the British government during the first British occupation and if the proclamation of an official northern boundary for the Cape Colony changed the legal rights of the Batavian Republic in terms of international law rules.¹⁵

In my conclusion I consider the validity of the assumption made by the British colonial government that all land not held in freehold by the non-indigenous settlers in the Cape Colony was Crown land. I give a summary of the types of land in which the Company could have had rights in 1795 and the powers that it had to transfer such rights in terms of the international law rules of state succession. I conclude that said international law rules do not provide any justification for the assumption made by the British colonial government.

3.2 Acquisition of territory at the Cape in terms of international law rules

I contend that in terms of the international law rules that were in force in the seventeenth century, the Company acquired the territory of the Cape by occupation. This contention is discussed in section 3.2.1. In section 3.2.2 I discuss the theory that the Company acquired the territory at the Cape in terms of international law rules by buying it from the indigenous communities.

3.2.1 Occupation of the territory at the Cape in terms of international law rules

Oppenheim defines acquisition of territory by occupation as the appropriation of territory by a state¹⁶ with the intention to exercise sovereignty over such territory in the absence of any other state exercising sovereignty over such territory.¹⁷ The exercise of sovereignty over the territory of the Cape must not be equated with the acquisition of ownership of the land in the territory in a private law sense. Although state territory, during medieval times, was regarded as the property of the monarch

¹⁵ See sections 3.4 and 3.4.1 of Chapter 3.

¹⁶ DP O'Connell *International law* (1970) 418-419 discusses the unique position of companies like the Dutch and English East India Companies and remarks that such companies 'could be regarded as in some sense sovereign agents' of the Netherlands and Great Britain respectively.

¹⁷ Oppenheim (n 3 above) 291.

of that state, international law rules had evolved to make a distinction between the territory where a state exercised *imperium* or sovereignty and the ownership of land in that territory in a private law sense.¹⁸

As far as the members of the family of nations of the seventeenth century were concerned, the inhabitants of the Cape were an indigenous community who did not have any livestock and did not appear to be a political society. The Cape could therefore be occupied.¹⁹ The essence of exercising sovereignty over territory is to exercise control over such territory.²⁰ As time progressed the Company succeeded in exercising control over the entire area of the Table Valley. This control or exercise of its sovereign power enabled the Company to prohibit the indigenous communities from using certain parts of the territory and to allocate certain parts of the territory to the indigenous communities. My contention is that the Company was able to exercise control over the Table Valley, because there was no other state or indigenous community that exercised such control. However, the absence of control over the said territory did not mean that the indigenous communities did not have rights in the Table Valley in terms of customary land law. This viewpoint is in line with the natural law theory of property of De Groot that had currency during the

¹⁸ Oppenheim (n 3 above) 229. The question of sovereignty is discussed in section 3.4 in the context of the rights that the Company transferred to the British government when the Cape Colony was transferred in 1795.

¹⁹ MF Lindley *The acquisition and government of backward territory in international law being a treatise on the law and practice relating to colonial expansion* (1926) 22-23. If it was factually correct, which it was not, that the small indigenous community living in the Table Valley at the Cape in April 1652 was the only community using the land at the Cape, this viewpoint of the members of the international community may have been accepted. I am of the opinion that in view of the facts regarding the Goringhaicona that I set out in section 2.3.1 of Chapter 2, the Cape was regarded as '*terra nullius*' by the family of nations of that period. JC de Wet *Die ou skrywers in perspektief* (1988) 19, E Fagan 'Roman-Dutch law in its South African historical context' in R Zimmermann & D Visser (eds) *Southern Cross: Civil law and common law in South Africa* (1996) 40-41. *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 3 SA 1293 (LCC) 1310. I do not contend that the Cape was in fact *terra nullius* but merely that in terms of the international law of the seventeenth century it was *terra nullius* because the indigenous community resident there did not conform to the required international norms. In other words, if the indigenous communities who consisted of more people and possessed livestock were permanently resident at the Cape, the members of the family of nations whose ships frequented the Cape would not have regarded the Cape as *terra nullius*. The views that prevailed with regard to the place of indigenous communities in the family of nations in the late nineteenth century did not exist in the seventeenth century. Anghie (n 3 above) 4. With regard to the nineteenth century views see TJ Lawrence *The principles of international law* (1905) 154-155. Thomas's remarks that according to the legal doctrine of the day 'the Cape was *res nullius* (thing without owner), and thus became Dutch territory and property of the VOC by way of *occupatio* (taking possession of)' appears to be an oversimplification of the position relating to the acquisition of land at the Cape. PhJ Thomas et al *Historical foundation of South African private law* (1998) 93.

²⁰ Oppenheim (n 3 above) 177.

seventeenth century.²¹ According to De Groot, as Ederington remarks, property ownership preceded the institutions of government and law.²²

The main consequence of the 1659 war between the Company and the indigenous communities of the Cape was that the latter lost the free access that they previously had to the area west of the Liesbeek and Salt Rivers and the Table Valley.²³ The colonial government erected a fence on the eastern limit of the territory which demarcated the territory occupied by the Company. Members of indigenous communities who wished to enter the territory were compelled to do so through a guarded gate.²⁴ At the peace negotiations held during April and May 1660, Van Riebeeck informed the leaders of the indigenous communities that by engaging in war with the Company they had forfeited the land lying to the west of the fence.²⁵ Apart from the fact that the indigenous communities could no longer access the grazing in Table Valley, they were also prohibited from hunting and gathering in that area.²⁶ Since the Company and the non-indigenous settlers were already in occupation of the area concerned before the war commenced in May 1659, the international law rules with regard to the acquisition of territory by conquest were not applicable.²⁷ The rather vague question posed by Dugard as to whether the Cape

²¹ W Whewell *Grotius on the rights of war and peace: An abridged translation* (1853) 125-126.

²² LB Ederington 'Property as a natural institution: The separation of property from sovereignty in international law' (1997) 13 *American University International Law Review* 268.

²³ The 1659 war is also discussed in section 8.2.2.2 of Chapter 8. In this thesis I name the wars between the Company and the indigenous communities by using the year in which the hostilities began. As the thesis is only concerned with certain consequences relating to land that flowed from these wars, I prefer not to choose between the many different names that are given to the wars in history sources.

²⁴ D Sleigh *Die buiteposte: VOC-buiteposte onder Kaapse bestuur 1652-1795* (2007) 129-131, 134.

²⁵ HCV Leibbrandt *Precis of the archives of the Cape of Good Hope January, 1659 - May, 1662: Riebeeck's journal &c* (1897) 118.

²⁶ Leibbrandt (n 25 above) 118.

²⁷ Grotius remarks that for a thing to become the property of a conqueror by the rights of war it must have belonged to the enemy. Whewell (n 21 above) 338. Oppenheim remarks as follows:

Conquered enemy territory, although actually in possession and under the sway of the conqueror, remains legally under the sovereignty of the enemy until through annexation it comes under the sovereignty of the conqueror.

Oppenheim (n 3 above) 303. From the quoted remarks it appears that it is a prerequisite that conquered territory must have been in possession of the enemy before conquest can take place. The Cape was in possession of the Company before the war and remained in its possession. See also sections 2.4.2.2 and 2.4.2.3 in Chapter 2 with regard to the process of occupation of land in the South-Western Cape.

was acquired by the Company by occupation of a *terra nullius* or by conquest can therefore be answered - it was acquired by occupation.²⁸

3.2.2 Territory bought from the indigenous communities

On 19 April 1672 and 3 May 1672 the Company entered into agreements in terms of which two indigenous leaders sold the territory under their jurisdiction to the Company.²⁹ The transactions related to land stretching from the Cape to Saldanha Bay and the Hottentots Holland and False Bay area that was already being used by the Company and non-indigenous settlers as pasture for their livestock.³⁰

Oppenheim classifies the sale of territory by a state to another state as a special form of cession which is one of the ways in which territory can be acquired in terms of international law rules.³¹ Formal legal language was used in the written documents containing the agreement between the indigenous leaders and the Company.³² It appears that for the purposes of these agreements, the Company regarded the indigenous leaders as the rulers of States with which the Company could enter into agreements that would be binding in terms of the international law rules of the seventeenth century.³³

The purpose of the transactions with the indigenous leaders was to strengthen the Company's claim to the territory at the Cape in terms of international law rules. This is evident from the colonial government resolution of 13 April 1672 in which it is made clear that the purpose of the proposed agreement is to show that the Company had legally bought the described territory from the indigenous

²⁸ J Dugard *International law: A South African perspective* (2011) 134. The Cape was not *terra nullius* as it was occupied. However, it was not occupied by a subject of international law as contemplated in the seventeenth century. For the purposes of seventeenth century international law, the Cape was unoccupied.

²⁹ HC Bredekamp 'Die grondtransaksies van 1672 tussen die Hollanders en die Skiereilandse Khoikhoi' (1980) 2 *Kronos* 7.

³⁰ Bredekamp (n 29 above) 7-8. See section 4.4.2 of Chapter 4 for a more precise description of the land that was sold.

³¹ Oppenheim (n 3 above) footnote 2 on 284, 287-288.

³² In this regard see the formal titles given to the indigenous leaders in these documents. Bredekamp (n 29 above) 7.

³³ Bredekamp remarks that Commissioner Van Overbeek, who was visiting the Cape and initiated the transactions, was a trained jurist. He therefore speculates that Van Overbeek may have been of the opinion that Grotius' viewpoint that agreements with the indigenous rulers of the East Indies were binding in terms of international law was also applicable to the indigenous leaders of the Cape. Bredekamp (n 29 above) 6-7.

inhabitants.³⁴ In this section the question is raised whether the transactions between the Company and the indigenous leaders created valid international law rights to the territory at the Cape. In other words, from an international law perspective, would any other member of the family of nations be obliged to accept that the agreements were valid and conferred ownership of the territory on the Company?

De Vattel, whose treatise on international law was published in 1758,³⁵ addresses the question whether a nation that takes possession of an area of land may at the same time lay claim to land that it cannot effectively populate or cultivate.³⁶ He relies on the law of nature to state that the earth was destined for all people and that one group or nation cannot exclude others from using the land that is not cultivated or used by them.³⁷ Flowing from these remarks, De Vattel expresses the following opinion with regard to the occupation of land by nomadic indigenous people:³⁸

Their unsettled habitation in those immense regions cannot be accounted a true and legal possession; and the people of Europe, too closely pent up at home, finding land of which the savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it and settle it with colonies.

From these remarks it is clear that in terms of the international law rules of the seventeenth and the eighteenth centuries transactions of sale or cession between nomadic communities and a member of the family of nations were not regarded as binding on other members of the family of nations.³⁹

³⁴ *Resolutions of the Council of Policy of Cape of Good Hope* C. 8, pp. 2-9. The relevant part of the resolution provides as follows:

Vervolgens is oock door d' Hr. Commissaris ter vergaderinge voorgedraegen, hoedat Sijn E. sijne speculation hadde laten gaen, off 't niet doenlijck ende ten dienste van d' E. Compe. tot voorcomingh van veele cavillatien nootsaekelijck soude wesen dat men met sommige Hottentosen en principaelijck die geene in welckers landt onse residentie begreepen sij ofte noch begreepen mochte werden, een accordt trachte aan te gaen, waerbij d'selve deden verclaren, ons te wesen d' regte en wettige possesseurs van dit Caapse district met den aencleve van dien, d' E. Compe. offte ons derselver dienaeren voor seekere somma van penningen wettelijck verkogt en ingeruijmt, omme sulx te meer 't recht en d' possessie van onse Heren Principalen daerop te vesten,

³⁵ *Le Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains.*

³⁶ J Chitty *The law of nations; or, principles of the law of nature, applied to the conduct and affairs of nations and sovereigns from the French of monsieur De Vattel* (1852) 98.

³⁷ Chitty (n 36 above) 98-99.

³⁸ Chitty (n 36 above) 100.

³⁹ When the claim of the Dutch West Indian Company ('WIC') to the territory of New Netherland in North America was challenged by Great Britain, one of the grounds on which it defended its claim was that the territory had been bought from the indigenous communities who were living there. The

3.3 International law rules applicable to the expansion of colonies

Occupation as a mode of acquisition of territory is usually associated with the initial settlement on a continent or island by a nation.⁴⁰ In the case of acquisition of territory by occupation, the extent of the initial territory acquired by the occupying nation is also governed by international law rules.⁴¹ These rules relate to the effective occupation of territory by a nation. Effective occupation means that a nation's title to territory expands together with the physical expansion of the territory over which that nation can exercise sovereignty effectively.⁴²

3.3.1 Principles relating to the effective occupation of territory

De Vattel remarks that in terms of international law rules the sovereignty of a nation over an area of land of which it had taken possession will not be acknowledged if that nation does not—

- (a) take actual possession of that area of land;
- (b) establish settlements in that area; and
- (c) make actual use of the land in that area.⁴³

His standpoint is therefore that ceremonial occupation of territory by the placing of beacons by a nation does not prevent another nation from actually settling on that

British discounted this claim as they contended that the indigenous communities were nomadic and could not have obtained ownership of the territory and could therefore not have sold it to the WIC. JW Leonard *History of the City of New York 1609-1909 From the earliest discoveries to the Hudson-Fulton celebration* (1910) 44. De Vattel remarks that the conduct of the Puritans who bought the land in New England from the indigenous communities living there and of William Penn who followed their example, was laudable, but he does not attach any legal effect to the said transactions. Chitty (n 36 above) 100.

⁴⁰ Oppenheim (n 3 above) 284, Lawrence (n 19 above) 143-156, 158-160, Lindley (n 19 above) 2, PK Menon 'The acquisition of territory in international law: A traditional perspective' (1994) 22 *The Korean Journal of Comparative Law* 128, S Lee 'Continuing relevance of traditional modes of territorial acquisition in international law and a modest proposal' (2000-2001) 16 *Connecticut Journal of International Law* 1-2. The methods of acquisition of territory discussed in this paragraph are those that had developed by the end of the nineteenth century and were discussed in contemporary treatises on international law by the mainly positivist writers of the period, for example Oppenheim, Lawrence and Twiss. T Twiss *The law of nations considered as independent political communities: On the rights and duties of nations in time of peace* (1884).

⁴¹ Lawrence (n 19 above) 150. With regard to small islands or even a group of very small islands, Lawrence (as above) remarks that occupation may take place by a single act of annexation or the establishment of one settlement.

⁴² See section 2.4.2 of Chapter 2 for an overview of the process of occupation of land by non-indigenous persons in the Cape Colony.

⁴³ Chitty (n 36 above) 99.

territory.⁴⁴ These principles were further developed by subsequent writers on international law in order to make it clear which actions constitute effective occupation of territory.⁴⁵

Twiss starts his discussion of the extent of the territory that may be occupied by a nation by pointing out that in order to be the legal owner of a thing, it is not necessary to be in possession of the whole thing.⁴⁶ It suffices if such an owner is in possession of a part that is integral to the thing to constitute him the owner of the whole thing. When he considers the requirements for actual possession of land, he remarks that where an owner of a farm or garden occupies only a part of the land it is relatively easy to determine the extent of land that he possesses by referring to the recorded boundaries of such a farm or garden. He contrasts this situation with the case where a person occupies a piece of land that does not have official boundaries. In such a case, the occupation of a part cannot constitute possession of the whole area adjacent to the occupied land, as such an approach would mean that where a nation occupies a part of a continent it will be able to claim possession of the whole continent.⁴⁷ He formulates the principle that the extent of land that may be taken possession of by such a nation must be determined by the 'natural boundaries which are essential to the independence and security of its settlement'.⁴⁸ In terms of the accepted rules of international law in 1884 when Twiss' work was published, the extent of land that it was necessary to possess for such independence and security was determined by the following: Occupation of an extent of sea coast by a nation confers the right to take possession of the land stretching inland from that expanse of coast to the watershed line.⁴⁹ The boundaries of the land will therefore depend on

⁴⁴ As above.

⁴⁵ I limit my discussion to the principles that are applicable to the territory of the Cape. For example, the question of the right to possession of a large part of the interior of a continent based on the occupation of the territory in the immediate vicinity of the mouth of a major river, like the Mississippi, is not applicable to the geography of the Cape.

⁴⁶ Twiss (n 40 above) 203.

⁴⁷ Twiss (n 40 above) 203-204.

⁴⁸ Twiss (n 40 above) 205.

⁴⁹ Twiss (n 40 above) 209, Lawrence (n 19 above) 151. O'Connell suggests a practical non-technical conception of the watershed, which is appropriate for use in this section and for the geographical circumstances, as far as the barrier of mountains is concerned, that prevail at the Cape. He remarks that when the watershed is used to indicate the limits of the territory in possession of a member of the family of nations that occupies the coast, it means the 'attribution to the coastal sovereign of that area of land which is geographically assimilated to it by a barrier of mountains and a

the extent of the coastline occupied, the territory that is drained by the rivers that flow into the sea on that coast and the location of the watershed line.

From the preceding remarks it is evident that in the late nineteenth century, when Twiss and his contemporaries were writing their treatises, the principles that had to be applied to determine the extent of territory to which legitimate claim could be made after occupation, were rather vague. Oppenheim was of the opinion that the abovementioned theories propounded by Twiss were fanciful as they had no basis to rest on.⁵⁰ He states that it is not possible to apply a general rule like the natural boundaries essential for independence and security rule, because a nation was only entitled to the territory that it could occupy effectively. A nation's right to occupy territory therefore had to be determined on a case by case basis. In cases where there were overlapping claims to territory by nations, a variety of methods was used by them to assert their respective rights to the disputed territory.⁵¹ In the majority of cases, the lack of fully developed international law rules that could be applied to resolve disputes between nations who were simultaneously expanding their territory led to a compromise reached by the conclusion of a treaty or through arbitration.⁵²

3.3.2 Effective occupation of the South-Western Cape

Already in 1654 the colonial government effectively occupied Robben Island by establishing an outpost with three soldiers there. This occupation was maintained almost permanently from 1654 to 1795.⁵³ However, the effective occupation of the South-Western Cape⁵⁴ commenced after the 1659 war. The colonial government initiated the expansion of the Colony beyond the boundary established in 1660. The colonial government effectively occupied the South-Western Cape by establishing

drainage of waterways'. DP O'Connell 'International law and boundary disputes' (1960) 54 *American Society of International Law Proceedings* 83.

⁵⁰ Oppenheim (n 3 above) 295. I contend that Oppenheim's approach to effective occupation must be accepted rather than that of Twiss and his contemporaries. The first time that the question of effective occupation of territory became relevant in the Cape Colony was with the first British occupation in 1795. By that time the principles established by De Vattel as discussed in this paragraph were already part of international law rules. Oppenheim's theory of effective occupation is the closest to the principles established by De Vattel.

⁵¹ Oppenheim (n 3 above) 295-296.

⁵² Oppenheim (n 3 above) 296.

⁵³ Sleight (n 24 above) 365-367. The only period of more than four years that the island was not occupied was from 1695 to 1705.

⁵⁴ In this chapter 'South-Western Cape' means the area west of the chain of mountains starting with the Hottentots Holland Mountains in the south and south of the Great Berg River.

outposts or, in the case of Stellenbosch and Drakenstein, a rudimentary local government in the form of heemraden and a landdrost who exercised the Company's authority over the area demarcated for settlement by the non-indigenous settlers.

The effective occupation of the territory between the Cape and the Hottentots Holland Mountains was out of the ordinary, as it commenced at the point most remote from the Cape, namely Hottentots Holland.⁵⁵ Sleigh refers to the establishment of the outposts at Hottentots Holland Mountain, Kuils River and at Klapmuts Mountain as the creation of the second frontier zone after the establishment of the border at the Liesbeek River in 1659.⁵⁶ These outposts were respectively established in 1672, 1680 and 1683. The effective occupation, in terms of international law rules, of the territory beyond the Cape up to 1700 was completed by the establishment of the settlement of Stellenbosch in 1679 and its subsequent extension into Drakenstein along the Berg River.⁵⁷

3.3.3 Acquisition of the territory in the interior of the Cape Colony after effective occupation thereof by the non-indigenous settlers

The further expansion of territory that has been acquired by occupation and effectively occupied is also governed by the traditional international law modes of acquisition of territory. In sections 9.2.1 and 9.2.2 of Chapter 9 I discuss how the expansion into the interior of the Cape Colony was initiated by the non-indigenous settlers and not by the colonial government. In this section I consider whether, in terms of international law rules, the Company acquired the territory that was appropriated by the non-indigenous settlers in the interior of the Cape Colony.⁵⁸ In addition to occupation of territory, the traditional modes of original acquisition of territory are conquest and annexation, prescription and accretion.⁵⁹ A further mode of acquisition is cession of territory. Cession of territory is characterised as derivative

⁵⁵ See the map on 145 of Sleigh (n 24 above).

⁵⁶ D Sleigh 'Die Kaapse diensstasie: 'n Ondersoek na produksiestelsels en dienslewering' in C de Wet et al (eds) *Die VOC aan die Kaap 1652-1795* (2016) 40.

⁵⁷ Sleigh (n 56 above) 40.

⁵⁸ When referring to the occupation of land in the interior of the Cape Colony by the non-indigenous settlers, I use the words 'appropriate', 'appropriated' and 'appropriation' to distinguish their actions from acquisition of territory by a nation.

⁵⁹ See sources and remarks in note 40.

and not original, as it can only take place between recognised members of the family of nations.⁶⁰

3.3.3.1 Reasons why the appropriation of territory by the non-indigenous settlers did not lead to acquisition of territory by the colonial government in terms of international law

South African history sources give no indication that the non-indigenous settlers were acting as agents or on behalf of the colonial government to expand the territory of the Cape Colony.⁶¹ Therefore, the non-indigenous settlers did not, in terms of international law rules, acquire territory for the Company by occupation.⁶² It was also not the intention of the Company to expand the territory of the Cape Colony by conquest.⁶³ As it is only international persons as recognised by international law

⁶⁰ Oppenheim (n 3 above) 285, Lee (n 40 above) 8, Menon (n 40 above) 150, RY Jennings *The acquisition of territory in international law* (1963) 16. M Kohen 'Original title in the light of the ICJ judgment on sovereignty over Pedra Branca / Pulau Batu Puteh, Middle Rocks and South Ledge' (2013) 15 *Journal of the History of International Law* 154.

⁶¹ The colonial government in fact took stringent measures to prohibit interaction between non-indigenous settlers and indigenous communities. GM Theal *History of South Africa under the administration of the Dutch East India Company [1652-1795] Vol I* (1897) 231-232, 346, 383, 387, L Guelke 'The making of two frontier communities: Cape Colony in the eighteenth century' (1985) 12 *Historical Reflections / Réflexions Historiques* 436-437.

⁶² Lindley (n 19 above) 84.

⁶³ From the peace agreement between the colonial government and Gonnema concluded after the 1673 war, it is clear that the colonial government did not have any aspirations to increase its territory when it waged war with the indigenous community. Theal (n 61 above) 230. Also, in 1712, when an expedition under KJ Slotsboo was sent to the Olifants River to prevent a possible invasion of the Cape Colony by the Namaqua indigenous community, he was instructed to only recover the livestock that may have been stolen and to try and resolve problems between the non-indigenous settlers and the indigenous community by diplomatic means. *Resolutions of the Council of Policy of Cape of Good Hope* C. 30, pp. 12-14. PL Scholtz *Dagverhaal van Luitenant Kaje Jesse Slotsboo, bygehou tydens die ekspedisie na die Groot-Namakwas 1712* (2002) 55-56. Historians like Legassick and Penn refer to the appropriation of land by non-indigenous settlers from indigenous communities as acts of conquest but do not indicate that the 'conquest' took place on behalf of the colonial government. Their remarks show that the hostile actions of the non-indigenous settlers were for their own benefit. MC Legassick *The politics of a South African frontier: The Griqua, the Sotho-Tswana and the missionaries, 1780-1840* (2010) 41-42, NG Penn 'Pastoralists and pastoralism in the Northern Cape frontier zone during the eighteenth century' (1986) 5 *Goodwin Series* 63-65. Although, according to Penn, the Company still played a significant role in the warfare that took place in the northern regions of the Cape Colony in 1739, the actions of the Company cannot be regarded as conquest as there was no annexation of territory. The result of an extensive campaign was that the livestock that was stolen by the indigenous communities and recovered, was redistributed between the owners. The assistance rendered by the colonial government was aimed at assisting the non-indigenous settlers to regain their livestock and not to increase the territory of the Cape Colony. However, because of the military victories during this period, the area of the present Piketberg, Nieuwoudtville, Clanwilliam, Tulbagh, Ceres and Prince Alfred's Hamlet districts was abandoned by the indigenous communities. N Penn *The forgotten frontier: Colonist and Khoisan on the Cape's northern frontier in the 18th century* (2005) 48, 58, 60, 65-71, 73, 76-77, 78. Sleight (n 24 above) 536. In terms of the international law rules of the period, conquest of territory must be accompanied by annexation of territory to constitute acquisition of territory. Oppenheim (n 3 above) 302-303. However,

rules that have the capacity to act in terms of international law, individuals acting on their own cannot acquire territory by conquest.⁶⁴ It is for the same reason that appropriation of land by the non-indigenous settlers in the Cape Colony cannot be taken as an act of the colonial government that could lead to the acquisition of territory through prescription.⁶⁵ Accretion, which is the increase of territory through new formations like islands rising in a river, as a way of acquiring territory, is clearly not applicable to the expansion of territory discussed in this chapter.⁶⁶

Lindley is of the opinion that in cases where indigenous communities occupied a territory, nations could not acquire such territory by occupation but could only obtain it by conquest or cession.⁶⁷ However, while the territory of the Cape Colony gradually expanded during the eighteenth century, I could find no evidence that the colonial government made any agreement with an indigenous community that can be interpreted as a treaty whereby land within the study area was ceded to the colonial government by an indigenous community.⁶⁸ This means that in terms of international law rules the territory appropriated by the non-indigenous settlers was not ceded to them or to the colonial government.

in section 12.4.4 of Chapter 12 I conclude that the indigenous communities that had lived in the abovementioned areas were dispossessed of their rights in land when the land was occupied by non-indigenous settlers.

⁶⁴ Oppenheim (n 3 above) 107, 362.

⁶⁵ The definition of prescription in the international law context (see Oppenheim (n 3 above) 309) refers to the exercise of sovereignty over a certain area. As only governments can exercise sovereignty over territory prescription is not applicable as a method of acquisition of territory in the interior of the Cape Colony.

⁶⁶ Oppenheim (n 3 above) 299.

⁶⁷ Lindley (n 19 above) 43-44. Lindley's approach differed from that of other positivist writers on international law of the period who were of the opinion that indigenous nations that did not form part of the family of nations could not conclude a binding treaty with a nation.

⁶⁸ The lack of evidence must be ascribed to the absence of indigenous communities in the study area (but outside the limits of the Cape Colony as they were in 1700) that had control over territory. After 1700 the independent indigenous communities within the limits of the Cape Colony were accommodated in areas not utilised by non-indigenous settlers. The colonial government and the non-indigenous settlers therefore did not think it necessary to negotiate with these indigenous communities about the appropriation of their land. GM Theal *History of South Africa under the administration of the Dutch East India Company [1652-1795] Vol II* (1897) 98-99.

3.3.3.2 Acquisition of the territory appropriated in the interior of the Cape Colony by the non-indigenous settlers

From the discussion in section 3.3.3.1 it is clear that after 1700 the Company did not, in terms of international law rules, obtain title⁶⁹ in the land in the interior of the Cape Colony as a result of the appropriation of land by the non-indigenous settlers for residential and agricultural purposes and for use as grazing. The colonial government had to perform its own actions to be able to claim title in the territory appropriated by the non-indigenous settlers. Only by performing such actions would it have been able to resist another nation's claim to territory in the rest of southern Africa. In the following sections I consider whether the actions of the colonial government, after the appropriation of the territory in the interior of the Cape Colony, can be regarded as acquisition of territory in terms of international law rules.

3.3.3.2.1 *Modification of the principle of effective occupation for the circumstances in the Cape Colony*

During the seventeenth century the Company's occupation of the territory at the Cape was challenged by France on two occasions.⁷⁰ Since attempts by the French to establish a territorial claim to the Saldanha Bay area failed, it never became necessary for the Company to conclude a treaty with France or any other nation with regard to apportionment of territory at the Cape or in the interior of the Cape Colony. The absence of any territorial rivalry between nations at the Cape makes it very difficult to determine whether the actions of the Company in the interior of the Cape Colony can, in terms of international law rules, be regarded as effective occupation. As the appropriation of territory in the interior of the Cape Colony was initiated by the non-indigenous settlers, I am of the opinion that the inquiry into the question of effective occupation must be approached in a different manner from the cases where appropriation of territory is conducted by the government of a nation. The territory in the interior of the Cape Colony had already been appropriated by the non-indigenous settlers, but the colonial government could only claim effective occupation in terms of

⁶⁹ Jennings remarks that in order to create and maintain title to territorial sovereignty, a nation must have actual effective control over the territory concerned. Jennings (n 60 above) 4.

⁷⁰ In the period from 1664 to 1671, officers of the French Navy on two occasions erected signposts on the islands and the coast at Saldanha Bay in order to try and establish a territorial claim to the area. In 1671 they even detained some of the Company's officials stationed at the Company outpost at Saldanha Bay and destroyed the Company's signposts. However, the French did not at any stage attempt to establish a settlement at Saldanha Bay. Theal (n 61 above) 164, 171, 181-182.

international law rules of such territory if it was able to exercise effective control over its non-indigenous subjects.⁷¹

3.3.3.2.2 *Effective control over the non-indigenous settlers in the districts of the Cape Colony*

The colonial government established effective control by dividing the interior of the Cape Colony into districts within which the landdrosts exercised administrative control over the non-indigenous settlers.⁷² At the time of the first British occupation in 1795, three districts had been established in the interior of the Cape Colony, namely Stellenbosch and Drakenstein, Swellendam and Graaff-Reinet.⁷³ In 1711 Stellenbosch and Drakenstein became the first district to obtain a boundary. In order to eliminate disputes with regard to the jurisdiction of the landdrost of Stellenbosch, the Kuils River and the Mosselbank River between Stellenbosch and Cape Town were designated as the limit of his jurisdiction in the west.⁷⁴ The remaining area of jurisdiction of the landdrost was not specifically defined but extended to the limits of the areas where the non-indigenous settlers had settled.⁷⁵ The boundaries of districts were only described when it was necessary to delimit the areas of jurisdiction of the landdrosts of two districts⁷⁶ or when the colonial government deemed it necessary to determine an eastern boundary for the Cape Colony. Where there was no possibility of overlapping jurisdiction of landdrosts, the limits of the district were determined by the settlement pattern of the non-indigenous settlers. This procedure is evidenced by the resolution of the colonial government of 19 July

⁷¹ Benton confirms this view. She remarks as follows with regard to the jurisdiction of the Company:

Dutch jurisdiction extended to employees of the Dutch East India Company, free burghers, and slaves, and the Dutch claim was that of rule over persons, not over a given territory and its inhabitants.

L Benton 'Colonial law and cultural difference: Jurisdictional politics and the formation of the colonial state' (1999) 41 *Comparative Studies in Society and History* 579.

⁷² CG Botha 'The early inferior courts of justice at the Cape' (1921) 38 *South African Law Journal* 408.

⁷³ Botha (n 72 above) 409.

⁷⁴ *Resolutions of the Council of Policy of Cape of Good Hope* C. 29, pp. 68–69.

⁷⁵ Theal (n 61 above) 424.

⁷⁶ Theal remarks that with the establishment of Swellendam district no northern or eastern boundary was determined, but it was merely remarked that the district extended to where the Company's power ended. In December 1769 the northern boundary of Swellendam was determined when the Swartberg Mountains were designated as the boundary with Stellenbosch and Drakenstein. Theal (n 68 above) 52, 102–103. With regard to the jurisdiction of the landdrost of the Stellenbosch and Drakenstein district when Swellendam was established, see *Resolutions of the Council of Policy of Cape of Good Hope* C. 123, pp. 263–271.

1786 by which the boundaries of the new district of Graaff-Reinet were established.⁷⁷ The boundaries between Graaff-Reinet and the districts of Stellenbosch and Drakenstein and Swellendam are described in the resolution with as much detail as was possible. Similarly, the eastern boundary, which was established to try and prevent the non-indigenous settlers from entering the territory of the Xhosa indigenous communities, was clearly defined. In the northern areas, where the colonial government did not deem it necessary to prevent the non-indigenous settlers from trespassing on the territory of the indigenous communities, the resolution did not prescribe a boundary.⁷⁸

Initially the colonial government at the Cape was not able to keep effective control over the non-indigenous settlers who settled across the proclaimed eastern boundary of the Colony and did not pay the required recognition to the colonial government.⁷⁹ Even after the establishment in 1745 of the new district Swellendam, east of the Stellenbosch and Drakenstein district, the landdrost of Swellendam was unable to exercise control over the non-indigenous settlers who disregarded the prohibition against establishing farms east of the Gamtoos River.⁸⁰ The establishment of the district of Graaff-Reinet in 1785 remedied this problem, as the Great Fish River was proclaimed as the eastern boundary of the new district and the Cape Colony. The landdrost of Graaff-Reinet was much nearer to the boundary and could exercise more effective control over the non-indigenous settlers. Although there were still some non-indigenous settlers who crossed the Great Fish River and trespassed on the territory of the Xhosa indigenous communities, the landdrost was able to exercise control over the non-indigenous settlers living in the district.⁸¹ However, due to the fact that the northern boundaries of the Stellenbosch and Drakenstein district and Graaff-Reinet district were not described, the limits of the territory over which the Company exercised effective control in 1795 could not be determined with precision.

⁷⁷ *Resolutions of the Council of Policy of Cape of Good Hope* C. 172, pp. 111–239, HCV Leibbrandt *Precis of the archives of the Cape of Good Hope: Requesten (Memorials) 1715-1806 Vol II F-O* (1906) 495-496.

⁷⁸ As above.

⁷⁹ Theal (n 61 above) 102-103.

⁸⁰ PJ van der Merwe *Die trekboer in die geskiedenis van die Kaapkolonie 1657-1842* (1938) 136-137, 148, 161, Sleight (n 24 above) 50.

⁸¹ Van der Merwe (n 80 above) 162.

3.3.3.2.3 *Effective control of the non-indigenous settlers in the northern frontier zone*

I am of the opinion that the fact that the colonial government did not proclaim a northern boundary for the Cape Colony makes it necessary to consider the concept of a frontier zone.⁸² There is a difference between a frontier zone and a demarcated boundary line. A frontier zone usually goes through a process of development from being an open zone where there is no formal government authority, to a zone that gradually closes as a government establishes control over the area.⁸³ In contrast, a boundary line is demarcated in order to create a division between communities or between nations. In the context of the Cape Colony, the Great Fish River was designated as a boundary line that had to serve as an effective divide between the non-indigenous settlers and the Xhosa indigenous communities.⁸⁴ However, as Penn remarks, in the absence of a nation or an indigenous community that was perceived as a threat by the colonial government, there was no need to demarcate a northern boundary.⁸⁵

The non-indigenous settlers who were prevented from moving north of the Olifants River by the arid circumstances, started to move east and settled on the northern slopes of the Roggeveld and Nuweveld Mountains.⁸⁶ According to Penn, this area formed part of the northern frontier zone.⁸⁷ In 1754 the non-indigenous settlers who lived in the Roggeveld were the victims of stock theft perpetrated by the indigenous communities and were afraid that their homes would be attacked and

⁸² The concept of a frontier zone was made applicable to South Africa by the historian Martin Legassick in a seminar paper entitled 'The frontier tradition in South African historiography' delivered at the Institute of Commonwealth Studies in London in 1970. Penn (2005) (n 63 above) 10-11. This concept was subsequently used by Nigel Penn in his history of the northern part of the Cape Colony in the eighteenth century. As this paragraph deals with the effective control by the colonial government over the non-indigenous settlers in the northern frontier zone, I rely on Penn's geographical description of this zone. He remarks that the frontier zone moved from the banks of the Berg River at the beginning of the eighteenth century to north of the Orange River by the end of the century, while it gradually extended from the Atlantic Ocean in the west to the eastern boundary of the Cape Colony and the Graaff-Reinet district. Penn (2005) (n 63 above) 14.

⁸³ P Vale 'Sovereignty, identity and the prospects for southern Africa's people' in D Chidester et al (eds) *What holds us together: Social cohesion in South Africa* (2003) 27-28, Penn (2005) (n 63 above) 12.

⁸⁴ A Müller 'The state and the development of the Cape 1795-1820' (1986) 1 *South African Journal of Economic History* 60-61.

⁸⁵ Penn (2005) (n 63 above) 113.

⁸⁶ Van der Merwe (n 80 above) 138, Penn (2005) (n 63 above) 82.

⁸⁷ Penn (2005) (n 63 above) 84.

burnt down. The Stellenbosch landdrost was able to assist the settlers by appointing officials, called field corporals, in the troubled areas and gave instructions that commandos be formed by them and sent out against the stock thieves.⁸⁸ From this incident it is clear that although the colonial government did not have permanent officials stationed in the remote parts of the Stellenbosch and Drakenstein district, it was willing and able to establish order in such areas. The colonial government in effect exercised indirect control over the northern frontier by way of the commando system.⁸⁹

3.3.3.2.4 *Effective control over the territory of the Cape Colony in 1795*

Prior to the establishment of the Graaff-Reinet district and the appointment of a landdrost, the colonial government was well aware of the precariousness of its claim to the territory occupied by the non-indigenous settlers. As part of his motivation to the Directors of the Company for the establishment of a new district, the governor remarked that a hostile seafaring nation establishing a settlement in Algoa Bay would be able to win the non-indigenous settlers in that area over to its cause and gain a ready-made colony.⁹⁰ It can therefore be contended that the Graaff-Reinet district was, amongst other reasons, established to bolster the Company's claim in

⁸⁸ Penn (2005) (n 63 above) 92.

⁸⁹ Penn (2005) (n 63 above) 78. As this thesis is not concerned with the manner in which the colonial government exercised effective control over the non-indigenous settlers but only with the fact that such effective control existed, I do not discuss the nature of the indirect control exercised by the colonial government. It suffices to refer to the following remarks of Penn as an illustration of the colonial government's involvement in the commando system:

...as the state sought to exercise greater control over the frontier zone through the organisation and provision of commandos, it was obliged to surrender substantial power to local commando leaders. In the early years of the eighteenth century, commando leaders were appointed by the VOC from officers of the garrison. But as the Company lost control over the ever-expanding frontier, the commando leaders, though appointed by the Company, were drawn from among the frontier farmers themselves. The Company simply acknowledged the existing leader of a frontier community.

Penn (2005) (n 63 above) 115. See also Legassick (n 63 above) 45; VC Malherbe 'The Khoekhoe soldier at the Cape of Good Hope: How the Khoekhoen were drawn into the Dutch and British defensive systems, to c 1809' (2002) 12 *South African Military History Journal* <http://samilitaryhistory.org/vol123vm.html> (accessed 30 May 2018). I am of the opinion that Penn's assertion that the actions of the commandos in the northern frontier zone must be regarded as conquest, can from a legal point of view not be accepted. The aggression shown toward the indigenous communities by the commandos did cause them to be displaced, but in terms of the international law rules of the period the actions of the commandos did not constitute conquest. The governmental control over commandos was so negligible that the actions of the commandos cannot be regarded as official actions of the colonial government. See note 63 for the reasons why the actions of the commandos cannot from a legal point of view be accepted as conquest of territory.

⁹⁰ *Resolutions of the Council of Policy of Cape of Good Hope* C. 169, pp. 114–138 Published on 26 August 1785; PJ Venter 'Landdros en heemrade (1682-1827)' in CG Botha et al (eds) *Argiefjaarboek vir Suid-Afrikaanse Geskiedenis Derde jaargang Deel II* 26.

terms of international law rules to an area that was of vital importance to the Company.⁹¹

In terms of the international law rules of the eighteenth century, the Company's title to the Cape Colony was based on occupation, which was an accepted mode of acquisition of territory. The territory at the Cape and the district of Stellenbosch and Drakenstein as it was before 1700 had been acquired by occupation.⁹² The colonial government only established control over the non-indigenous settlers after they had occupied the territory outside these districts as they existed before 1700 on their own initiative. Notwithstanding this fact, such control must be regarded as sufficient to contend that in 1795, in terms of international law rules, the colonial government had effective control over the whole territory appropriated by the non-indigenous settlers.

3.3.4 The transfer of the Cape Colony to the British government

The fact that the Company was in lawful occupation of the territory of the Cape Colony in 1795 in terms of international law rules does not serve to determine the nature of the rights of the Company that were transferred to the British government after the conquest of the Cape Colony in 1795. The Cape Colony was surrendered by the Company to the British government in terms of the Articles of Capitulation which were signed on 16 September 1795 at Rustenburg in the Cape.⁹³ In terms of

⁹¹ The Graaff-Reinet area was important to the Company as it was dependent on the meat supply coming from this area. Venter (n 90 above) 26.

⁹² See section 3.3.2.

⁹³ The surrender of the Company forces on 16 September 1795 to British forces started the first British occupation of the Cape. The use of the word 'occupation' is problematic from the perspective of international law. The first British occupation took place in the period of the Wars of the French Revolution when France waged war against various coalitions of European powers, of which Great Britain formed a part from 1793. The conquest of the Cape in 1795 formed an insignificant part of the war of the First Coalition which lasted until 1799. RE Dupuy & TN Dupuy *The Collins encyclopedia of military history* (1993) 741, 796. The first general peace in Europe for a decade was concluded with the Treaty of Amiens signed on 27 March 1802. Dupuy (above) 815. In terms of the Treaty of Amiens the Cape Colony was returned to the Batavian Republic which was the successor of the United Provinces. Oppenheim remarks that in terms of international law rules, after the surrender of defending forces, the conquered territory is occupied while the military forces of the invaders establish a temporary administration, until the conclusion of peace. L Oppenheim *International law a treatise Volume II War and neutrality* (1912) 206. However, the British forces did not occupy the Cape for the whole period from 1795 to 1803 when peace was established. In the case of the Cape Colony, the military government came to an end when civilian government was restored by the first civilian British governor in 1797. UA Seemann 'The British military occupation of the Cape 1795-1815: The case of York redoubt' unpublished Doctoral dissertation, University of Cape Town, 2001 23-24; M van der Burgh 'The age of revolutions at the Cape of Good Hope, 1780-1830: Contradictions and connections'

an accepted international law rule, when the British government succeeded the Company at the Cape, it could only acquire the rights that the Company had and nothing more.⁹⁴

3.3.4.1 The effect of the Articles of Capitulation and inventory of transferred immovable property

The Articles of Capitulation was the only document signed by the colonial government and the British forces providing for the transfer by the Company of the Cape Colony to the British government. Only the Castle and Cape Town were transferred to the British forces in terms of Article 1 of the Articles of Capitulation.⁹⁵ In view of my remarks in sections 3.3.3.2.2 and 3.3.3.2.3, it is clear that the Company would not have been able to specify the extent of the transferred territory. However, it has never been in doubt that all the districts of the Cape Colony were transferred to the British government in terms of the Articles of Capitulation.⁹⁶ From these facts it appears that the Articles of Capitulation were not intended to deal with territorial matters, but dealt exclusively with the transfer by the Company of the control of the Cape Colony to the British military forces.⁹⁷

The classic rule of international law relating to the transfer of state property in the case of cession of territory, is that only the public property of the ceding state is transferred to the successor state.⁹⁸ The only official document that reflects the

(2015) 16 *Journal of Colonialism and Colonial History* <http://muse.jhu.edu/uplib.idm.oclc.org/article/587722> (accessed 1 June 2018).

⁹⁴ Jennings relies on the Latin maxim *nemo plus juris transferre potest quam ipse habet* to explain that a sovereign cannot cede more rights than it has itself to the succeeding sovereign. Jennings (n 60 above) 16. This maxim is translated as 'no one can transfer more rights to another than he himself has'. VG Hiemstra & HL Gonin *Drietalige regswoordeboek Trilingual legal dictionary* (1992) 236. Twiss (n 40 above) 127-128; E Kambel & F MacKay *The rights of indigenous peoples and maroons in Suriname* (1999) 31. De Vattel confirms that this international law rule also applies in the case of conquest of territory. Chitty (n 36 above) 386-387.

⁹⁵ Theal (n 12 above) 127.

⁹⁶ This is notwithstanding the fact that at the time of the British conquest of the Cape the districts of Swellendam and Graaff-Reinet were not under the effective control of the Company, as the rebellious non-indigenous settlers had evicted the landdrosts appointed by the Company from the districts. Theal (n 68 above) 284-285.

⁹⁷ This is in line with De Vattel's and Oppenheim's remarks that capitulations are exclusively military in nature. Although the transfer of military material and public property may be addressed in Articles of Capitulation, no arrangements regarding permanent transfer of territory can be made. The rights of civilians may be guaranteed in such Articles. Chitty (n 36 above) 413; Oppenheim (n 93 above) 285.

⁹⁸ MN Shaw *International law* (2008) 987. In the case of the transfer of the Cape Colony during the first British occupation no formal (*de jure*) cession of the colony took place. See note 93 for a

transfer of immovable property from the colonial government to the British government is an inventory prepared by officers of the colonial government and signed by the respective parties on 20 September 1795 ('inventory').⁹⁹ This inventory lists the buildings that were used by the colonial government for official purposes and the land connected to such buildings, but does not contain any reference to land used communally by the Company and the non-indigenous settlers like pasture and outspans.¹⁰⁰ As the Articles of Capitulation and the inventories of public property transferred to the British government do not mention the transfer of public land or public things or the rights that the colonial government had in such land or things, the question is whether these were in fact transferred. In view of the classic rule of transfer of state property, public land or public things and the rights therein could only have been transferred if the colonial government owned the public land or had established other rights in it. The ownership of the public land or the rights of the colonial government are determined by the domestic law of the Cape Colony and not by international law rules.¹⁰¹

3.3.4.2 Ownership of public land in the districts of the Cape and Stellenbosch and Drakenstein

The public land I have in mind in this paragraph is the land that was used as pasture by the colonial government and the non-indigenous settlers in the districts of the

discussion of the reasons for this. From these reasons it is however clear that there was an effective (*de facto*) cession of territory by the Company to the British government.

⁹⁹ Theal (n 12 above) 141-146. It must be noted that the specific listing of the immovable property was pursuant to Article 8 of the Articles of Capitulation in which it was stated that the immovable property of the Company was to serve as security for the paper money issued by the Company. It appears that paper money was issued against the security of the estates of the persons to whom the money was issued. However, there was also paper money in circulation that was not issued against such security. In order to ensure that such paper money remained in circulation an arrangement was made providing that the Company's immovable property transferred to the British would serve as security for the said money. (Theal (n 12 above) 129-130.) In correspondence between the British colonial government and Commissioner-General De Mist and General Janssens of the Batavian Republic, the last mentioned officers used this Article of Capitulation to argue that the Cape Colony had not in fact been ceded to the British government and that the sovereignty of the Netherlands had only been suspended during the French revolutionary wars. GM Theal *Records of the Cape Colony From May 1801 to February 1803* (1899) 497. Dupuy (n 93 above) 742-757, 812-815. See further section 3.4.

¹⁰⁰ From a note added by Theal to the copy of the inventory it appears that there were also other inventories of mostly movable property and things like slaves and actual coins. Theal (n 12 above) 146.

¹⁰¹ Shaw (n 98 above) 987.

Cape and Stellenbosch and Drakenstein.¹⁰² In sections 8.5.1, 8.5.1.2.1 and 8.5.1.2.2 of Chapter 8, I contend that the land used as pasture must, in terms of Roman and Roman-Dutch Law, be regarded as public land that was owned by the colonial government, but was used on a communal basis by the non-indigenous settlers and the colonial government. The ownership of such land was therefore limited by the fact that the non-indigenous settlers had to have access to the land used as pasture in order to maintain their working cattle. The colonial government could not exclude the non-indigenous settlers from the land, but controlled it in a manner that was to the benefit of the colony.¹⁰³ The colonial government exercised control by establishing outposts, like the one at Groene Cloof, where the Company's working cattle were kept and where military personnel were stationed.¹⁰⁴ It is therefore accepted that in terms of the domestic law of the Cape Colony in September 1795, the land used as pasture by the colonial government and the non-indigenous settlers in the Cape and Stellenbosch and Drakenstein districts was the property of the colonial government and was transferred to the British government.

3.3.4.3 Control over land used as pasture and forests in the interior of the Cape Colony

Land used as grazing was not a scarce resource throughout the Cape Colony. As is indicated in section 8.5.1.2.2 of Chapter 8, the scarcity of land used as grazing in the districts of the Cape and Stellenbosch and Drakenstein was caused by the prevalence of agricultural activities conducted by the non-indigenous settlers and the presence of colonial government outposts in these districts. Agricultural activities in the Cape Colony during the seventeenth and eighteenth centuries were to a large extent limited to the South-Western Cape. Although the dry climate of the interior was not suitable for agricultural enterprises, there were also other circumstances that contributed to this situation. During the period of Company rule, when the transport

¹⁰² In sections 8.5.1.2.1 and 8.5.1.2.2 of Chapter 8 I discuss the classification of land used as pasture as a public thing in the Cape Colony. It is this land that I now refer to as public land, as the phrase 'public thing' will not be appropriate in the context of this section. In those sections I contend that although land used as pasture was, in terms of Roman and Roman-Dutch law, not regarded as a public thing, it is the only possible classification for land used as pasture at the Cape. The categories of land that were regarded as public things in Roman and Roman-Dutch law were things like public roads and public harbours. For the purposes of this thesis it is accepted that these types of public things were transferred and became the property of the British government with the transfer of the Cape Colony.

¹⁰³ GM Theal *Records of the Cape Colony from March 1811 to October 1812* (1901) 102-103.

¹⁰⁴ See section 8.5.1.2.2 of Chapter 8.

facilities were of a poor standard, the great distance from the interior of the Cape Colony to Cape Town also tended to limit agriculture to the Cape and Stellenbosch and Drakenstein districts. This was due to the fact that Cape Town was the only market for agricultural products, which rendered agriculture in the interior of the Cape on a scale of anything more than subsistence level, uneconomical.¹⁰⁵ In the absence of agricultural activities in a district it was less likely that grazing would become scarce, as it was not necessary to provide suitable pasture for working animals in the vicinity of the farms. The non-indigenous settlers' cattle could use grazing far away from the homestead as the animals were not required to cultivate the land.

In the area north and east of the Berg River and east of the Hottentots Holland Mountains the colonial government established only eight outposts.¹⁰⁶ Not all of these outposts were involved in keeping the Company's livestock, while some of those that were used for this purpose were sold to non-indigenous persons or abandoned before 1795.¹⁰⁷ The preceding section deals only with public land that was used as pasture, but in this section forests that were used by the colonial government and the non-indigenous settlers and were controlled by the colonial government are also considered.¹⁰⁸ Therefore, I also refer to the cases where the post holders at these outposts were ordered to conserve nearby forests that were vital for supplying wood to the Company and the non-indigenous settlers. As the forests were valuable scarce resources, they must also be included in the category of public things that were owned by the Company and controlled by the colonial government for the benefit of the colony.¹⁰⁹

¹⁰⁵ RC Harris & L Guelke 'Land and society in early Canada and South Africa' (1977) 3 *Journal of Historical Geography* 138, 142-143, 146, 152, Sleight (n 24 above) 617.

¹⁰⁶ Sleight (n 24 above) See maps on 520, 540, 586.

¹⁰⁷ Sleight remarks that in 1788 the Directors of the Company ordered the governor to reduce the number of outposts in the Cape Colony. Pursuant to this order an outpost such as Riet Valleij aan de Buffeljagtsrivier had to be sold. Sleight (n 24 above) 570.

¹⁰⁸ From the inventory it appears that the public forests that remained in the districts of the Cape and Stellenbosch and Drakenstein were included in the immovable property transferred to the British government.

¹⁰⁹ Sleight (n 24 above) 561.

The outpost in the Land van Waveren was established between 1700 and 1705¹¹⁰ and was maintained as a military post and as a post where livestock was kept. Consequently, the grazing in the Waveren Valley was also utilised for the livestock of the Company. The outpost remained in existence until 1743.¹¹¹ With the increase of the population in the Waveren Valley and the granting of land to non-indigenous settlers, it became necessary for the colonial government to demarcate three areas in the Valley that were reserved as pasture for the Company's livestock kept at the outpost.¹¹² From this arrangement it appears that while the outpost was operational in the Waveren Valley, the colonial government deemed it necessary to exercise control over the grazing in the Valley. The grazing was therefore pasture that must be regarded as public land.¹¹³

The first outposts established east of the Hottentots Holland Mountains that had the keeping of the Company's livestock as part of their duties, were the three established at or near the Riviersonderend River. Sleigh does not indicate whether the post holders exercised any control over the public land used as pasture by the Company and non-indigenous settlers. In 1792 the Moravian missionary institution at Baviaanskloof near the Riviersonderend outposts was re-established and soon caused a large influx of indigenous persons who established encampments in the area. The reason why encampments were established near the mission station was that indigenous persons were not necessarily immediately accepted as members of the mission station.¹¹⁴ It appears that in these circumstances the colonial government deemed it necessary to impose measures to safeguard the position of the Company at the outposts and that of the missionaries and indigenous people already living at the mission station against the influx of newcomers. The governor therefore ordered the post holder to ensure that the new arrivals did not squat on the

¹¹⁰ During this period the outpost was not yet established at a fixed location and was one of three outposts that were used mainly for military purposes. It was only in 1705 that one permanent outpost with a permanent post holder was established. Sleigh (n 24 above) 527, 529.

¹¹¹ Sleigh (n 24 above) 530.

¹¹² Sleigh (n 24 above) 531, 533.

¹¹³ The outpost was closed before 1795. Therefore this public land had lost its character as such and could not be transferred to the British government as public land.

¹¹⁴ I could find no evidence that independent groups or sub-groups moved from other regions and established encampments near Baviaanskloof.

land that was used as pasture by the non-indigenous settlers and the Company.¹¹⁵ The role of the post holder at the Riviersonderend outposts with regard to the conservation of the forest in its vicinity was clearly defined. From 1777 they were supposed to ensure that the non-indigenous settlers did not have further use of the forests and the colonial government also ceased to use wood obtained from the forests.¹¹⁶ The conservationist role played by the post holder of the Riviersonderend outposts explains why the entry in the inventory referring to Zoetemelks Valley, which was one of the Riviersonderend outposts, included the woods.¹¹⁷

In 1734, when the outpost Rietvalleij aan de Buffeljagtsrivier was established on a permanent basis, it was the most easterly outpost of the Company.¹¹⁸ The outpost was used as alternative grazing in winter for the Company's livestock that was usually kept at the Land van Waveren outpost. Its main purpose was therefore to serve as an outpost where livestock was kept.¹¹⁹ Apparently a non-indigenous settler occupied the land at the Buffeljagts River, which the colonial government wished to use as grazing. The settler, Jacobus Botha, was consequently asked to vacate his loan place to enable the colonial government to use the land as grazing for its own livestock.¹²⁰ From this action of the colonial government it appears that the land occupied by Botha was not used for residential or agricultural purposes.¹²¹ It can therefore be assumed that the area at the Buffeljagts River was not used for agricultural purposes. The colonial government therefore did not have to control the available land used as grazing. The outpost was also near Grootvadersbos, which was an important source of wood for the colonial government.¹²² It is interesting to note that when the outpost was sold to a private person in 1791 the non-indigenous

¹¹⁵ Sleigh (n 24 above) 566-567. Baviaanskloof became known as Genadendal. These outposts were still in existence in 1795. Sleigh (as above) 751. The grazing used by the livestock of the Company and the non-indigenous settlers was controlled by the colonial government and was therefore pasture that must be regarded as public land that was transferred to the British government.

¹¹⁶ Sleigh (n 24 above) 561-562.

¹¹⁷ Theal (n 12 above) 145.

¹¹⁸ Sleigh (n 24 above) 574.

¹¹⁹ Sleigh (n 24 above) 574-575.

¹²⁰ Sleigh (n 24 above) 574.

¹²¹ I could find no evidence that Botha was compensated for the loss of his loan place. It is possible that it was merely used as grazing by Botha, as it was the colonial government's practice when taking back loan places that had homesteads or cultivated land on them to compensate the non-indigenous settler. CG Botha 'Early Cape land tenure' (1919) 36 *South African Law Journal* 158, Theal (n 103 above) 106.

¹²² Sleigh (n 24 above) 579-580.

settlers living in the vicinity of Grootvadersbos assumed that the Company had relinquished control of the forest. To counteract this impression, the colonial government appointed the previous post holder to remain as guardian of the said forest.¹²³ From the assumption made by the non-indigenous settlers it would appear that they only acknowledged the control of the colonial government over scarce resources, when the government was in fact able to physically control the resource concerned.¹²⁴

Due to the poor control and conservation measures applied to the forests at the Riviersonderend and Rietvalleij outposts, these forests were of no use to the colonial government in the last quarter of the eighteenth century. The main purpose of the outpost established at the Swarte River in 1777 was therefore to ensure an adequate supply of wood for the Company from the Outeniqua forests. The livestock that was kept at the outpost was used principally as working cattle engaged in the difficult work of removing felled trees from the forest and for transport of the wood by wagon to Cape Town.¹²⁵ When the colonial government decided that the transport of the wood by wagon was too costly, it moved the wood supply operation to the vicinity of Plettenberg Bay from where the wood could be transported to Cape Town by ship. The outpost was not closed, but the personnel were reduced and their main task was to regulate the use of the Outeniqua forests by the non-indigenous settlers. Although this post was still in existence in 1795, it is not mentioned in the inventory that the outpost was transferred to the British government. This must have been an administrative oversight as the successive British colonial governments and the Batavian colonial government continued to safeguard the forests as public land.¹²⁶

The main purpose of the outpost established at Plettenberg Bay was to supply wood to Cape Town by sea. Sleigh gives a detailed description of the measures that were to be implemented by the post holder to ensure that the colonial government

¹²³ Sleigh (n 24 above) 583.

¹²⁴ Sleigh's remarks regarding the wasteful manner in which the non-indigenous settlers exploited the Outeniqua forest before the establishment of an outpost nearby serves as further evidence of the attitude of the non-indigenous settlers. The settlers did not utilise the forests in a scientific manner and therefore failed to provide for the future requirements of the Cape Colony. One example of their methods mentioned by Sleigh is that they felled trees in a manner that damaged the other trees. Sleigh (n 24 above) 590.

¹²⁵ Sleigh (n 24 above) 591-592.

¹²⁶ Sleigh (n 24 above) 595-596.

would be provided with an adequate supply of wood.¹²⁷ The plan was to provide plots of land near the outpost, where non-indigenous settlers who wanted to provide wood to the Company could settle. The non-indigenous settlers living on these plots would have access to communal pasture for their working cattle. The colonial government reduced two of the non-indigenous settlers' loan places to 60 morgen to provide space for the outpost. The post holder had to play an active role in conserving the forest that was used by the non-indigenous settlers. This entailed that he had to inspect their work places in the forest and ensure that the resource was not prematurely exhausted by injudicious tree felling.¹²⁸ Plettenberg Bay outpost and its forests were also included in the inventory.¹²⁹

3.3.4.4 Public property transferred to the British government

The discussion in sections 3.3.4.2 and 3.3.4.3 identified the public land that belonged to the Company in terms of the domestic law of the Cape Colony. It is clear that the Company did not own all the land in the Cape Colony outside the land given to non-indigenous settlers in terms of ownership transactions. The inventory offers a good illustration of the pattern of public property owned by the Company. The bulk of the public buildings and public land listed in the inventory is situated in Cape Town and the Cape district. In contrast, there are only seven public properties listed for the vast interior districts of Stellenbosch and Drakenstein, Swellendam and Graaff-Reinet.¹³⁰

Similarly, the land used as pasture on a communal basis which is classified as public land, was mainly situated in the Cape district and the parts of Stellenbosch and Drakenstein where agriculture was the main activity. I am of the opinion that the public land that was administered by the Company for its own benefit and for the

¹²⁷ Sleight (n 24 above) 622-623,

¹²⁸ As above.

¹²⁹ Theal (n 12 above) 146. The purpose of this paragraph is well illustrated by the case of the Plettenberg Bay outpost. The inventory provided for the transfer of the buildings and the protected forests at Plettenberg Bay. The buildings at the outpost were the private law property of the Company and became the private law property of the British government. The forests at Plettenberg Bay were public land that became the property of the British government, who had to utilise it for the benefit of the colony. The pasture used by the non-indigenous settlers, who had loan places and worked in the forests, and used by the Company for their working cattle, was also public land that was transferred to the British government. This is notwithstanding the fact that such land was not mentioned in the inventory.

¹³⁰ Theal (n 12 above) 141-146.

benefit of the non-indigenous settlers constituted public property. In terms of the international law rules of state succession, it was the property of the Company and was transferred to the British government. However, from the discussion in section 3.3.4.3, it is also clear that the majority of the land in the interior of the Cape Colony was not controlled by the colonial government. This land was either used by the non-indigenous settlers as loan places on an individual basis, or it was land and forests that were not controlled by the colonial government. Land used as grazing by individuals on different loan places could not be classified as land controlled by the colonial government for its own benefit or for the benefit of the non-indigenous settlers. Consequently, there is no Roman law or Roman-Dutch law principle in terms of which the land used as loan places by the non-indigenous settlers can be public property. In terms of the international law principles of state succession the Company could not transfer this land as public property to the British government.¹³¹

3.4 The international law implications of the Batavian period and the second British occupation

Article III of the Treaty of Amiens, signed on 27 March 1802 and concluded between the British sovereign and the French Republic and her allies, the Spanish sovereign and the Batavian Republic, dealt with the restoration of the colonies conquered by the British forces to France, Spain and the Batavian Republic, except for the islands of Trinidad and Ceylon. Article VI of the Treaty dealt specifically with the Cape of Good Hope and provided that it 'remains in full Sovereignty to the Batavian Republic, as it was before the War'.¹³² In his communication of 6 February 1803 to General Francis Dundas and Admiral Curtis, the Commissioner-General JA de Mist protested against the delay in the transfer of the Cape Colony to the Batavian government. He relied on Article VI, read with Article XII, to contend that from the expiry of the three-month period provided for in Article XII, British authority to govern the Cape Colony had ceased and the suspended sovereignty of the Batavian

¹³¹ The transfer of public property discussed in this paragraph differs fundamentally from the transfer of immovable property that took place in 1763 when the French king ceded all his rights in Canada to the British Crown. In that case the French king was the owner of all the ungranted land in the French colony and when the British crown succeeded the French king the Crown became the allodial owner of all ungranted land. J McEvoy 'On shore natural resource ownership: Atlantic Canada perspective' (1986) 10 *The Dalhousie Law Journal* 105.

¹³² GW Eybers *Select constitutional documents illustrating South African history 1795-1910* (1918) 12.

Republic over the Cape Colony was revived. Consequently, the Cape Colony was already Batavian territory when he arrived on 24 December 1802 and it was not necessary to cede any powers back to the Batavian government.¹³³

As far as the sovereignty of the British colonial government is concerned this was a patently incorrect interpretation given to Article VI of the Treaty of Amiens. I am of the opinion that the drafters of Article VI of the Treaty could not have had a suspended sovereignty in mind when it used the phrase 'remains in full Sovereignty'. The phrase can only mean that the Cape of Good Hope would be returned to the Batavian Republic without the British government retaining any of the powers that it exercised in the Cape Colony in the period from 1795 to 1802.¹³⁴

3.4.1 The transfer of the immovable and public property in the Cape Colony to the Batavian government in terms of international law rules

The formal transfer of the Cape Colony to the Batavian government, in confirmation of Article VI of the Treaty of Amiens, was done by a proclamation issued by General Francis Dundas on 20 February 1803, which did not contain any reference to the territory of the Cape Colony or the transfer of immovable property to the Batavian government.¹³⁵ It must therefore be accepted that the immovable property as

¹³³ Theal (n 99 above) 497, JP van der Merwe *Die Kaap onder die Bataafse Republiek 1803-1806* (1926) 28-29.

¹³⁴ Theal (n 12 above) 28, 29. The modern concept of suspended sovereignty is not compatible with De Mist's contention. According to Yannis, the concept of suspended sovereignty in the context of the Mandated Territories meant that in such territories sovereignty was in abeyance until such time as the territory could become a sovereign nation on its own. Suspended sovereignty therefore in effect means absence of sovereignty. A Yannis 'The concept of suspended sovereignty in international law and its implications in international politics' (2002) 13 *European Journal of International Law* 1039, 1044, 1052. See also my remarks in note 93. There is no doubt that the British government exercised sovereignty in the Cape Colony. In this regard it is only necessary to refer to the powers that the British government assigned to itself as sovereign in the proclamation published on 7 October 1795. Theal (n 12 above) 179-182. The Cape Colony was not ceded 'back' to the Batavian Republic in terms of the Treaty of Amiens as it was never ceded to Great Britain. De Mist was correct that the Cape Colony was never formally alienated. It must be borne in mind that prior to the Wars of the French Revolution and the Napoleonic Wars, the international law rules regarding the military occupation of territory were not yet fully formulated. This meant that the distinction between temporary military occupation and acquisition of territory by conquest was not yet clearly established. Oppenheim (n 93 above) 205-206. It is accepted that it is for this reason the British government installed a civilian government at the Cape without peace having been concluded and without formal cession of the territory of the Cape Colony to the British government. The establishment of a civilian government signified that the British government regarded the Cape Colony as its territory by conquest. The public property that was transferred to the British forces in terms of the Articles of Capitulation automatically became the public property of the British civilian colonial government as sovereign.

¹³⁵ GM Theal *Records of the Cape Colony from February 1803 to July 1806* (1899) 156.

transferred to the British government in 1795 as well as the public property as contemplated in section 3.3.4.4, was transferred to the Batavian government. This assumption is based on the fact that the domestic legal system was preserved during the first British occupation and the Roman and Roman-Dutch law rules relating to public property were therefore still applicable when the retransfer of the Cape Colony took place.¹³⁶

The only important change that took place with regard to the territory that was transferred by the British government to the Batavian government, was that a northern boundary had been proclaimed for the Cape Colony in 1798. The declared purpose of the boundary was to prohibit the non-indigenous settlers from settling beyond the boundary or letting their livestock use the grazing beyond the boundary.¹³⁷ In 1805 the Batavian colonial government by proclamation altered the northern boundary to include the loan places of non-indigenous settlers beyond the previous northern boundary and to eliminate certain mistakes made in the proclamation of 1798.¹³⁸ The proclamation of a northern boundary for the Cape Colony changed the international law position from what it had been in 1795. Whereas it was not possible to precisely determine the extent of the territory over which the Company exercised effective control in 1795, it was possible to do so in 1803. Therefore, while in 1795 the colonial government could only transfer sovereignty (or control) over the non-indigenous settlers and not territorial sovereignty, the British government in 1803 and the Batavian government in 1806 could do so.

The question is, whether in view of this change the Batavian government, in terms of international law rules, obtained rights similar to private law ownership in all the land not held in terms of ownership transactions in the Cape Colony in 1803. It must be borne in mind that in the seventeenth and eighteenth century there were still some vestiges of the feudal system remaining in the international law theories

¹³⁶ The fact that English common law did not replace the domestic law of the Cape Colony during the first British occupation means that the English common law doctrine of tenures as it applied to public land, did not play any role when the Cape Colony was returned to the Batavian government. See Chapter 7 with regard to the introduction of the doctrine of tenures in the Cape Colony.

¹³⁷ GM Theal *History of South Africa from 1795 to 1872 Vol I* (1915) 39.

¹³⁸ Theal (n 137 above) 180.

regarding the rights of governments to the land within their territory. Consequently, the feudal principle that ownership of all the land in a territory vested in the sovereign of that territory was equated with territorial sovereignty exercised in terms of international law rules.¹³⁹ However, Westlake did not subscribe to this theory and describes territorial sovereignty as follows:¹⁴⁰

The other right enjoyed over the soil is that which the state has over the territory at large, as well those parts of it which are in private ownership as those which belong to itself as owner. This is a right existing for the purposes of government, and comprises the right to act within the limits of the territory upon or against all persons found there, and to dispose of the property in all parts of the territory, whether with or without compensation to private owners, as in the judgment of the state the purposes of government may require. Being a right of supreme government, it is usually and properly described as the sovereignty over the territory...

Accordingly, Westlake contrasts private ownership of land with the territorial sovereignty that a government may exercise. Territorial sovereignty entitles a government to exercise the powers of government within a defined territory and to deal with the land as required to exercise those powers. In other words, if a government should flood the private property of its subjects to ensure the safety of the country against invasion by an enemy, it may do so with or without compensating the owner of the property. This right flows from the supreme power of the government and does not imply that the government is the ultimate owner of the land. Oppenheim also contrasts the territorial property of a government with private property and remarks as follows:¹⁴¹

State territory is also named territorial property of a State. Yet it must be borne in mind that territorial property is a term of Public Law and must not be confounded with private property. The territory of a State is not the property of the monarch, or of the Government, or even of the people of a State; it is the country which is subjected to the territorial supremacy or the *imperium* of a State.

In view of these remarks of Westlake and Oppenheim, the question whether the British government could have transferred rights similar to private law ownership in all the land not held in terms of ownership transactions in the Cape Colony to the Batavian government, must be answered in the negative.

¹³⁹ L Oppenheim (ed) *The collected papers of John Westlake on public international law* (1914) 10-11.

¹⁴⁰ J Westlake *International law: Part I Peace* (1910) 86-87.

¹⁴¹ Oppenheim (n 3 above) 229.

3.4.2 The transfer in 1806 of immovable and public property to the British government in terms of international law rules

The Articles of Capitulation signed by the representatives of the Batavian government and the commanders of the British forces on 10 January and 18 January 1806, made provision for the territory and public property that were to be transferred to the British government. Article 1 of the Articles of Capitulation signed on 10 January 1806 provided for the surrender of Cape Town, the Castle and the fortifications in and around Cape Town. Article 7 required that all movable and immovable public property in Cape Town and environs had to be inventoried and delivered to the British government. Article 10 related to the immovable property of the Batavian government that served as security for the paper money in circulation and was similar to the arrangement made in Article 8 of the Articles of Capitulation signed in 1795.¹⁴²

The Cape Colony was only transferred to the British forces when General Janssens had surrendered and signed the Articles of Capitulation on 18 January 1806. Article 1 of these Articles of Capitulation also provided for the surrender of all the rights and privileges of the Batavian government to the British government.¹⁴³ When Articles 1 and 7 of the Articles of Capitulation signed on 10 January are considered, together with Article 1 of the Articles of Capitulation signed on 18 January, it is clear that all the public property of the Batavian government was transferred to the British government. I am of the opinion that—

- (a) the public buildings; and
- (b) public land used for public purposes; and
- (c) the public land that was administered by the Batavian colonial government for its own benefit and for the benefit of the non-indigenous settlers,

were also transferred to the British government in terms of Article 1 of the Articles of Capitulation of 18 January 1806.

¹⁴² Theal (n 135 above) 263-265. With regard to the arrangements in connection with the paper money see note 99 above.

¹⁴³ Theal (n 135 above) 299.

3.5 Conclusion

The British colonial government assumed that it was the owner of all land not held in freehold in the Cape Colony.¹⁴⁴ This assumption is considered from an international law perspective in this chapter. Two principles of international law are important for the purposes of this chapter, namely the principle that a sovereign cannot transfer more rights to its successor than it has itself and the principle that the rights of a sovereign are determined in terms of the domestic law of the territory that is being ceded.

The Company was the private law owner of all the real estate¹⁴⁵ mentioned in the inventory of 1795. The British colonial government transferred this real estate to the Batavian government in 1803. With the conquest of the Cape Colony in 1806 the Batavian government transferred this real estate to the British government in terms of article 1 of the Articles of Capitulation signed on 10 January and on 18 January and article 7 of the Articles of Capitulation signed on 10 January.

The public streets and roads and harbour works and any other comparable immovable thing in the Cape Colony were transferred to the British government in 1795 in terms of the international law rules relating to state succession. These things form part of what I refer to in this chapter as public property. The British colonial government became the owner thereof, but its ownership cannot be equated to private law ownership as it was limited by the right of the non-indigenous settlers to have access thereto and to use these things and by the fact that they could not be alienated.¹⁴⁶ This type of public property was transferred to the Batavian government in 1803 and transferred to the British government in 1806 in terms of article 7 of the Articles of Capitulation signed on 10 January and Article 1 of the Articles of Capitulation signed on 18 January.

¹⁴⁴ The grounds on which this assumption is based are discussed in section 6.6 of Chapter 6.

¹⁴⁵ I use the phrase 'real estate' in this paragraph for the military and administrative buildings of the Company and the agricultural land and buildings at the outposts that became the private law property of the Company by occupation. See my remarks regarding the acquisition of private law property by occupation in section 5.4.3 of Chapter 5.

¹⁴⁶ PJ Badenhorst et al *Silberberg and Schoeman's The law of property* (2006) 26-28. Public things like roads are out of commerce, which means that they do not form part of the things that can be bought and sold in private law transactions.

The pasture in the more densely populated areas of the Cape and Stellenbosch and Drakenstein districts, used by the livestock of the non-indigenous settlers and the colonial government, was a public thing in the Cape Colony.¹⁴⁷ In all locations outside the abovementioned area (i.e. the sparsely populated part of the district of Stellenbosch and Drakenstein, and the districts of Swellendam and Graaff-Reinet), where pasture was used by the livestock of the Company and the non-indigenous settlers and was subject to the control of the colonial government, such pasture was also a public thing.¹⁴⁸ Wood was a scarce resource everywhere in the Cape Colony and had to be conserved for the public benefit. The forests where the colonial government established outposts to control the access to the forests and the use of the wood are therefore also regarded as a public thing. In this chapter I refer to the pasture and forests controlled by the colonial government as public land. Public land formed part of the public property that was owned by the Company as a public thing and was transferred to the successive colonial governments between 1795 and 1806.

The land described in the two previous paragraphs was the only land that was owned by the Company in the Cape Colony and is the only land that the Company could legally transfer to the British government in 1795 in terms of the international law rules of state succession. Included in this category is the public land that was leased to non-indigenous settlers but remained the property of the Company.¹⁴⁹ The land that was held in terms of ownership transactions by non-indigenous settlers was not transferred to the British government and this fact has never been contested. Included in this category was land leased in terms of the *erfpacht* system after 1732. The rights the non-indigenous settlers obtained in this type of leased land were akin to rights in land obtained in terms of ownership transactions.¹⁵⁰

¹⁴⁷ My contentions with regard to this classification of pasture are set out in sections 8.5.1.2.1 and 8.5.1.2.2 of Chapter 8.

¹⁴⁸ Such locations would be at outposts where the colonial government kept the Company's livestock and at military outposts and outposts for supplying wood where the colonial government kept working cattle.

¹⁴⁹ The ownership of the land that was leased to non-indigenous settlers is discussed in section 10.3.1 of Chapter 10.

¹⁵⁰ The rights in land obtained in terms of the *erfpacht* system are discussed in section 10.3.2 of Chapter 10.

The remaining types of land in the Cape Colony were the land that was loaned to non-indigenous settlers as grazing and land that was not suitable for use as grazing or for agricultural purposes like very mountainous areas, virgin forests and deserts. In 1795 the Company could not transfer any sort of right in connection with these types of land to the British colonial government. It could only transfer the right to exercise sovereignty over the non-indigenous settlers who occupied the loaned land. After the establishment of the northern boundary of the Cape Colony, the British government and the Batavian government could, in terms of international law rules, transfer territorial sovereignty to their respective successors. This territorial sovereignty did not include any private law ownership rights in the land.

The respective rights of the Company and the non-indigenous settlers in the loaned land are discussed in Chapter 10. The land that was not suitable for agricultural purposes or for use as pasture remained unowned things (*res nullius*) until such time as it was sufficiently demarcated for it to be acquired by occupation.¹⁵¹

In summary, this chapter illustrates that there are no international law rules on which the British government could have relied when developing its new land tenure policy, to justify the assumption that it was the owner of all land not held in terms of ownership transactions in the Cape Colony.

¹⁵¹ JC Sonnekus 'Grondeise en die klassifikasie van grond as *res nullius* of as staatsgrond ' (2001) *Tydskrif vir die Suid-Afrikaanse Reg* 84-85.

4 Uniqueness of the domestic law of the Cape Colony relating to the occupation of land

4.1 Introduction

From the history of the occupation of land discussed in Chapter 2 it is clear that environmental conditions in the Cape Colony played an important role in determining the extent of the territory of the colony. The human factor also played a role in shaping how land was occupied. The officers of the Company serving at the Cape were as a rule not qualified lawyers, and did not consider the occupation and use of land from a legal point of view, but rather from a practical point of view. Another human factor that played a role in how land was occupied by the Company and non-indigenous settlers in the Cape Colony was that the indigenous communities in the study area did not practise agriculture.¹

The unique manner in which land was occupied by non-indigenous settlers in the study area can only be appreciated if the acquisition of territory in the Cape Colony is compared with the acquisition of territory in other Dutch colonies² established by the Company and other Dutch role players.³ From the discussion in this chapter it will become apparent that territory was generally acquired in the Dutch colonies by conquest, purchase of land from indigenous communities and occupation of land. These methods of acquisition of land played an important role in determining whether and to what extent the Company and other Dutch role players had private law rights in land in the Dutch colonies, and the implications thereof.

Part of the purpose of this chapter is to contrast the acquisition of land by the Company at the Cape with the acquisition of land in other Dutch colonies. To this end the manner in which the indigenous communities in those colonies occupied

¹ See section 2.4.1.1 of Chapter 2.

² The use of the phrase 'Dutch colonies' in the context of this chapter is not very precise because, during the seventeenth and eighteenth centuries, the States-General of the United Provinces did not act directly as a coloniser of overseas territories. Commercial companies like the Company and the Dutch West India Company ('WIC') and a variety of others acted as agents of the States-General. Each had its own colonies and trading posts that did not form a united Dutch colonial empire. However, I use this phrase to avoid having to use cumbersome expressions like 'colonial possessions of the Company'.

³ The WIC was a major trading company that established Dutch colonies in the Atlantic Ocean area. However, it was not the only role player in establishing Dutch colonies as there were private enterprises and conglomerates which also established colonies. I refer to the WIC and these companies collectively as 'other Dutch role players'.

land is also considered in order to compare it with the manner in which indigenous communities in the study area occupied land.

In the final part of this chapter I compare the private law rights in land that the Company and other Dutch role players obtained in the other Dutch colonies with the private law rights in land that the Company obtained at the Cape and in the interior of the Cape Colony. From this comparison it becomes clear that in the Cape Colony not only environmental and human factors played a role in making the domestic land law system unique. The fact that the Company acquired its territory at the Cape by occupation imposed legal barriers on its private law rights in land, which did not exist in other Dutch colonies.

4.2 Extra-legal factors contributing to the development of the domestic law of the Cape Colony relating to the occupation of land

In this section I consider whether the environmental circumstances that prevailed in the Cape Colony prevented the colonial government from basing the manner in which land was occupied on the manner in which this was done in other settled Dutch colonies. I also give a brief overview of the human factors that contributed to the development of the unique features of the occupation of land in the interior of the Cape Colony.

4.2.1 Environmental factors

Historians and economists agree that wheat was the most important food crop produced in the districts of the Cape and Stellenbosch and Drakenstein, while in the interior of the Cape Colony meat production from cattle and sheep was the most important food production activity.⁴ They also agree that this phenomenon was caused by the different environmental circumstances prevailing in the two regions.⁵

⁴ L Guelke 'Blanke boere en grensbewoners 1652-1780' in Giliomee, H & Elphick, R (eds) *'n Samelewing in wording: Suid Afrika 1652-1840* (1990) 67; J Fourie 'The Quantitative Cape: Notes from a new historiography of the Dutch Cape Colony' Economic Research Southern Africa working paper (2013) 17. Viticulture was also a major agricultural activity in the districts of the Cape and Stellenbosch and Drakenstein, but did not produce a food crop.

⁵ Fourie (n 4 above) 17.

Due to the environmental circumstances and climatic conditions in the interior of the Cape Colony, the non-indigenous settlers adopted a lifestyle that can be characterised as semi-nomadic.⁶ Mobility is the central feature of nomadic or semi-nomadic pastoral activity. In the case of the non-indigenous settlers who moved into the northern frontier zone,⁷ the movement of people and livestock between different areas depended on the seasonal availability of grazing and water.⁸ The movement of non-indigenous settlers in the interior of the Cape Colony is regarded as semi-nomadic, because, in addition to their pastoral activity, they also cultivated wheat and vegetables for subsistence purposes.⁹

Gilbert remarks that the lifestyle adopted by non-indigenous settlers and indigenous communities played a decisive role in the development of particular land tenure systems in colonies.¹⁰ Colonial powers that acquired the territory of nomadic indigenous communities often disregarded their rights in land, because they did not practise agriculture.¹¹ This attitude of the colonial powers had the effect that land was allocated to non-indigenous settlers without taking the rights of nomadic indigenous communities into account.

With the exception of New Netherland in North America, the settled Dutch colonies were situated in the tropics, which had a different climate and rainfall pattern to that of the Cape Colony.¹² This means that in the other settled Dutch

⁶ N Penn *The forgotten frontier: Colonist and Khoisan on the Cape's northern frontier in the 18th century* (2005) 16; J Joubert & JA Groenewald 'Land tenure systems in white South African agriculture I: Historical review' (1974) 13 *Agrekon: Agricultural Economics Research, Policy and Practice in Southern Africa* 42.

⁷ See note 82 of Chapter 3 for a description of the concept of a frontier zone and section 3.3.3.2.3 of Chapter 3 for a description of the northern frontier zone.

⁸ Penn (n 6 above) 17.

⁹ The difference between nomadic and semi-nomadic movement is to a large extent determined by the level and intensity of the cultivation done by the community concerned. The nomadic communities either do not cultivate land at all or only occasionally, while cultivation of land for subsistence purposes forms a permanent part of semi-nomadic communities' lifestyle. ER Arnold & HJ Greenfield *The origins of transhumant pastoralism in temperate south eastern Europe: A zooarchaeological perspective from the Central Balkans* (2006) 7-8. The non-indigenous settlers who were livestock farmers in the interior of the Cape Colony cultivated land for subsistence purposes, as is evident from the discussion of the resolution of 17 April 1714 in section 9.3.1.3 of Chapter 9.

¹⁰ J Gilbert 'Nomadic territories: A human rights approach to nomadic peoples' land rights' (2007) 7 *Human Rights Law Review* 685.

¹¹ See the discussion of the 'agricultural argument' in section 2.4.1.1 of Chapter 2.

¹² The settled Dutch colonies in the tropics were Batavia, Ceylon, Banda and Makassar in the East Indies (see note 21), and the Caribbean islands and the settlements in Guiana in South America (see section 4.3.2) in the Atlantic Ocean area. With regard to the effect of, amongst other things, the

colonies, the semi-arid conditions that prevented large-scale cultivation of cereals in the interior of the Cape Colony did not prevail. This also means that it was not necessary to adopt a semi-nomadic lifestyle in these colonies.¹³

4.2.2 Human factors

Robertson remarks that the legal position regarding land tenure at the Cape was uncertain.¹⁴ The colonial government officials were not trained in law and were therefore unable to apply legal principles relating to land law that were current in the Netherlands at the time. An extra complication was that the circumstances relating to the nature of the land and its fertility, as well as water resources at the Cape, differed greatly from those prevailing in the Netherlands.¹⁵ Milton endorses the view expressed by Robertson by confirming that the land tenure systems at the Cape developed due to the unique circumstances prevailing there.¹⁶

However, Robertson and Milton did not take into account that the colonial officials at the Cape, especially the commanders, also served in various other parts of the Dutch colonial empire where they became acquainted with the land law systems established by the Company and other Dutch role players. The circumstances relating to the occupation of land that prevailed in these other colonies also differed from the circumstances in the Netherlands.¹⁷ It is not inconceivable that these colonial officials accepted that the Company had private law

different climates of the settled colonies in the tropics and in the Cape Colony see HJ Wiarda *The Dutch diaspora Growing up Dutch in new worlds and the old The Netherlands and its settlements in Africa, Asia and the Americas* (2007) 2-3. With regard to the difference in rainfall between the settled colonies in the tropics and the Cape Colony, see M Jefferson 'A new map of world rainfall' (1926) 16 *Geographical Review* 286-287.

¹³ For the evidence, see the discussion of the manner in which land was occupied in other Dutch colonies in section 4.3.

¹⁴ HM Robertson 'Some doubts concerning early land tenure at the Cape' (1935) 3 *South African Journal of Economics* 172.

¹⁵ Robertson (n 14 above) 172.

¹⁶ JRL Milton 'Ownership' in R Zimmermann & D Visser (eds) *Southern Cross: Civil law and common law in South Africa* (1996) 664 footnote 53. The 'unique circumstances' that Milton refers to, in addition to the fact that the colonial officers did not have legal training, are that the administrative control exercised by the colonial government in the interior of the Cape was very weak and followed the expansion initiated by the non-indigenous settlers.

¹⁷ GM Theal *History of South Africa under the administration of the Dutch East Company [1652-1795] Vol I* (1897) 6, 130, 160, 193; CR Boxer 'Review: De gezaghebbers der Oost-Indische Compagnie op hare buiten-comptoiren in Azie. by W. Wijnaendts van Resandt' (1951) 10 *The Far Eastern Quarterly* 218; RA Laing & J Goris 'Serendipity - 'Governor' Joan Bax, and the Herentals connection' (2002) 47 *Historia* 210.

ownership rights in the land at the Cape, as was the case in some of the other Dutch colonies.

4.3 The acquisition of territory in other Dutch colonies

It is necessary to determine whether the manner in which territories were acquired by the Company and the Dutch role players in the East Indies¹⁸ and the Atlantic Ocean area¹⁹ was similar to the manner in which territory was acquired at the Cape and in the interior of the Cape Colony. In this section, I consider the type of ownership the Company and other stakeholders obtained in the territories that developed into settled colonies.²⁰

4.3.1 Acquisition of territory by the Company on Java and Ceylon

The settled colonies that I discuss are the two major settled colonies of the Company in the East Indies, namely Batavia on Java and the coastal areas of Ceylon.²¹ The

¹⁸ 'East Indies' is the collective term that I use for the colonial territories of the Company in southern Asia and the Indian Ocean archipelagos, which comprise modern Indonesia and Malaysia, and also on the Indian sub-continent and Ceylon.

¹⁹ This is the area where various colonies were established by Dutch trading companies other than the Company. These colonies are collectively referred to as the 'Atlantic Ocean area'.

²⁰ The comparison of types of ownership in this chapter is limited to Dutch colonies because the predecessors of the Dutch in colonial enterprises were Spain and Portugal. Since they were enemies of the United Provinces and moreover followed the Roman-Catholic creed, which was unacceptable to the Dutch, it can be accepted that the Spanish and Portuguese land tenure systems would not have been employed by the Dutch. AJA Quintus Bosz's contention that the land tenure system in Suriname was inherited from the Spanish cannot be accepted. He neither provides motivation for this theory, nor does he refer to any other writers that concur in this view. It is also notable that respected legal writers like De Blécourt, in his article published in 1923, where he deals with exactly the same subject as Quintus Bosz, makes no mention of Spanish antecedents of the said land tenure system. AJA Quintus Bosz 'Het recht van allodiale eigendom en erfelijk bezit in Suriname' (1954) 1 *Vox Guyanae* 80-81; AS de Blécourt 'Allodiaal eigendom en erfelijk bezit in Suriname' (1923) 4 *Nieuwe West-Indische Gids/New West Indian Guide* 129-158. (In the coastal areas of Ceylon, certain features of the Portuguese land tenure system were retained. However, this does not mean that the Company followed Portuguese land law precedents when establishing its own settled colonies. See my discussion of the land tenure system in section 4.3.1.3). The other colonial powers, Great Britain and France, were just starting to establish settled colonies during this period and it is therefore unlikely that they would have served as role models for the Dutch companies and other role players.

²¹ L Mbeki & M van Rossum 'Private slave trade in the Dutch Indian Ocean world: A study into the networks and backgrounds of the slavers and the enslaved in South Asia and South Africa' (2017) *Slavery & Abolition* 98, 99. Batavia and Ceylon were not the only settled colonies of the Company in the East Indies. In the Banda Islands, the Company conquered the islands with excessive force and dispersed the indigenous communities, which meant that the Company had to obtain settlers and slaves to tend to the agriculture on the islands. <http://voc-kenniscentrum.nl/gewest-banda.html> (accessed 19 January 2017). On the South Celebes island the local ruler transferred the fortress Ujungpandang to the Company, which enabled it to build the city Makassar on the site. The Company also conquered the areas to the north and south of the settlement. <http://voc-kenniscentrum.nl/gewest-makassar.html> (accessed 19 January 2017). The methods by which these territories were acquired coincide to a large extent with the methods by which Batavia and Ceylon were acquired. It is therefore not necessary to discuss Banda and Makassar in detail. For a list of the

indigenous ruler of the area where Batavia was established, was defeated by the Company and his subjects were dispersed. In the case of Ceylon the Company conquered territories that had already been colonised by Portugal. The divergent circumstances under which the Company came to occupy territories in the East Indies had a major influence on the manner in which the land tenure systems developed in these colonies.

4.3.1.1 The acquisition of territory on Java

A Company fleet under the leadership of JP Coen attacked and destroyed the settlement of Jakatra on the island of Java on 30 May 1619.²² The small town was burned and its inhabitants were forced to flee. As far as the Company was concerned, the former residents of Jakatra had dispersed to the neighbouring sultanates. The Company regarded the land around the fortress it had previously established at Jakatra as conquered territory that did not belong to any individuals or communities.²³ The headquarters of the Company in the Dutch East Indies was transferred to the fortress at Jakatra and the settlement that developed around the fortress was named Batavia in 1621. The Company contended that by conquering Jakatra they acquired sovereignty over the territory from the north coast of Java, where Batavia was built, to the south coast between the indigenous sultanates of Bantam in the west and Tjeribon in the east.²⁴

Although the Company claimed sovereignty over a large area, it did not in the first year of the settlement aspire to develop the land adjacent to the town of Batavia.²⁵ This meant that the settlement depended on importation from the

territories of the Company see <http://voc-kenniscentrum.nl/gewesten.html> (accessed 19 January 2017).

²² JJ Meinsma *Geschiedenis van de Nederlandsche Oost-Indische bezittingen* (1872) 52. Although the name of the settlement is usually spelled Jakarta, Meinsma refers to the settlement as Jakatra. For this reason and to make a clear distinction between the settlement that was conquered by Coen and the modern city Jakarta, I use Meinsma's spelling in this chapter.

²³ B Kanumoyoso 'Beyond the city wall: Society and economic development in the ommelanden of Batavia, 1684-1740' unpublished Doctoral dissertation, Universiteit Leiden, 2011 47; O van Rees *Geschiedenis der koloniale politiek van de Republiek der Vereenigde Nederlanden* (1868) 254. The ruler of Jakatra had, prior to 1619, granted a concession to the Company to establish a trading post near this settlement. Meinsma (n 22 above) 42, 45, 47.

²⁴ JA van der Chijs *Nederlandsch-Indisch plakaatboek, 1602-1811 Eerste deel* (1885) 57; Meinsma (n 22 above) 54. The modern English names of the cities that were the main centres of these principalities are Banten and Ceribon.

²⁵ Kanumoyoso (n 23 above) 15.

Netherlands and on trade to provide it with all the necessities to survive.²⁶ Although the Batavian government did not develop the immediate surroundings of the settlement, it exercised control over the land and forests outside its walls. Shortly after the conquest of Jakatra, the settlers were prohibited to pick fruit in the forest surrounding the settlement without permission from the government. The chopping down of trees was similarly prohibited.²⁷ Later in the same year, the chopping down of trees was again prohibited and further arrangements regarding the gathering of fruit were made. The Batavian government declared that it was the lord of the land situated around Batavia and imposed a tithe on all the fruit gathered from such land and brought into the settlement.²⁸

Eventually the land around Batavia had to be cultivated to provide the necessary food for the growing town. The relationship between the Company, the Bantam sultanate and the powerful Mataram sultanate played an important role in the manner in which land was given out to settlers.²⁹ The unsettled political circumstances had the effect that the Company loaned land to the settlers who were willing to cultivate the land outside the city walls, rather than granting it in freehold.³⁰ The process of giving the land in loan was of an informal nature.³¹ The settlers started to occupy land outside the walls of the settlement rather than waiting for the Batavian government to allocate the land to them. However, because the Company regarded such land as its property, it regarded the land occupied by the settlers as given to them in loan.³² On 18 August 1620 the Batavian government declared that its policy with regard to plots of land (*erven*) was that the land occupied by settlers had to be regarded as loaned from the Company and that the government would

²⁶ Kanumoyoso (n 23 above) 15-16, 55.

²⁷ Van der Chijs (n 24 above) 56, 57-58, 61.

²⁸ Van der Chijs (n 24 above) 81.

²⁹ Raiders from the sultanate of Bantam were a threat to the settlers who cultivated the land around Batavia. Kanumoyoso (n 23 above) 25. The Sultanate of Mataram was the most important regional power on Java and besieged Batavia in 1629. J Hooymans *Verhandeling, over den tegenwoordige staat van den land-bouw, in de ommelanden van Batavia* (1825) 184-185; Meinsma (n 22 above) 61-63; L Blussé 'Batavia, 1619-1740: The rise and fall of a Chinese colonial town' (1981) 12 *Journal of Southeast Asian Studies* 170

³⁰ Kanumoyoso (n 23 above) 94-95.

³¹ Although it is not expressly stated, it can be deduced that the land outside the walls of the settlement was occupied in line with the policy announced on 18 August 1620, that land had to be regarded as loaned from the Company.

³² Kanumoyoso (n 23 above) 108; JL Cobban 'Geographic notes on the first two centuries of Djakarta' (1971) 44 *Journal of the Malaysian Branch of the Royal Asiatic Society* 138.

determine a just amount (*chyns ofte erfpachte*) that had to be paid for the right to occupy the plot concerned. The government also declared that government officials would in due time ensure that a proper record of all land given in loan to settlers would be compiled and that a register of plots of land, houses and fruit trees given in loan to the settlers, would be established. Any change in occupation of plots of land would be noted in the register. It is therefore apparent that occupiers of land on loan were able to sell, transfer, alienate or mortgage the land that they occupied.³³ On 2 June 1623 a tax of a tenth of the value of the alienated property was imposed. Any alienation without payment of this tax would be void.³⁴ It appears that the settlers were not very diligent in reporting their land transactions to the colonial government. It therefore had to assert its rights in terms of a *plakaat* published on 7 February 1624. It stated that the settlers had appropriated land both inside and outside the settlement without obtaining the necessary authority (*erfbrieven*). Consequently, the settlers were commanded to obtain such authority within one month from the publication of the *plakaat*. Failure to comply with this order could lead to forfeiture of the land.³⁵

On 1 April 1627 the Batavian government adopted a resolution that the loaned land had to be converted into freehold and future grants of land had to be given in freehold. A tithe was to be collected on the produce of the land given to the settlers in freehold.³⁶ The Batavian government found it necessary to ensure that the settlers who received their land in freehold used it for agricultural purposes. Some of the settlers chose to make the greatest possible profit from their land by erecting brick-making works on it, and in doing so ruined the land for agricultural purposes. Consequently, a *plakaat* was published requiring that consent had to be obtained from the government before non-agricultural activities could be conducted on the land. The settlers had to ensure that any such profit-making enterprises did not impact detrimentally on the agricultural potential of the land, and failure to cultivate the land could lead to forfeiture of the land.³⁷

³³ Van der Chijs (n 24 above) 65-66.

³⁴ Van der Chijs (n 24 above) 113.

³⁵ Van der Chijs (n 24 above) 116-117.

³⁶ Van der Chijs (n 24 above) 216-217, 221. See the footnote on 217 regarding the resolution taken by the *Hooge Regeering*.

³⁷ Van der Chijs (n 24 above) 221-222.

The Batavian government was motivated by a desire to advance the development of agriculture on the land around the settlement. To this end, the government made extensive infrastructural improvements to the land around Batavia by, amongst other things, digging canals to advance irrigation and to provide transport to the city for the produce of the area.³⁸ The focus of the Batavian government when granting land to individuals was to encourage agriculture. High-ranking officials of the Company were granted extended estates near Batavia that were developed as sugar and coconut plantations. These officials were granted semi-feudal rights with regard to the tenants who lived on these estates.³⁹ These officials were not the only persons to whom land was granted in the area surrounding the settlement. The land near the settlement was deemed to be of greater value than land further away. Consequently, the Dutch officials were given the best land close to the settlement and the rivers and canals connected to the settlement. However, the land granted to the Chinese and Mardijkers⁴⁰ was also situated not too far from the settlement. The headmen or chiefs of indigenous Javanese communities were granted land but in the parts furthest from the settlement. These chiefs did not become the owners of the granted land, but held it as a fief from the Company.⁴¹ The agricultural uses to which the granted land was put were rice cultivation, sugar-cane plantations, vegetable, coconut, and market gardens, sugar-mills and pasturage for cows and buffaloes. However, the main use of the land was for sugar and rice plantations.⁴²

4.3.1.2 The land tenure system established in Batavia

In Batavia, from the outset, the Batavian government dealt with land on the basis that the Company was the owner thereof. It must however be borne in mind that the conquest of Jakarta and the surrounding land did not confer private law ownership of

³⁸ Kanumoyoso (n 23 above) 29-30; Hooyman (n 31 above) 185.

³⁹ Kanumoyoso (n 23 above) 80-81 Kanumoyoso refers specifically to compulsory labour services that the tenants had to perform for the land owners.

⁴⁰ Freed Christian slaves originating from the former Portuguese colonies in the East Indies. Kanumoyoso (n 23 above) 52.

⁴¹ Kanumoyoso (n 23 above) 94; P Boomgaard 'Land rights and the environment in the Indonesian Archipelago, 800-1950' (2011) 54 *Journal of the Economic and Social History of the Orient* 479.

⁴² Kanumoyoso (n 23 above) 100.

the land on the Company.⁴³ In terms of the international law rules of the period, as articulated by De Groot, the conquered land became public property.⁴⁴ This means that the land became the property of the sovereign and the citizens of the conquering nation. De Groot also makes it clear that the sovereign power had the authority to dispose of the conquered land as it saw fit.⁴⁵

In the case of the conquest of Jakarta, there were no indigenous owners of land whose rights had to be taken into account by the Company when it disposed of the land. The absence of indigenous communities also had the effect that there was no established legal system in the area conquered by the Company. Consequently, Roman-Dutch law was introduced in Batavia.⁴⁶ The land that was used for public purposes by the Company and the settlers in and around Jakarta, was acquired by and became the property of the Company in terms of international law rules and in terms of Roman-Dutch law principles relating to public things (*res publicae*).⁴⁷

From 1619, with the conquest of Jakarta, to 1627, the settlers' rights in land both within and outside the walls of the settlement went through three phases.⁴⁸ In the first phase, the Batavian government made it clear through legislation that it was the owner of all the natural resources in the vicinity of the growing settlement. They

⁴³ There are two reasons for this. It is accepted that the concepts of sovereignty (*imperium*) and private ownership are governed respectively by public law and private law and can therefore not be equated. L Oppenheim (ed) *The collected papers of John Westlake on public international law* (1914) 131-132; L Benton & B Straumann 'Acquiring empire by law: From Roman doctrine to early modern European practice' (2010) 28 *Law and History Review* 17-18; MR Cohen 'Property and sovereignty' (1927) 13 *Cornell Law Quarterly* 8-9; WAM van der Linden *The acquisition of Africa (1870-1914): The nature of nineteenth-century international law* (2014) 27. It must however be borne in mind that the English common law applied in British colonies did not make this distinction. Van der Linden (above) 32-33; B Edgeworth 'Tenure, allodialism and indigenous rights at common law: English, United States and Australian land law compared after *Mabo v Queensland*' (1994) 23 *Anglo-American Law Review* 412. The more important reason is that the notion of private law ownership as an absolute right is a modern concept that became part of the South African common law and the European civil law systems during the nineteenth and twentieth centuries. At the time that the Dutch colonies were established, the concept of ownership was not absolute, in other words, the sovereign could be referred to as 'owner' of the public land while its ownership was in fact limited by the law and the rights that private persons could exercise in relation to the land. RW Lee *The jurisprudence of Holland by Hugo Grotius Vol I* (1926) 223; DP Visser 'The 'absoluteness' of ownership: The South African common law in perspective' (1985) *Acta Juridica* 46-47; Van der Linden (above) 29.

⁴⁴ W Whewell *Grotius on the rights of war and peace: An abridged translation* (1853) 340, 342.

⁴⁵ Whewell (n 44 above) 340. See the remarks in section 5.3.2.4 of Chapter 5 with regard to the powers of the States-General as sovereign of conquered territories.

⁴⁶ H Gall 'An introduction to Indonesian legal history' (1996) *Tydskrif vir die Suid-Afrikaanse Reg* 117-118.

⁴⁷ The Roman law rules relating to public things are discussed in section 8.5.1.2.2 of Chapter 8.

⁴⁸ See the discussion in section 4.3.1.1.

did this by making rules that regulated the picking of fruit and the chopping down of trees. However, during this phase they did not give much attention to regulating the rights in land of the settlers who started building houses and making gardens. Within a year after the conquest of Jakarta, the colonial government made a policy decision that envisaged an end to the unregulated occupation of land by the settlers, by clearly stating that the occupied land must be regarded as being loaned from the colonial government.

The rights in land conferred on the settlers by this policy decision of the Batavian government have all the characteristics that De Groot ascribes to the land tenure form of *emphyteusis*.⁴⁹ De Groot defines this form of land tenure as 'hereditary use of another's immovable property subject to a yearly payment'.⁵⁰ Fabius contends that the WIC, when establishing land tenure systems in the Atlantic Ocean area, followed the example set by the Company in loaning land to settlers at Batavia. He appears to be under the impression that the loan of the land in Batavia was of a feudal nature and that this was the example followed by the WIC.⁵¹ However, De Groot makes a clear distinction between *emphyteusis* and feudal tenure.⁵² According to his definition of feudal tenure, the use of another person's immovable property is not subject to an annual payment but involves 'reciprocal duties of protection on the one side, and of homage and fines on the other'.⁵³ As it is clear that the loan of land by the settlers in Batavia did not involve the reciprocal duties required by feudal tenure, Fabius' contention cannot be accepted.

The third form of rights in land, namely freehold ownership of land, was introduced in Batavia by the *plakaat* of 1 April 1627.⁵⁴ This measure was deemed necessary to promote greater endeavour in agricultural activities on the land surrounding the settlement. The only land that was not held in freehold was that of

⁴⁹ De Groot uses the term '*erfpacht-recht*' which is translated by Lee as *emphyteusis*. Lee (n 43 above) 240-241.

⁵⁰ Lee (n 43 above) 241. The Company was the owner of the public property in Batavia, subject to the rights that the subjects of the Company had to the land. See the comprehensive discussion of the ownership of public property in sections 3.3.4.2 and 3.3.4.3 in Chapter 3 and section 8.5.1.2.2 in Chapter 8.

⁵¹ GJ Fabius 'Het leenstelsel van de Westindische Compagnie' (1915) 70 *Bijdragen tot de Taal-, Land- en Volkenkunde van Nederlandsch-Indië* 556.

⁵² Lee (n 43 above) 241.

⁵³ Lee (n 43 above) 247.

⁵⁴ Van der Chijs (n 24 above) 116-117.

the indigenous immigrants who had been loaned land on the outskirts of the settled territory around Batavia.⁵⁵

4.3.1.3 The acquisition of Portuguese territory in Ceylon

The Company acquired its territory in Ceylon in totally different circumstances from those which prevailed with the conquest of Jakatra on Java. In the first place, the hostile actions of the Company on Ceylon were initially not aimed at the indigenous population but at the Portuguese settlements there. The Company in fact entered the hostilities against the Portuguese as an ally of an indigenous ruler who hoped that the Company would help him to oust the Portuguese.⁵⁶ Secondly, there was no part of the territory in Ceylon that was without a sovereign and which the Company could claim as abandoned territory. In contradistinction to the situation that the Company found at Jakatra, in Ceylon they encountered a well-organised political society and economic and social system based on the indigenous law of the indigenous communities. They chose to preserve this system and the changes made to it by the Portuguese as far as was possible.⁵⁷

The indigenous land tenure system was complex in nature, because the user of the land paid for the privilege by performing certain services for the ruler of the territory. The indigenous ruler was regarded as the lord of the land (*bhupati*). According to Serrão, it is not clear whether this concept meant that the ruler was the owner of the land, in a private law sense, and that private ownership of land by others was therefore impossible. He remarks that the concept could also be interpreted to mean that the ruler only had the ultimate power to allocate land or

⁵⁵ The indigenous inhabitants of Jakatra had been dispersed in 1619. However, since the Company needed labour to develop the land around Batavia, labourers were recruited from amongst other indigenous people of Java and the surrounding Indonesian islands. These indigenous labourers had to live under their own headmen in settlements that were called *kampung*. Kanumoyoso (n 23 above) 47-49, 94; Boomgaard (n 41 above) 479.

⁵⁶ Meinsma (n 22 above) 81, 82; NR Dewasiri *The adaptable peasant: Agrarian society in western Sri Lanka under Dutch rule, 1740-1800* (2008) 6, 243 footnote 11. AF Schrikker 'Dutch and British colonial intervention in Sri Lanka c. 1780-1815: Expansion and reform' unpublished Doctoral dissertation, Universiteit Leiden, 2006 21.

⁵⁷ JV Serrão 'The Portuguese land policies in Ceylon: On the possibilities and limits of a process of territorial occupation' in JV Serrão et al (eds) *Property rights, land and territory in the European overseas empires* (2014) 184, 185.

retract such an allocation. He is nevertheless of the opinion that land could only be legally held when it was granted by the indigenous ruler.⁵⁸

4.3.1.4 The consequences of the succession of the Company to the rights of the Portuguese in Ceylon

The international law rules of the seventeenth century provided that in the case of acquisition of territory by annexation⁵⁹ or cession, the succeeding state could only accede to the rights in the territory that its predecessor had. Such rights were determined by the domestic law of the conquered state.⁶⁰ The domestic law of the territory conquered by the Company was determined by the Portuguese government that preceded the Company. The system that was established by the Portuguese was a hybrid of the well-established existing land law system that was based on the indigenous law of Ceylon and some superimposed features of Portuguese domestic law.⁶¹ The Portuguese law elements of this hybrid system were imported from Portuguese colonial settlements on the Indian subcontinent which were established before the colonisation of Ceylon began.⁶² This land tenure system was based on the Roman law concept of *emphyteusis* which was used in Portugal and throughout Europe. The basic principle of *emphyteusis* as it was applied in Portugal, was that the owner transferred the land to the occupier for him to make full use thereof, and only retained the bare ownership of the land. The transfer was so complete that the occupier had the right to alienate the land during his lifetime or in his will. The only benefit the owner received from *emphyteusis* was that the occupier was obliged to pay an annual quitrent.⁶³

⁵⁸ Serrão (n 57 above) 187.

⁵⁹ Annexation of territory is the formal step in taking possession of conquered territory. L Oppenheim *International law a treatise Volume I Peace* (1912) 302-303. This is the step that did not take place in the case of the conquest and destruction of Jakatra. The territory was regarded as being an independent kingdom and not part of the neighbouring sultanates. As Jakatra ceased to exist, it was not necessary to formally annex the territory.

⁶⁰ These international law rules are discussed in sections 3.3.4 and 3.3.4.1 of Chapter 3.

⁶¹ RJ Henry 'A tulip in lotus land': The rise and decline of Dutch burgher ethnicity in Sri Lanka' unpublished Masters dissertation, Australian National University, 1986 8.

⁶² Serrão (n 57 above) 190; SM Miranda 'Property rights and social uses of land in Portuguese India: The Province of the North (1534-1739)' in JV Serrão et al (eds) *Property rights, land and territory in the European overseas empires* (2014) 172.

⁶³ Miranda (n 62 above) 172-173. The Portuguese law relating to *emphyteusis* was therefore basically the same as described by De Groot. See section 4.3.1.2.

In Ceylon, the Portuguese stepped into the shoes of the indigenous rulers and therefore regarded themselves as the lord of the land.⁶⁴ As lord of the land, the Portuguese rulers granted whole villages to non-indigenous and indigenous occupiers in return for payment of rent or for services rendered.⁶⁵ It was the rights in land created by this hybrid land tenure system which devolved to the Company when it succeeded the Portuguese as colonial ruler from 1658.

In line with the rights in land that its colonial predecessor had in Ceylon, the Company regarded itself as lord of the land in the parts of Ceylon that it had conquered from the Portuguese. Dewasiri remarks that it cannot be accepted that either the Portuguese or the Company correctly understood the indigenous concept of the indigenous rulers of Ceylon being lords of the land. In modern times there have been diverging views on the question whether the indigenous ruler had absolute ownership in his domain, excluding the possibility of private ownership of land by individuals, or whether private ownership of land by individuals was possible. In the latter case, the indigenous ruler could not be the absolute owner of the land but could only ultimately determine how land should be disposed of.⁶⁶ The concept of the indigenous ruler being lord of the land is characterised as an ideology that could be put into practice in different ways. The way in which the Company put the ideology into practice with regard to ownership of land gave implicit recognition to the principle that private ownership of land was possible. The Company claimed ownership of all land that no other person could prove ownership of.⁶⁷ Acting on this interpretation of the indigenous law relating to the powers of the indigenous ruler with regard to land, the Company disposed of this land as owner thereof. Initially this was done by requiring that the land be alienated subject to the payment of a tithe and later the land was sold by public auction.⁶⁸

⁶⁴ In the case of the territory Kotte on Ceylon, the Portuguese succeeded to the rights of the indigenous ruler as the kingdom was bequeathed to the Portuguese crown. Serrão (n 57 above) 185.

⁶⁵ Serrão (n 57 above) 189-190.

⁶⁶ Dewasiri (n 56 above) 130-134.

⁶⁷ Dewasiri (n 56 above) 134-135.

⁶⁸ MU de Silva 'Land tenure, caste system and the Rājakāriya, under foreign rule: A review of change in Sri Lanka under Western powers, 1597-1832' (1992) 37 *Journal of the Royal Asiatic Society of Sri Lanka* 15, 17.

The combination of the international law rules of the seventeenth century regarding conquest and annexation of territory and the hybrid of European and indigenous land law rules that existed in Ceylon, presented the Company with an established land tenure system. Although this system did not contain clear-cut rules with regard to the rights in land of the sovereign, the Company chose to interpret the existing system in a manner that made the Company the owner of all the land in Ceylon under its jurisdiction that was not in private ownership. The Company chose to either develop this land as government plantations or to dispose of the land by selling it at auctions. It therefore appears that in addition to the emphyteutic system inherited from the Portuguese, the Company introduced a freehold system in Ceylon.⁶⁹

4.3.2 The settled colonies in the Atlantic Ocean area

The settlements established by the Dutch in the Atlantic Ocean area ranged from isolated trading posts to well-developed settled colonies.⁷⁰ These settlements were situated in four locations, not all equally important for purposes of this study, as explained in more detail below. Fortresses were conquered from the Portuguese or were established on the West African coast to serve as bases for the slave trade and to transport slaves from Africa to the Caribbean or the Americas.⁷¹ As these settlements remained military in character and did not develop as colonies, they are not of interest for the purposes of this thesis.⁷² The Dutch also acquired six Caribbean islands⁷³ which were developed for different purposes. Curaçao had a safe harbour and developed into an important Caribbean trade centre that was used by all the colonial powers that played a role in the Caribbean and the Americas.

⁶⁹ NR Dewasiri 'Peasant in transition: Agrarian society in western Sri Lanka under Dutch rule, 1740-1800' unpublished Doctoral dissertation, Leiden University, 2007 97-98.

⁷⁰ All the colonies that were established by the Dutch West India Company and others in the Atlantic Ocean area are discussed in V Enthoven 'Dutch crossings: Migration between the Netherlands and the New World, 1600–1800' (2005) *Atlantic Studies* 153.

⁷¹ I use the collective term 'Americas' for the continents North and South America.

⁷² Enthoven (n 70 above) 154, 157; G Oostindie & JV Roitman 'Introduction' in G Oostindie & JV Roitman (eds) *Dutch Atlantic connections, 1680-1800: Linking empires, bridging borders* (2014) 7; Fabius (n 51 above) 555.

⁷³ St. Eustatius, Curaçao, Aruba, Bonaire, Saba, and St. Maarten (which was shared with France) Oostindie (n 72 above) 3. Enthoven remarks that until 1770 no settlers were allowed on Aruba while no settlers were allowed on Bonaire before 1780. Enthoven (n 70 above) 159.

However, it had very little potential as a producer of agricultural products.⁷⁴ Saint Eustatius was another trading centre for Caribbean and American traders, but is, together with Curaçao, not important for purposes of this discussion dealing with the development of land tenure systems.⁷⁵ The Dutch established various settlements in Guiana on the South American continent, some of which are important for the purposes of studying the land tenure systems that developed there before 1795.⁷⁶ The fourth location was the present New York in the United States, where the Dutch had the colony New Netherland in the period from 1614 to 1664, when it was conquered by the British. In accordance with the Treaty of Breda of 1667, the British retained New Netherland while Suriname was ceded back to the Dutch.⁷⁷

4.3.2.1 The purchase of land from indigenous communities and the effect thereof on the development of a land tenure system

In 1614 the States-General of the Dutch Republic granted a charter for the settlement and exploitation of the area in the vicinity of Manhattan and Long Island on the east coast of North America, between the British settlements in Virginia and at New Plymouth. After the establishment of the WIC, this area was named New Netherland. For the first ten years after the granting of the charter, the Dutch activities were limited to erecting trading posts and establishing trading relationships with the indigenous communities. It was only after the incorporation of the WIC in

⁷⁴ W Klooster 'Curaçao as a transit center to the Spanish Main and the French West Indies' in G Oostindie & JV Roitman (eds) *Dutch Atlantic connections, 1680-1800: Linking empires, bridging borders* (2014) 25-26; Enthoven (n 70 above) 159.

⁷⁵ Klooster (n 74 above) 33-34; Enthoven (n 70 above) 159; G Oostindie & B Paasman 'Dutch attitudes towards colonial empires, indigenous cultures, and slaves' (1998) 31 *Eighteenth-Century Studies* 352. It must be noted that agriculture and stock farming did take place on Curaçao and St Eustatius, but it was not as important as the trade that took place there. The land used as pasture on Curaçao was public land, comparable to the public land that was used as pasture in the Cape and Stellenbosch and Drakenstein districts. This is clear from the fact that the WIC complained about the practice of the settlers to fence the pasture used by their livestock. Fabius (n 51 above) 581, 582. St Eustatius was a patroonship. See section 4.3.2.2 with regard to patroonships.

⁷⁶ These settlements, Suriname, Essequibo and Demerara and Berbice, were situated in the north-eastern part of South America. The coastal area between the Spanish settlements at the Orinoco River (in modern Venezuela) and the Portuguese settlements at the Amazon River (in modern Brazil) was known as Guiana and was also referred to as the Wild Coast in the early sixteenth century. E Sluiter 'Dutch Guiana: A problem in boundaries' (1933) 13 *The Hispanic American Historical Review* 2. For the purposes of this thesis the importance of these colonies is that they remained Dutch colonies at least until 1795.

⁷⁷ AD Coox 'The Dutch Invasion of England: 1667' (1949) 13 *Military Affairs* 232-233. The colony was reconquered by the Dutch in August 1673 but returned to the British in October 1674. E Herman et al 'The changes in the allegiance and laws of colonial New York' (1901-1902) 15 *Harvard Law Review* 819, 821.

1621 that a concerted effort to colonise these areas was made.⁷⁸ The first settlements of the WIC in New Netherland were Fort Nassau on the Delaware River and Fort Orange on the North River. A settlement was started on Long Island and the WIC also purchased Manhattan Island from indigenous communities.⁷⁹ Although non-indigenous settlers were initially located at the Delaware River and Fort Orange, these settlers were eventually relocated on Manhattan Island. Therefore, in the early stages of the development of New Netherland, Manhattan and Long Island were the only locations where land was occupied by non-indigenous settlers.⁸⁰

From a legal point of view, the purchase of Manhattan must be regarded as a private law transaction between two corporate persons and not as acquisition of territory by an international person.⁸¹ Banner remarks that it is not clear why North American indigenous communities sold their land and why non-indigenous governments and settlers decided to buy land from these communities, rather than seizing it.⁸² The theory that the North American indigenous communities did not own land as they did not settle permanently in one place was disproved early in the period of colonisation of the East Coast of North America. The indigenous communities with which the Europeans first came into contact cultivated the land. This was a clear indication that they were not nomadic communities without any interest in specific parcels of land.⁸³ Being confronted with communities that cultivated the land, the non-indigenous settlers could not contend that there was no obvious sign that the land was occupied. This may have been a factor that persuaded the non-indigenous settlers to buy the land occupied by the indigenous communities.

⁷⁸ EB O'Callaghan *History of New Netherland; or, New York under the Dutch Vol I* (1848) 69-91.

⁷⁹ O'Callaghan (n 78 above) 100-101, 103-104. It is not necessary for the purposes of this thesis to enter into the legal and moral arguments relating to the legality of the purchase of land from the indigenous people of the United States, on which writers like Cohen and Banner, amongst others, have commented in great detail. FS Cohen 'Original Indian title' (1947) 32 *Minnesota Law Review* 28; S Banner *How the Indians lost their land: Law and power on the frontier* (2005) 49-84.

⁸⁰ JR Brodhead *History of the state of New York: First period 1609-1664* (1853) 170, 182-183.

⁸¹ This situation prevailed until 1763, when the British government conferred the right to obtain land from indigenous communities exclusively on the various colonial governments. Banner (n 79 above) 85.

⁸² Banner (n 79 above) 2.

⁸³ Banner (n 79 above) 19.

De Blécourt remarks that the charter of the WIC must be interpreted to mean that the legal rights of the WIC in the land occupied by it were either ownership in a private law sense or a lesser right.⁸⁴ The Director-General and council of New Netherland had to exercise their legislative power 'subject to the approval or revision of the Amsterdam Chamber of the WIC and within the parameters of the law of the fatherland'. O'Callaghan remarks that the law of the fatherland was the Roman-Dutch law.⁸⁵ This means that the WIC had to apply the Roman-Dutch law rules relating to the alienation of land when transferring or selling its land to non-indigenous settlers. Any such alienations of land by the WIC were private law transactions between it and the settlers on Manhattan and Long Island.

4.3.2.2 The introduction of patroonships

Seven years after the incorporation of the WIC, the colonisation of New Netherland, apart from the fortresses and lands cultivated to sustain the inhabitants of the fortresses, had not progressed. The Directors of the WIC in the Netherlands decided to authorise entrepreneurs to occupy extensive estates in New Netherland. These entrepreneurs were granted extensive powers, akin to those of a feudal landlord, which they could exercise on their estates. The WIC regarded the establishment of these patroonships as the best way to promote colonisation in New Netherland.⁸⁶ However, the change in the colonisation policy of the WIC applied not only to New Netherland but also to the WIC's settlements in the Caribbean and South America.

In the next two sections, I give a chronological account of the significant conditions relating to the patroonships which were introduced by the WIC in the Caribbean and South America, and New Netherland respectively.

4.3.2.2.1 *Chronological development of patroonships in the Caribbean and South America*

The two leading chambers of the WIC were the chamber of Amsterdam and the chamber of Zeeland. The chamber of Amsterdam was concerned with the development of New Netherland, while the chamber of Zeeland concerned itself with

⁸⁴ De Blécourt (n 20 above) 129.

⁸⁵ EB O'Callaghan *The laws and ordinances of New Netherland, 1638 to 1674* (1868) iv-v.

⁸⁶ O'Callaghan (n 78 above) 110-111; Brodhead (n 80 above) 187.

the Caribbean and South America. These two chambers played a leading role in formulating the freedoms and exemptions that would be applicable to the entrepreneurs that took up the challenge of colonising the Dutch territories in the Atlantic Ocean area.⁸⁷

In 1627, a merchant from Vlissingen, Abraham van Pere, requested permission from the WIC to establish a settlement on the river Berbice in Guiana.⁸⁸ After negotiations between Van Pere and the directors of the chamber of Zeeland, draft conditions and articles were submitted to the Directors of the WIC. The Directors made certain changes to the conditions and articles and submitted them to the chamber of Zeeland on 12 June 1627. On 12 July 1627 Van Pere chose to sign the amended version.⁸⁹ Fabius is of the opinion that the Directors of the WIC amended the conditions and articles to make them of more general application to entrepreneurs who wished to embark on colonisation ventures.⁹⁰ The first paragraph of the conditions and articles authorised entrepreneurs to establish colonies at any place on the coast of Guiana and to transport settlers to such a place.⁹¹ The only limitation placed on the choice of location of the colony was that it was not allowed to be within seven to eight miles of another colony established in terms of the conditions and articles.⁹² In paragraph 14, the entrepreneurs are referred to as *patronen* who had to ensure that, within three years after the establishment of the settlement, the settlers to whom land was given⁹³ commenced to utilise the land. Failure to do so could lead to forfeiture of the land, which could then be made available to other settlers. However, in terms of paragraph 15, the *patroon* and his settlers had the right to request to be allocated another piece of land if it transpired

⁸⁷ Fabius (n 51 above) 565, 571. The patroons were granted 'freedoms and exemptions' from certain conditions of the 1621 Charter of the WIC.

⁸⁸ At present this coastline belongs to the two independent states Guyana and Suriname and the French overseas region French Guiana.

⁸⁹ PM Netscher *Geschiedenis van de koloniën Essequibo, Demerary en Berbice, van de vestiging der Nederlanders aldaar tot onzen tijd* (1888) 57.

⁹⁰ Fabius (n 51 above) 558.

⁹¹ Netscher (n 89 above) 350. The conditions and articles contained 31 paragraphs but I only discuss those paragraphs that relate to the occupation of land and the rights of the parties to such land.

⁹² Paragraph 7 of the conditions and articles. Netscher (n 89 above) 351; J Jacobs 'Dutch proprietary manors in America: The patroonships in New Netherland' in LH Roper & B van Ruymbeke (eds) *Constructing early modern empires: Proprietary ventures in the Atlantic world, 1500-1750* (2007) 307.

⁹³ Fabius (n 51 above) 558.

that it was impossible to make a proper living in the first location.⁹⁴ From these paragraphs of the conditions and articles it appears that the Directors of the WIC did not deem it necessary to provide in detail for matters relating to the ownership of land. The document does not say whether the *patroon* would be the owner of the land on which the settlement was established. This is in line with the fact that the conditions and articles did not contain any provision dealing with the extent of the land that could be occupied by the settlers.

After 1627, the WIC did not formally adopt new conditions and articles for the establishment of patroonships in the Caribbean and South America. Fabius contends that agreements that were concluded with prospective *patroons* after 1627 contained new provisions, which means that the 1627 conditions and articles were only applicable to the settlement in Berbice.⁹⁵ None of the other patroonships in this part of the Atlantic Ocean area lasted for a significant period and it is not necessary to consider the changes that were made in their charters. In 1678 the reconstituted WIC⁹⁶ concluded a new contract with the heirs of Van Pere with regard to the patroonship of Berbice. This contract was to be valid until 1700 and provided that the land would be held by the heirs of Van Pere in *onsterfelijk erfleen*.⁹⁷

The islands St Eustatius and Saba also came under the jurisdiction of *patroons*.⁹⁸ It is not clear whether any conditions and articles additional to those contained in the 1627 conditions and articles were included in the contracts of these *patroons*. It is therefore also not clear whether the WIC was the owner of the land on the islands. However, as the reconstituted WIC bought the rights in land of the *patroons* in St Eustatius and Saba in the period from 1681 to 1683, it appears that the *patroons* were the owners of these islands.⁹⁹ The Dutch settlement on the island St Maarten was also a patroonship. According to Fabius, the brothers Lampsin were

⁹⁴ Netscher (n 89 above) 352.

⁹⁵ Fabius (n 51 above) 565.

⁹⁶ The 1621 charter of the WIC was not extended in 1671. A new charter was given to a reconstituted WIC in 1674. Enthoven (n 70 above) 157.

⁹⁷ Fabius (n 51 above) 565- 566.

⁹⁸ Fabius (n 51 above) 567; L Knappert 'Verzuimd St Eustatius' (1930) 11 *New West Indian Guide / Nieuwe West-Indische Gids* 160; S Kalff 'Uit de geschiedenis van St. Eustatius' (1927) 8 *New West Indian Guide / Nieuwe West-Indische Gids* 405.

⁹⁹ Fabius (n 51 above) 567; JW de Brauw 'Het eiland Saba en zijn bewoners' (1935) 16 *New West Indian Guide / Nieuwe West-Indische Gids* 307.

authorised to establish a settlement on St Maarten in 1649. In terms of their contract with the WIC they received in ownership all the land on the island that they could cultivate or use as pasture.¹⁰⁰

4.3.2.2.2 *Chronological development of patroonships in New Netherland*

On 28 March 1628 the Directors of the WIC decided that it would use entrepreneurs to settle on the lands of New Netherland, except Manhattan, which remained the property of the WIC. After extensive consultation in the chambers of the WIC, the Directors were able to accept the '[f]reedoms and exemptions granted by the Assembly of the XIX of the privileged West India Company, to all such as shall plant any colonies in New Netherland' ('freedoms and exemptions') on 7 June 1629.¹⁰¹ Paragraph IV of the freedoms and exemptions is the first to deal with land.¹⁰² The *patroon* was given the land that he chose in absolute property, but could, if the land proved to be barren, request to relocate to other land of his choice. In contradistinction to the conditions and articles of 1627, paragraph V of the freedoms and exemptions provides in detail for the extent of the land that a *patroon* may occupy. The extent of the land that a *patroon* may occupy along a river is prescribed, while he is authorised to extend his land outward from a river as is necessary to accommodate the settlers under his control. A *patroon* had to allow for a space of seven or eight miles between his land and that of a fellow *patroon*. The WIC reserved the use of the land that fell between two settlements of *patroons* for itself.¹⁰³ Nevertheless, it did not prohibit the *patroon* from using the land contiguous to his land.¹⁰⁴ Paragraph XXI of the freedoms and exemptions authorised persons, other than *patroons*, to occupy in full ownership as much land as they could properly improve.¹⁰⁵ Such persons along with *patroons* were also authorised, in the case where they discovered suitable places to establish a fishery or a saltpan, to occupy

¹⁰⁰ Fabius (n 51 above) 567-568.

¹⁰¹ O'Callaghan (n 78 above) 111-112; WG Sherwood 'The patroons of New Netherland' (1931) 12 *The Quarterly Journal of the New York State Historical Association* 273-274.

¹⁰² As in the case of the conditions and articles for settlement in the Caribbean and South America, I only deal with the paragraphs in the freedoms and exemptions that relate to the occupation of land and the rights of the parties to such land. My comments are based on the English translation of the original Dutch that appears in O'Callaghan's work.

¹⁰³ O'Callaghan (n 78 above) 113; Brodhead (n 80 above) 195.

¹⁰⁴ Paragraph VIII of the freedoms and exemptions. O'Callaghan (n 78 above) 114.

¹⁰⁵ O'Callaghan (n 78 above) 118.

such land as their property and to exploit the resources that they had discovered.¹⁰⁶ Paragraph XXVI of the freedoms and exemptions is, for the purposes of this chapter, very important. It provides that persons who occupy land in New Netherland in terms of the freedoms and exemptions, must compensate the indigenous communities for the land that they have appropriated. The paragraph also authorises the *patroons* to increase the extent of the land initially occupied by them, if they could obtain settlers to occupy such additional land.¹⁰⁷ The freedoms and exemptions are unequivocal in conferring ownership of the land on *patroons* or other persons who were willing to commit to settling in New Netherland.

The new charter of freedoms and exemptions which was instituted for New Netherland by the Directors of the WIC on 19 July 1640 was almost the same as that of 1629.¹⁰⁸ There were three changes in the 1640 charter with regard to land tenure. The extent of land that could be occupied by a *patroon* was reduced, by providing specifically how much land fronting on a river could be occupied and limiting the extent of land that could be occupied outward from the river. On the other hand, the right given to settlers other than *patroons* in paragraph XXI of the 1629 freedoms and exemptions was described in more detail. Such a settler and five other persons would be granted in full ownership in Rhineland measure 100 morgen of land next to each other at a location of their choice.¹⁰⁹ The third change was that the 1640 charter did not stipulate that the *patroons* or the other settlers had to buy the land that they wished to occupy from the indigenous communities.

¹⁰⁶ Paragraph XXIII of the freedoms and exemptions. O'Callaghan (n 78 above) 118; Brodhead (n 80 above) 194.

¹⁰⁷ O'Callaghan (n 78 above) 119.

¹⁰⁸ Fabius (n 51 above) 561; Sherwood (n 101 above) 289; O'Callaghan (n 78 above) 219.

¹⁰⁹ EB O'Callaghan (ed) *Documents relative to the colonial history of the state of New-York; procured in Holland, England and France by John Romeyn Brodhead Esq Vol. 1* (1856) 120-121; Sherwood (n 101 above) 289. The Dutch measure of land 'morgen' is defined in the *Oxford English Dictionary* as '...a measure of land equal to about 0.8 hectare or two acres'. 'morgen, n'. *OED online*. March 2016. Oxford University Press.

<http://0-www.oed.com.innopacup.ac.za/view/Entry/122221?redirectedFrom=Morgen> (accessed 20 March 2016). The *Oxford English Dictionary* defines the use of the word 'Rhineland' in conjunction with a unit of measure as 'Forming the names of units of measurement formerly used in the area of Europe lying on either side of the Rhine (esp. in the Netherlands)'. 'Rhineland, n.' *OED Online*. June 2017. Oxford University Press.

<http://www.oed.com.uplib.idm.oclc.org/view/Entry/165219?redirectedFrom=rhinelands> (accessed 7 January 2018).

The last charter of freedoms and exemptions for prospective settlers in New Netherland was accepted by the Directors of the WIC on 24 May 1650.¹¹⁰ In contradistinction to the charters of 1629 and 1640, the 1650 charter shifts the focus from the rights of *patroons* to the rights of ‘all inhabitants’ or freemen who were interested in establishing settlements in New Netherland.¹¹¹ The conditions under which these freemen could take up land on arrival in New Netherland were that they had to pay quitrent for the land of their choice or they had to take such land as a fief from the WIC. They were obliged to start cultivating the land within one year from occupying it.¹¹² A new freedom that was included for the first time in a charter of freedoms and exemptions, was that if the new settlers wished to engage in stock farming suitable grazing would be provided as far as possible. The charter did not stipulate anything with regard to the ownership of such grazing.¹¹³ The charter provides that if a settler should choose to settle on land that did not already belong to the WIC, such a settler was obliged to purchase, in the presence of an officer of the WIC, the land from the indigenous community concerned.¹¹⁴ As far as the rights to land of *patroons* were concerned, the 1650 charter once more authorised a patroon to occupy land outward from the prescribed river frontage in the same way as was provided for in the 1629 charter. Another right that was restored to the *patroons* was that they could use the land and water resources adjacent to their land until such time as these were allotted to another person.¹¹⁵

4.3.2.2.3 *Nature of the land tenure system established under patroonships*

I am of the opinion that the 1650 charter of freedoms and exemptions confirmed that it was the intention of the WIC that the *patroons* of New Netherland were to be the owners of the land that they occupied. This means that the WIC had no underlying right in the land occupied by the *patroons*.¹¹⁶ I base my opinion on the express words

¹¹⁰ Sherwood (n 101 above) 291, O’Callaghan (n 109 above) 401; Fabius (n 51 above) 564.

¹¹¹ Fabius (n 51 above) 563.

¹¹² O’Callaghan (n 109 above) 401.

¹¹³ As above.

¹¹⁴ As above.

¹¹⁵ O’Callaghan (n 109 above) 402; Fabius (n 51 above) 563.

¹¹⁶ It must be noted that in terms of international law rules, the WIC did not base its claim to the New Netherland territory on the doctrine of discovery as was done by the British. The WIC based its claim on effective occupation of the territory. J Simsarian ‘The acquisition of legal title to terra nullius’ (1938) 53 *Political Science Quarterly* 116-118, 120. The doctrine of effective occupation does not presuppose proprietary rights in the occupied territory as is the case with the doctrine of discovery.

used in paragraphs IV, XXI and XXIII of the 1629 freedoms and exemptions and the fact that the land occupied by the *patroons* and other persons had to be bought from the indigenous communities.

However, Fabius is of a different opinion in this regard. Although he admits that the 1629 charter confers land in full ownership on the *patroons*, he remarks that it was not the intention that the *patroons* would be the allodial owners of the land.¹¹⁷ He bases this opinion on the wording of the documents in terms of which the land of the indigenous communities was transferred to the *patroons*. He contends that these documents provided that the *patroons* were exercising the rights in the land on behalf of the WIC.¹¹⁸ However, it is clear that he misinterpreted the English translations of the documents that he refers to.¹¹⁹ The documents are formal contracts of sale of land between the indigenous communities and the *patroons* concerned. The officers of the WIC were merely acting as the agents of the *patroons* who were not present at the signing of the contracts. The contracts clearly provide that the *patroons* will in the future exercise all the rights in the land that the indigenous communities had. As the indigenous communities owned their land free of any encumbrances, the *patroons* received it free of encumbrances in full ownership. Fabius' misunderstanding of the English documents leads to his contention that only the *patroons* who received their land after 1640 received it as allodial property.¹²⁰ The first sentences of the English translations of paragraph IV of the 1629 charter of freedoms and exemptions and the eighth paragraph of the 1640 charter of freedoms and exemptions are virtually the same and therefore should convey the same meaning.¹²¹ These sentences can only mean that it was the intention of the Directors of the WIC that the *patroons* would be the allodial owners of the land that they chose to buy from the indigenous communities.

See my remarks in note 11 of Chapter 3. With regard to the domestic law rights of the WIC, see section 4.3.3.2.

¹¹⁷ The *Oxford English Dictionary* defines 'allodial' as

1. Of property: held in absolute ownership, without acknowledgement of any superior; not subject to any feudal obligation. Also applied to tenure of or title to such property. Frequently opposed to *feudal*.

'allodial, adj. and n.' *OED Online*. June 2018. Oxford University Press.

<http://www.oed.com/uplib.idm.oclc.org/view/Entry/5363?redirectedFrom=allodial> (accessed 10 July 2018).

¹¹⁸ Fabius (n 51 above) 560.

¹¹⁹ These documents are the formal conveyances of the land bought from the indigenous communities by the *patroons*. O'Callaghan (n 109 above) 43, 44.

¹²⁰ Fabius (n 51 above) 561-562.

¹²¹ O'Callaghan (n 78 above) 114; O'Callaghan (n 109 above) 120.

Sherwood remarks that the various charters of freedoms and exemptions created two systems of land tenure. He has in mind the land tenures that were created for *patroons* and other persons.¹²² However, the nature of these land tenures was the same. Both the 1629 and the 1640 charters gave individual settlers the right to be the allodial owners.¹²³ The 1650 charter made it clear that in the case where individual persons bought land from the indigenous communities, the land would be their property as was the case with the previous charters. However, by 1650 the WIC had, through purchase from the indigenous communities, acquired more land of its own on which the other persons could also establish settlements. In such a case the other persons did not obtain the land in freehold but had to hold the land on the payment of quitrent to the WIC or as a fief from the WIC.¹²⁴

The *patroons* in the Caribbean were also the owners of the land to the exclusion of the WIC or any other stakeholder. However, the position of the *patroons* in South America was not as clear cut. The conditions and articles of 1627 did not provide for ownership of the land, or that the land on which the *patroons* wanted to settle had to be bought from the indigenous communities. Berbice was the only patroonship of importance in South America.¹²⁵ From the remarks of Netscher it appears that there was very little official correspondence between the States-General, the Directors of the WIC and the authorities in Berbice. He ascribes this to the fact that Berbice was the property (*een particulier eigendom*) of the Van Pere family and that correspondence with the States-General and the Directors of the WIC was therefore not necessary.¹²⁶

4.3.2.3 The acquisition of Suriname

Suriname was the only Dutch colony remaining in South America after the Napoleonic wars and presents a different history of the sovereign's rights in land than that of the other Dutch colonies in the Atlantic Ocean area. The British was the

¹²² Sherwood (n 101 above) 289.

¹²³ Paragraph XXI of the 1629 charter. O'Callaghan (n 78 above) 118; Sixth paragraph of the 1640 charter. O'Callaghan (n 109 above) 119.

¹²⁴ Paragraphs three and eight of the 1650 charter. O'Callaghan (n 109 above) 401.

¹²⁵ Fabius (n 51 above) 565.

¹²⁶ Netscher (n 89 above) 153. See also section 4.3.2.2.1 for the reasons why the land in Berbice belonged to Van Pere and his heirs and not the WIC.

first non-indigenous nation to establish a settlement in the territory that is Suriname today. This settlement was conquered in 1667 by a Dutch expedition that was outfitted and financed by the province of Zeeland. Subsequent to the conquest, the province contended that it was the owner of the settlement to the exclusion of the States-General and the WIC. The private ownership rights of the settlers who had established plantations under the British government were guaranteed in the Articles of Capitulation signed by the British government in Suriname and the Dutch conquerors.¹²⁷ The settlement pattern of the non-indigenous settlers near the coast and major rivers of Suriname had the effect that their contact with the indigenous communities of the region was sporadic and often hostile. The indigenous communities preferred to remain in the densely forested interior of Suriname where no non-indigenous settlement took place during the eighteenth century.¹²⁸

Notwithstanding the protests of the other provinces of the United Provinces, the province of Zeeland acted as the owners of the settlement for 15 years.¹²⁹ The settlement did not prosper under the management of the province and was eventually sold to the WIC in June 1682. When the WIC took ownership of Suriname a new charter was drafted for it that served as a type of constitution for the colony. However, very shortly after the transfer of Suriname to the WIC it realised that the costs of maintaining the colony were prohibitive and it in turn sold two thirds of the colony to a consortium, the *Societeit van Suriname*, formed by the WIC, the city of Amsterdam and a private citizen Cornelis van Aerssen van Sommelswijck.¹³⁰

¹²⁷ Apart from the Cape Colony, Suriname was the only settled Dutch colony on a continent. The Dutch settlement in New Netherland was on the North American continent, but was hemmed in by British claims to the hinterland. The main settlement of the Dutch was on Manhattan, Staten Island and Long Island, while its presence on the continent was limited to Fort Nassau on the Delaware River and Fort Orange on the North River. The Dutch were prevented from expanding on the continent by the loss of New Netherland in 1664. Suriname and the Cape Colony are therefore the only Dutch colonies that were established on the coast of a continent and gradually expanded into the hinterland. See also the comments in note 142.

¹²⁸ P Boomgaard 'The tropical rain forests of Suriname: Exploitation and management 1600-1975' (1992) 66 *New West Indian Guide / Nieuwe West-Indische Gids* 229; Oostindie (n 72 above) 353.

¹²⁹ J Wolbers *Geschiedenis van Suriname* (1861) 40-41; E Kambel & F MacKay *The rights of indigenous peoples and maroons in Suriname* (1999) 35; LAHC Hulsman 'Routes of Guiana: The frontier between Suriname and Brazil' in RG de Oliveira & AI Jubithana-Fernand (eds) *From historical paths to the cultural processes between Brazil and Suriname* (2014) 41 footnote 8.

¹³⁰ Wolbers (n 129 above) 52, 54; Kambel (n 129 above) 36.

4.3.2.3.1 *The consequences of the transfer of Suriname to the consortium*

De Blécourt remarks that with the transfer of the colony to the consortium, each of the three members became an owner of one third of the land in the colony which was now the property of the consortium. The consortium had the power to govern the colony subject to the overall sovereignty of the States-General.¹³¹ One of the conditions of the transfer of the colony to the consortium was that Van Sommelsdijk would himself act as governor.¹³² Prior to the transfer of Suriname to the consortium, land was granted to settlers in freehold without any encumbering conditions.¹³³ Under the governorship of Van Sommelsdijk this situation changed. The new grants of land contained conditions that required the payment of a fee, referred to as *ackergeld*. The grants provided that 10 per cent of the value of the land had to be paid to the consortium if it was sold within 12 years and thereafter five per cent was payable.¹³⁴ In addition, the consortium claimed the right of *naasting*.¹³⁵ The non-indigenous settlers submitted a petition to the Board of the consortium to request the omission of these conditions from the grants of land made to them. In response to this petition, Van Sommelsdijk made it clear that the condition of payment of an annual fee (*ackergeld*) was in line with the accepted land tenure system of *emphyteusis*.¹³⁶ The new conditions in the grants therefore transformed the land tenure system of the non-indigenous settlers from that of freehold to *emphyteusis*.¹³⁷

¹³¹ De Blécourt (n 20 above) 134.

¹³² Wolbers (n 129 above) 55.

¹³³ De Blécourt (n 20 above) 136-137.

¹³⁴ De Blécourt (n 20 above) 137-138, 139.

¹³⁵ De Blécourt (n 20 above) 137. Bell equates the Dutch word '*naasting*' with the Latin phrase '*ius retractus*' and defines the concept as follows:

the right of retraction. This right is of two kinds, conventional and legal. Conventional retractus is an agreement annexed to a contract of sale that if the purchaser again sells the thing he shall sell it not to another, but to the original vendor... The legal right of retraction, also called *naasting*, was the right belonging to the blood relations of the seller of immovable property to step into the place of the purchaser if the property should be again sold.

WHS Bell *South African legal dictionary* (1910) 312-313. De Blécourt points out at 138 that Van Sommelsdijk defended the inclusion of this condition in the grants as being common practice, as such a provision was often included in contracts of sale in Europe. From Bell's definition it appears that the grants made provision for conventional *ius retractus*.

¹³⁶ De Blécourt (n 20 above) 138.

¹³⁷ De Blécourt (n 20 above) 139. Graaf van Limburg Stirum errs in his contention that these conditions are evidence of the feudal nature of the tenure of the settlers in Suriname. He has clearly lost sight of the fact, which is highlighted by De Blécourt, that the Roman-Dutch law was applicable in Suriname before the law was codified during the nineteenth century. OEG Graaf van Limburg Stirum '*De Surinaamsche grondpolitiek*' (1923) 5 *De West-Indische Gids* 641. See my remarks in note 43 where it is explained that the concept of ownership in Roman-Dutch law was not absolute and that grants and deeds could include conditions which limited ownership. See in general with regard to conditions in the grants of the land that was given in freehold to non-indigenous settlers at the Cape, the remarks of G Denoon '*Conditions in deeds*' (1948) 65 *South African Law Journal* 362-370.

For the purposes of this thesis, the most important point made by Van Sommelsdijk in defence of his actions was that the consortium was '*grontheeren, eygenaars ende possesseurs van de colonie*'.¹³⁸ De Blécourt endorses Van Sommelsdijk's assertion that the consortium was the owner of the land in Suriname when he discusses the inclusion of the *naasting* condition in the grants by referring to the consortium as '*groot-grondeigenaar*'.¹³⁹

4.3.3 The rights in land of the Company and other Dutch role players in the Dutch colonies

In Chapter 3 I considered the nature of the rights in land in the Cape Colony that the Company could legitimately transfer to the British in 1795 in terms of the international law rules of the period. From that discussion and from the discussion of the private law rights of the Company in the Cape Colony in Chapter 5, it is clear that the acquisition of territory by occupation played an important role in determining the nature of the rights concerned. The manner in which territory was acquired by the Company and other Dutch role players in other Dutch colonies not only had international law implications but also domestic law implications. These implications are discussed in this section.

4.3.3.1 The domestic law rights in land obtained by the conquest of Jakatra, Ceylon and Suriname

The conquest of Jakatra conferred ownership of all the land in the conquered territory on the Company, because there were no indigenous land owners who remained in the territory.¹⁴⁰ On the other hand, the conquest and annexation of Ceylon from the Portuguese had the effect that the Company obtained the rights in land that its colonial predecessor had. This meant that the Company also became the lord of the land, taking the place of their Portuguese predecessors. The fact that the Company was the lord of the land enabled it to interpret the indigenous law principle of *bhupati* in a manner that made it the owner of all the land that was not

¹³⁸ De Blécourt (n 20 above) 138.

¹³⁹ De Blécourt (n 20 above) 141.

¹⁴⁰ WR van Hoëvell 'Geschiedkundig onderzoek na den oorsprong en den aard van het partikulier landbezit op Java' *Tijdschrift voor Nederlandsch Indië* (1849) 244-245. This meant that the Company did not have to take the rights of the indigenous communities into account when settling on the land in the area surrounding the settlement.

privately owned.¹⁴¹ The third Dutch colony that was acquired by conquest was Suriname. In terms of English common law the British crown became the absolute owner of the land within the boundaries of a colony.¹⁴² Therefore, the right that was transferred to the province of Zeeland was the ownership of the land, subject to the rights of the private persons whose rights were guaranteed under the Articles of Capitulation.

4.3.3.2 Domestic law rights obtained by the purchase of land from indigenous communities

Fabius, Graaf van Limburg Stirum and De Blécourt remark that the States-General, in terms of the 1621 Charter of the WIC, conferred ownership of the land on the WIC in the colonies that it established.¹⁴³ In terms of the international law rules of the seventeenth century, the States-General was only able to cede to the WIC its right to govern newly acquired territory as sovereign ruler. With regard to private law ownership of such land, the States-General was only able to authorise the WIC to become the private law owners of land not occupied by anyone else.¹⁴⁴ The rule that a person cannot transfer more rights to his successor than he has himself, made it impossible for the States-General to legally confer private law ownership of land on

¹⁴¹ See section 4.3.1.4.

¹⁴² See the sources referred to in note 43 above. See also section 5.3.2.2 of Chapter 5. The boundaries of the British colony were purported to be contained in the charter granted by the British sovereign to the founder and proprietor of the British settlement. AO Thomson 'The Guyana-Suriname boundary dispute: An historical appraisal, c. 1683-1816' (1985) 39 *Boletín de Estudios Latinoamericanos y del Caribe* 65-66. It is not necessary to consider the legality of the boundaries provided for in the charter from an international law perspective, as it is clear that prior to 1795 the province of Zeeland and its successors only exercised their ownership rights in a very limited area along the Suriname and Commewijne Rivers near the coast. R Bijlsma 'De karteering van Suriname ten tijde van gouverneur Van Aerssen van Sommelsdijck' (1921) 2 *De West-Indische Gids* 351-354. The English common law that was applicable in the British colony was at some stage superseded as domestic law by Dutch law. FAJ van der Ven 'O. dat volgens het oud Hollandsche Regt, in de colonie Suriname nog geldende, (..) ofwel enige opmerkingen over relatieve eigendom' (2009) *Groninger Opmerkingen en Mededelingen* 1. Therefore the province of Zeeland only became private law owner of the land that it occupied effectively directly after the conquest. The consequence of the abolition of the English common law was that the province of Zeeland could not claim private law ownership of that part of the land within the boundaries mentioned in Willoughby's charter that was not occupied. This is due to the fact that Roman-Dutch law does not contain a principle that the sovereign is the owner of all unoccupied territory within the boundaries of that territory.

¹⁴³ Fabius (n 51 above) 555-556; Van Limburg Stirum (n 137 above) 640; De Blécourt (n 20 above) 129.

¹⁴⁴ With regard to private law ownership of land acquired by occupation see my remarks in section 5.4.3 in Chapter 5.

the WIC in as yet unclaimed or even undiscovered regions.¹⁴⁵ When the WIC started to contemplate the colonisation of New Netherland by settlers from Europe, it realised that it would have to obtain title to the land that it wanted to make available to the settlers.¹⁴⁶ Although the WIC acquired the land used for fortresses and trading posts by occupation, it could only obtain title to land for settlers by buying it from indigenous communities living near the fortresses and trading posts. In other words, the exercise of sovereignty by the WIC over the territory in New Netherland did not authorise it to grant, sell or lease land to the settlers arriving in New Netherland. It was the fact that the WIC had bought the land that gave it the power to make the land available to non-indigenous settlers.

In New Netherland the freedoms and exemptions granted to the *patroons* and private persons in terms of the 1629, 1640 and 1650 Charters, made it possible for them to obtain private law ownership in the land. If they were able to buy the land that they settled on from the indigenous communities they became the owners of such land. They were only subject to the sovereign power of the WIC.

4.3.3.3 The domestic law rights obtained by the acquisition of land by occupation

The 1627 conditions and articles under which patroonships in the Caribbean and South America were granted did not contain the condition that land had to be purchased from the indigenous communities in Guiana. The *patroon* Abraham van Pere therefore obtained ownership of the land that he acquired by occupation on the Berbice River.¹⁴⁷ De Blécourt points out that the additional agreement between Van Pere and the WIC in 1660 contains a contradiction in terms, in that the *patroon* could not be given the land in Berbice in absolute ownership and in perpetual hereditary loan. He remarks that ownership excludes loan.¹⁴⁸ Furthermore, it does not appear

¹⁴⁵ I discuss the application of the maxim *nemo plus juris transferre potest quam ipse habet* in international law in note 94 of Chapter 3. I also discuss the maxim as it applies in the domestic law of the Cape Colony in section 5.3.2.4 of Chapter 5. The maxim was equally applicable to the domestic law of the various Dutch colonies.

¹⁴⁶ O'Callaghan (n 78 above) 103-104.

¹⁴⁷ Netscher remarks that neither he nor other historians writing about Guiana could obtain information regarding the nature of the settlement on the Berbice River in the first 30 to 40 years of its existence. In view of the powers conferred on the patroon Van Pere it is accepted that land was acquired by occupation. Netscher (n 89 above) 59-60.

¹⁴⁸ De Blécourt (n 20 above) 133.

from the agreement between Van Pere and the WIC how the WIC could have obtained a prior right in the land that the *patroon* had occupied from 1627.

The chamber of Zeeland, under the auspices of the WIC, established a trading post on the Essequibo River in the years between 1625 and 1627.¹⁴⁹ This was to be the only successful settlement established by the WIC itself in the Caribbean and South America. However, success did not come immediately and the WIC failed to send any colonists to the Essequibo settlement for many years after its establishment.¹⁵⁰ The first colonists arrived in 1657 and the first sugar mill was established in 1664.¹⁵¹ The appointment in 1670 of an enterprising governor for the settlement led to the establishment of more plantations along the Essequibo and its tributaries.¹⁵² The development of the Essequibo colony (to which the settlement on the Demerara River was added later) was unique, because apart from a very small settlement around the fortress on Flag Island, no town was established. The colony therefore consisted of a number of plantations established along the Essequibo River on land that was controlled by the WIC and where the WIC exercised sovereignty.¹⁵³

4.4 Comparison between the rights in land of the Company in the Cape Colony and the other Dutch colonies

In Chapter 5 I discuss the private law rights of the Company in the land of the Cape Colony. In this section I compare those rights with the private law rights in land that the Company and other Dutch role players had in other Dutch colonies. The purpose of this comparison is to illustrate the unique nature of the domestic law of the Cape Colony relating to the occupation of land.

¹⁴⁹ Report and accompanying papers of the commission appointed by the president of the United States “to investigate and report upon the true divisional line between the Republic of Venezuela and British Guiana” Volume 1 Historical (1897) 179-181.

¹⁵⁰ Report of the commission appointed by the president of the United States (n 150 above) 184, 186, 190, 200.

¹⁵¹ Report of the commission appointed by the president of the United States (n 150 above) 192, 194, 196.

¹⁵² Report of the commission appointed by the president of the United States (n 150 above) 199-200.

¹⁵³ Report of the commission appointed by the president of the United States (n 150 above) 202-203.

4.4.1 Comparison of the Cape Colony with conquered Dutch colonies

It is common cause that the Cape and the interior of the Cape Colony were not conquered from a European nation. The fact that the Company, in the case of Ceylon, and the province of Zeeland, in the case of the Suriname, acquired the respective territories from non-indigenous colonial predecessors means that the rights in land of the colonial governments in those colonies were very different from those of the Company at the Cape.¹⁵⁴

In this thesis I make a case that the Company at the Cape did not, in terms of the international law rules of the seventeenth and eighteenth centuries, acquire territory from the indigenous communities by conquest.¹⁵⁵ Similarly, I contend that the operations conducted by the non-indigenous settler commandos in the interior of the Cape Colony were not conducted on behalf of the colonial government. Therefore the commandos did not acquire any territory in terms of international law rules for the colonial government.¹⁵⁶ The fact that the Company conquered Jakarta from an indigenous community therefore also means that the rights in land of the Company at and around Batavia cannot be compared with its rights at the Cape.

The Company claimed an extensive territory subsequent to the conquest of Jakarta, but the occupation of the land around the settlement was a gradual process.¹⁵⁷ This may create the impression that land was acquired by occupation in the area surrounding Batavia as was done at the Cape. However, in the case of Batavia, the Company, as conqueror, had the right to dispose of land which was surveyed and registered and granted to the settlers.¹⁵⁸ In section 4.3.1.2 it is explained that due to the conquest of Jakarta and the surrounding area, the land became public property and the Company and its subjects became the owners of the conquered land. As conqueror, the Company had the power to dispose of the conquered land as it deemed appropriate. The granting of land in freehold to its subjects was therefore a transfer of the Company's ownership in the land to its subjects. As the Cape Colony was not conquered, the Company and the non-

¹⁵⁴ See note 142.

¹⁵⁵ See the remarks in sections 3.2 and 3.3.3.1 of Chapter 3.

¹⁵⁶ See notes 63 and 89 of Chapter 3.

¹⁵⁷ Van Rees (n 23 above) 276; Van Hoëvell (n 140 above) 244-245.

¹⁵⁸ See the remarks of De Groot referred to in section 4.3.1.2.

indigenous settlers never became the owners of the land that had not previously been occupied.¹⁵⁹

4.4.2 Comparison of the Cape Colony with the Dutch colonies where land was purchased from indigenous communities

At the Cape the only instance of purported purchase of land from indigenous communities took place in 1672.¹⁶⁰ The main obstacle for these transactions to be accepted as valid in terms of the domestic law of the Cape Colony, is that the descriptions of the land sold by the indigenous communities to the Company are not clear enough. The descriptions given by Bredekamp and Moodie of the land that was sold describe areas delimited respectively by—

- (a) in the case of the transaction of 19 April 1672, the coastline from Saldanha Bay to the Lion's Hill in Table Bay and also including Hout Bay; and
- (b) in the case of the transaction of 3 May 1672, the coastline of what is known today as False Bay.

The agreements apparently did not contain an indication of the limits of the land in the interior, merely referring respectively to the Cape district and Hottentots-Holland.¹⁶¹ In 1672 there was no demarcated area with the name of the Cape district and there never was a demarcated district called Hottentots-Holland.¹⁶² When these very vague descriptions of the land purportedly purchased from the indigenous communities at the Cape are compared with the detailed descriptions given in the conveyances of land between the indigenous communities of New Netherland and

¹⁵⁹ In other words the Company and the non-indigenous settlers could only become owners of demarcated land that they occupied.

¹⁶⁰ I discuss these purchases in the context of international law rules in section 3.2.2 of Chapter 3.

¹⁶¹ HC Bredekamp 'Die grondtransaksies van 1672 tussen die Hollanders en die Skiereilandse Khoikhoi' (1980) 2 *Kronos* 7-8; D Moodie *The record; or, a series of official papers relative to the condition and treatment of the native tribes of South Africa*. (1960) 317-318.

¹⁶² In *Visser v Du Toit* (1861-1867) 1 Roscoe 415 as discussed in the *South African Law Journal*, Mr Justice Watermeyer argued that if an accurate description is given of a piece of land in a grant an accurate diagram of that piece of land is not necessary, and vice versa. As motivation for this argument he refers to one of the transactions of 1672 and remarks that as that transaction is regarded as a proper cession of land without any diagram, it can be accepted that a proper description of the land ceded is sufficient. Although his argument may be valid, he erred in regarding the description as being sufficient in the circumstances. EF Watermeyer 'Mr. Justice Watermeyer's judgment in *Visser v. Du Toit*.' (1914) 31 *South African Law Journal* 39-40.

the *patroons*, it is clear that the descriptions of the land at the Cape were inadequate.¹⁶³

De Groot remarks that a buyer cannot buy a thing that already belongs to him.¹⁶⁴ Bredekamp is of the opinion that the only reason why the Company entered into these agreements 20 years after settling at the Cape, was to give legitimacy to the appropriation by the Company of the land of the indigenous communities that had already taken place.¹⁶⁵ Theal is of the opinion that the indigenous leaders were not conceding any land that they had not already lost.¹⁶⁶ There can be no doubt that large parts of the territory described in the contracts of sale already belonged to the Company and could therefore not be bought from the indigenous communities. The land used as grazing that was purportedly sold must also be regarded as a thing that does not form part of the normal legal traffic between private individuals.¹⁶⁷ I am of the opinion that the agreements of 1672 cannot be equated with the land transactions between the indigenous communities and the WIC and the *patroons* that preceded the settlement in New Netherland, as discussed above.

4.4.3 Comparison of the Cape Colony with the Dutch colonies where land was acquired by occupation

The early history of the settlement at the Cape and that of the settlement at Essequibo show remarkable similarities. Although the physical setting and the reason for the establishment of the two settlements were very different - in Essequibo the focus was on trade with the indigenous communities, whereas the colonial government at the Cape had to provide the Company's ships with vegetables and meat - their development was initially similar. When the officials of the Company and the WIC built their fortresses, they occupied the most suitable land and did not take the rights of the indigenous communities into account. In the first years of existence of the settlements, the respective Companies only utilised the

¹⁶³ O'Callaghan (n 109 above) 43, 44.

¹⁶⁴ Lee (n 43 above) 361.

¹⁶⁵ Bredekamp (n 161 above) 7.

¹⁶⁶ Theal (n 17 above) 197.

¹⁶⁷ The classification of the land used as pasture at the Cape is discussed in section 8.5.1 of Chapter 8.

land outside the fortifications to the extent that it was necessary to sustain themselves and fulfil their core functions.

However, as time passed, the colonies developed in different ways. The necessity to occupy land further away from the fortifications arose much sooner at the Cape than at Essequibo. For the Company to perform its functions properly, the agricultural and livestock farming activities at the Cape had to be expanded. The semi-nomadic nature of the expansion of the non-indigenous settlers to the interior of the Cape Colony led to the rapid increase of the territory of the Colony after 1700. In Essequibo non-indigenous settlers arrived on the scene to exploit the opportunities provided by the establishment of plantations. In the absence of any evidence to the contrary, it may be contended that the non-indigenous settlers in Essequibo also acquired the land for their plantations by occupation as was the case at the Cape. However, their activities were limited to the areas along the Essequibo River. In contrast, the non-indigenous settlers at the Cape were not compelled to stay in fertile places where they could make a living from agriculture. The wheat that they needed for subsistence could be grown on a small scale at any of the places where water and suitable land were available. The consequent rapid expansion that characterised the process of acquiring land by occupation in the interior of the Cape Colony means that it cannot be compared with the process in Essequibo.

4.5 Conclusion

In this chapter I establish that the manner in which land was occupied at the Cape, and especially in the interior of the Cape Colony, was unique in nature, for various reasons. This finding is based, in the first place, on the views of Robertson and Milton that the land tenure system in the Cape Colony was not transplanted from the Dutch Republic. In the second place, it must be accepted that the environmental circumstances and climatic conditions in the interior of the Cape Colony played a major role in creating a mode of occupation of land that was suitable for semi-nomadic livestock farmers. None of the other Dutch colonies established by the Company and the other Dutch role players had a climate that was conducive to the development of livestock farming as the primary agricultural activity in the colony. From the remarks in this chapter relating to the settlement patterns of the indigenous communities in the other Dutch colonies in the Atlantic Ocean area, it is also clear

that the said patterns differed from those of the indigenous communities in the Cape Colony. This was another factor that played a role in the development of a unique domestic law system relating to the occupation of land in the Cape Colony.

The officers of the Company and other Dutch role players who established colonies in remote places were more often than not men of action and not men of learning.¹⁶⁸ They were resourceful people who knew that they had to adapt to the circumstances around them rather than try to implement legal systems that were only appropriate for circumstances in Europe. However, notwithstanding the relative isolation of the various colonies, colonial officials were often transferred from one colony to another where they were able to apply the experience they had gained from the places where they had served previously.¹⁶⁹ This cross-pollination of ideas necessitates a study of the methods of acquisition of land and the development of land tenure systems in the settled colonies in the East Indies and the Atlantic Ocean area. Although there are minor similarities between the land tenure systems of the Cape Colony and the other Dutch colonies, the comparison of these systems confirms the view that the manner of occupying land at the Cape and in the interior of the Cape Colony was unique.

Colonial government officials often remarked in resolutions that the land in the Cape Colony belonged to the Company.¹⁷⁰ Although this may be a reflection of their ignorance of legal doctrine, there may also be another reason. From the discussion in this chapter it is clear that in the majority of the other Dutch colonies, the Company had much more extensive private law rights in the land it acquired than was the case in the Cape Colony. Chapters 3 and 5 make it clear that the Company had limited private law rights in land, because it was acquired by occupation. As the colonial government officials probably did not know about the different ways territory could be acquired, it can be accepted that they believed that the Company had the same

¹⁶⁸ Milton (n 16 above) 664 footnotes 52 and 53.

¹⁶⁹ Theal (n 17 above) 225.

¹⁷⁰ An example is the resolution of 1 July 1732, where the owners of allocated land are warned not to cultivate land outside their land beacons on '*Comps. grond*'. *Resolutions of the Council of Policy of Cape of Good Hope* C. 90, pp. 59–72. Other examples are resolutions made on 14 November 1724 and 19 July 1729, in which the colonial government regulated or prohibited the removal of firewood from certain parts of the territory which were regarded as the Company's land. *Resolutions of the Council of Policy of Cape of Good Hope* C. 71, pp. 253-260, C. 83, pp. 59-68.

private law rights in land in the Cape Colony as the rights they had in the other Dutch colonies.

5 The Company's private law rights in land

5.1 Introduction

In South African legal historiography it is accepted that the Company was the owner of the waste land in the Cape Colony and could therefore grant such land to the non-indigenous settlers.¹ This view was apparently adopted shortly after the second occupation of the Cape Colony by Great Britain,² either due to a failure to investigate the rights that the Company had in the land that it ostensibly granted, or through the unquestioned assumption that the Company was the owner of all waste land and could grant it to the non-indigenous settlers.³ In this chapter I contend that the accepted opinions regarding the Company's ownership and granting of waste land need to be reconsidered.

The writers who discuss the transactions between the Company and the non-indigenous settlers in terms of which land was given to the last named parties on a conditional basis⁴ are of the opinion that the settlers became the freehold⁵ owners of

¹ PhJ Thomas, CG van der Merwe & BC Stoop *Historical foundation of South African private law* (1998) 93; F du Bois & D Visser 'The influence of foreign law in South Africa' (2003) 23 *Transnational Law and Contemporary Problems* 596. The unacceptability of using the word 'grant' for the action of giving land to non-indigenous persons is discussed in section 5.3.2.4. Carey Miller remarks that the Company apparently assumed that its overlordship extended on an undefined and unlimited basis into the interior of the Cape Colony. He also remarks that there is a 'fundamental difficulty in purporting to exercise a property right over an undefined entity.' DL Carey Miller & A Pope *Land title in South Africa* (2000) 5.

² See Chapter 6 and the remarks in note 2 of Chapter 3.

³ The failure to conduct research into the question whether the Company had an underlying title in the land in the Cape Colony may possibly be ascribed to the fact that during the Company's government no controversy ever arose between the colonial government and the non-indigenous settlers on the question whether the last named were able to obtain a valid title to land by cession of land directly from an indigenous community. An example of a case where such a controversy had to be resolved is *Johnson and Graham's Lessee v William M'Intosh* 21 US 543 (*Johnson*). The United States of America Supreme Court had to decide whether the title in land obtained by certain non-indigenous settlers from indigenous communities constituted ownership in such land. For the relevant facts and legal question before the Court see *Johnson* (above) 550-560, 571-572.

⁴ In this chapter I refer to these transactions as 'land cultivation transactions'. I contend that these transactions were not concerned with giving land to the non-indigenous settlers, but were aimed at regulating the relationship between the Company and the non-indigenous settlers after the employment relationship between them was ended. In section 5.5 I contend that the purpose of the land cultivation transactions was not to grant land to the non-indigenous settlers, but to release them from the Company's employment and at the same time bind them to cultivate the land given to them. The land was given to them as compensation for the service of cultivating the land. The contracts therefore included a condition that it must be cultivated otherwise it would be forfeited.

⁵ Freehold is an English common law form of land tenure that does not relate to the domestic law of the Cape Colony. K Gray & SF Gray *Elements of land law* (2009) 59.

the land concerned.⁶ However, accepting that the non-indigenous settlers obtained ownership in the land they received presupposes that the States-General, as the sovereign of the United Provinces, or the Company, was the owner of such land. In this chapter I contend that neither of these institutions was the owner of the land concerned.

The writers mentioned above give no reasons for regarding the Company as the owner of the waste land at the Cape. It is possible that they assumed that the Company's charter conferred similar rights on it as the rights that the British sovereign conferred on the companies that were involved in the colonisation of North America. In this chapter the charters that were granted by the Dutch and British sovereigns to companies trading in Asia are contrasted with the charters that were granted by the same sovereigns to companies exploring the Americas and establishing trading posts there. This comparison reveals that the nature of the charters issued to the trading companies in Asia differs fundamentally from that of the charters issued to companies that played a pioneering role in establishing trading posts in unexplored parts of the Americas.⁷

An important difference between the charters granted to the Asian trading companies and the companies involved in the Americas, is that the first mentioned charters did not authorise the companies to appropriate land in Asia to establish colonies. Consequently, the question of granting land to officials or settlers was not addressed in these charters. In the case of the charters granted to companies interested in North America, the British sovereign specifically empowered the companies to appropriate land in North America to establish settlements. Concomitantly, the companies were authorised to grant parcels of the appropriated land to settlers.

⁶ 'Transfer and registration' (1887) 1 *Cape Law Journal* 319; CG Botha 'Early Cape land tenure' (1919) 36 *South African Law Journal* 15; G Denoon 'The development of methods of land registration in South Africa' (1943) 60 *South African Law Journal* 179; GG Visagie *Regspleging en reg aan die Kaap van 1652 tot 1806* (1969) 80; TRH Davenport 'Some reflections on the history of land tenure in South Africa, seen in the light of attempts by the state to impose political and economic control' (1985) *Acta Juridica* 54; Carey Miller (n 1 above) 4-5.

⁷ Apart from the settlements established on Taiwan and at the Cape, the Company either succeeded the Portuguese as principal European trade partner with Asian rulers or negotiated with Asian rulers to be included in existing trading networks. In the case of the Americas the companies had to establish their own settlements and had to engage with the indigenous communities to establish trade partnerships.

As the Company did not have the power either to appropriate land or to grant such land to settlers, the question how the concept of a grant of land came to form part of the domestic law of the Cape Colony is addressed in this chapter. To this end the legal nature of a grant of land is considered. As the power to grant land is based on the underlying ownership that the sovereign, as grantor, has in the land, the rights of the States-General in this regard are discussed. It transpires that the States-General had only limited jurisdiction as a landlord and therefore did not have any rights in the land at the Cape. I conclude that the concept of a grant of land is derived from the English common law doctrine of tenures.

It is common cause that prior to 1795 English common law did not form part of the domestic law of the Cape Colony. Therefore, other legal grounds must be found to explain the nature of the land cultivation transactions between the Company and the non-indigenous settlers. The application of the Roman law principle of acquisition of property by occupation is discussed in the context of the occupation of land by the Company at the Cape. I contend that the Company acquired ownership of the land that it occupied to erect its fortifications, government buildings and outposts and of the land that it cultivated and fenced. However, the Company could not acquire ownership by occupation of the land it used as pasture as such land was not clearly demarcated.

In terms of Roman-Dutch law it is legally impossible to confer greater rights in land on someone than the rights that you yourself have. As the Company was not the private law owner of the land that it used as pasture or of any other waste land, it could not confer ownership on the non-indigenous settlers of the land it gave to them to occupy and cultivate. I suggest that the legal relationship established between the Company and the non-indigenous settlers in terms of the land cultivation transactions was that of contract. As far as I could determine it has never before been suggested that the transactions concerned were contractual in nature and did not confer any rights in the land on the settlers. In order to substantiate my contention I discuss the Roman-Dutch law of contract to motivate my argument in this regard.

5.2 Different types of charters granted by the Dutch and British sovereigns

The traders and adventurers who took the lead in establishing the United Provinces and Great Britain⁸ as major European colonial powers obtained their authority to act from their respective sovereigns.⁹ In sections 5.2.1 and 5.2.2 the various charters that were used by the States-General and the British sovereign to authorise colonial enterprises are discussed and compared. In section 5.3.2 I contend that the charter of the Company did not authorise the Company to grant land to the non-indigenous settlers as was the case with the charters granted by the British sovereign for settlement in North America.

5.2.1 Powers conferred on the Company by its charter

The elimination of competition between the various Dutch trading companies that traded in Asia via the Cape of Good Hope sea route was an important reason for the establishment of the Company.¹⁰ These companies and the cities and provinces where they were based were loath to share the profits of their trade with Asia with each other. That meant that the initiative for the formation of one company with a trade monopoly to trade with Asian nations had to come from the States-General of the United Provinces.¹¹ To this end a charter (*octrooi*) was granted to the Company by the States-General on 20 March 1602. Of the 46 Articles in the charter it is only Articles XXXIV and XXXV that deal with the territorial jurisdiction and governmental powers of the Company.

5.2.1.1 Legal nature of the charter

The rights and obligations provided for in Articles XXXIV and XXXV, as well as XLIV, created a contract between the States-General and the shareholder-directors of the existing companies (*bewindhebbers*) who were also to be the main shareholders of

⁸ Although the letters patent referred to in this paragraph were issued by the English sovereign and not the British sovereign, I refer to Great Britain and the British sovereign to avoid unnecessary confusion. The colonies established in terms of the letters patent concerned all later formed part of what became known as the British Empire.

⁹ E Sanderson *The British Empire in the nineteenth century Volume I* (1898) 95.

¹⁰ G Schutte 'Die wêreld van die VOC' in C de Wet et al (eds) *Die VOC aan die Kaap* (2016) 16.

¹¹ J J Meinsma *Geschiedenis van de Nederlandsche Oost-Indische bezittingen* (1872) 24-25; C Schnurmann 'Wherever profit leads us, to every sea and shore...': The VOC, the WIC, and Dutch methods of globalization in the seventeenth century' (2003) 17 *Renaissance Studies* 478; D Gerstell 'Administrative adaptability: The Dutch East India Company and its rise to power' *Emory Endeavors in History: Volume III Navigating the Great Divergence* (2010) 51.

the Company.¹² Article XXXIV of the charter obliged the States-General to ensure that no other Dutch company or person would engage in trade with rulers or countries situated to the east of the Cape of Good Hope and west of the Strait of Magellan.¹³ Article XXXV of the charter conferred the right on the Company to enter into treaties and contracts with foreign rulers, recruit military personnel, engage in warfare, erect fortifications on foreign soil, appoint governors to rule over the fortifications and maintain law and order.¹⁴ By conferring these powers on the Company the States-General added political powers to the trading powers that were conferred on the Company by the rest of the Articles of the charter.¹⁵ Article XLIV of the charter obliged the Company to pay a certain amount of money to the States-

¹² O Gelderblom et al; 'An Admiralty for Asia: Isaac le Maire and conflicting conceptions about the corporate governance of the VOC' paper produced for the Erasmus Research Institute of Management (2010) 16. For the use of the phrase 'shareholder-directors' for the Dutch term *bewindhebbers* see 18 and JS Robertson 'Capitalism and accounting in the Dutch East-India company 1602-1623: An historical study of determining influences and practices' unpublished Doctoral dissertation, University of Wollongong, 2011 footnote 12 on 264.

¹³ François Valentijn included the Dutch version of the charter in his work *Oud en Nieuw oost-Indiën*, which was published in 1724. This copy of the charter is reproduced at <https://www.vocsite.nl/geschiedenis/octrooi.html> (accessed 1 October 2017): Article XXXIV provided as follows:

Ende op dat het voornemen van deze Compagnie met meerder vrugt mag uitgevoerd worden, tot welstand der geunieerde Provintien, conservatie ende augmentatie der neering, mitsgaders tot profyt van de Compagnie, zoo hebben wy de voorsz Compagnie geoctroyeert ende geaccordeert, octroyeren ende accorderen mits dezen, dat niemant, van wat qualiteit ofte conditie die zy, anders dan die van de voorsz Compagnie uit deze vereenigde Landen zal mogen vaaren, binnen den tyd van 21 jaaren eerstkomende, beginnende met dezen jaare 1602. inclus, Beoosten de kaap de Bonne Esperance, ofte door de straat van Magellanes, op de verbeurte van de schepen en goederen, blyvende in haar geheel de concessien voor dezen gegeven aan eenige Compagnie, omme te vaaren door de voorsz straat van Magellanes, behoudelyk datze hare schepen uit deze Landen zullen afzenden binnen 4 jaaren na dato dezes, op pene van te verliezen 't effect van de voorsz concessie.

¹⁴ These powers were conferred by Article XXXV of the charter. <https://www.vocsite.nl/geschiedenis/octrooi.html> (accessed 1 October 2017) which provides as follows:

Item, dat die van de voorsz Compagnie zullen vermogen Beoosten de kaap de Bonne Esperance, mitsgaders in ende door de engte van Magellanes, met de Princen ende Potentaten verbintenis te maaken, ende contracten op den naam van de Staaten Generaal van de vereenigde Nederlanden, ofte Hooge Overheden der zelve, mitsgaders aldaar eenige fortressen ende verzekerteden te bouwen, gouverneurs, volk van oorlog, ende officiers van justitie, ende tot andere noodelyke diensten, tot conservatie van de plaatzen, onderhouding van goede ordening, politie, en justitie, eenzaamelyk tot vordering ende nering te stellen, behoudelyk dat de voorsz gouverneurs, officiers, volk van justitie, en volk van oorlog, zullen eed van getrouwigheid doen aan de Staaten Generaal, ofte de Hooge Overigheid voorsz, ende aan de Compagnie, zoo veel de nering ende traffycque aangaat, ende die zullen de voorsz gouverneurs ende officiers van justitie afstellen, by zoo verre zy bevinden dat de zelve hen qualyk ende ontrouwelyk dragen, met dien verstande, dat zy lieden de voorsz gouverneurs ofte officiers niet en zullen beletten herwaarts over te komen, om haare doleantien ofte klagten, zoo zy eenige meenen te hebben, aan ons te doen, ende dat die van de Compagnie t'elker wederkomst van de schepen gehouden zullen wezen de Heeren Staaten Generaal te informeren van de gouverneurs, ende officieren, die zy in de voorsz plaatzen zullen hebben gesteld, omme haare commissie als dan geaggreëert ende geconfermeert te worden.

¹⁵ Schutte (n 10 above) 17; Gerstell (n 11 above) 51, 58; Meinsma (n 11 above) 27.

General as consideration for the privileges granted to the Company in Articles XXXIV and XXXV.¹⁶

5.2.1.2 The power to establish colonies in terms of the charter

It is not clear from Article XXXV if the charter conferred the power on the Company to wage war with the object of obtaining territory to establish colonies.¹⁷ The Company had the power to negotiate with the rulers of foreign nations and to enter into treaties with them. Flowing from these negotiations or treaties the Company could build and man fortresses erected on land obtained from the said rulers. The Company had the right to recruit soldiers to defend these fortresses from the attacks of any enemy.

In the first years after 1602 the Company established fortresses on the coasts of the territories where it had obtained trading rights. By 1609 the Company had 11 big and small fortresses on the islands that are today known as the Maluku Islands.¹⁸ It was only in 1609 that a governor-general and a board were appointed to act as the government of the Company's East Indian fortresses and trading posts.¹⁹ At that stage the Company had not even established a permanent seat for its new government in Asia.²⁰ At Jakarta, which later became Batavia, the capital of the Company on Java, the first governor-general of the Company had by 1611 only erected a warehouse.²¹

¹⁶ <https://www.vocsite.nl/geschiedenis/octrooi.html> (accessed 8 October 2017). Article XLIV provided as follows:

Ende tot erkentenis ende recognitie van dezen Octroye, ende 't gene voorsz is, zullen die van de voorsz Compagnie aan ons betalen de somme van 25000 ponden, tot 40 grooten Vlaams 't stuk, die wy inleggen in de equipage van de eerste 10 jaaren ende rekening, daar van tot profyt van de Generaliteit genoten ende gedragen zal winst ende risicque, gelyk alle andere Participanten in deze Compagnie zullen genieten ende dragen.

¹⁷ Schutte does not cite any authority for his statement that political powers were included in the Company's charter with the express purpose that the Company should wage war against Spain and Portugal. Schutte (n 10 above) 17. As the United Provinces were in a state of war against Philip II of Spain and Portugal in 1602, it would not have been necessary to include such a power in the charter.

¹⁸ A Pompe *Geschiedenis der Nederlandsche overzeesche bezittingen* (1872) 38-39.

¹⁹ Meinsma (n 11 above) 41;

²⁰ P Mijer *Verzameling van instructien, ordonnancien en reglementen voor de regering van Nederlandsch Indie* (1848) 9 and footnote 3 on 9.

²¹ Mijer (n 20above) footnote 1 on 15; Pompe (n 18 above) 41;

<https://www.vocsite.nl/geschiedenis/handelsposten/batavia.html> (accessed 4 October 2017); Schoeman refers to the ambitious plans of Governor-General Coen to develop a colonial empire in the East Indies and remarks that the Directors of the Company were not interested in establishing a colonial empire. K Schoeman *Armosyn van die Kaap: Voorspel tot vestiging, 1415-1651* (1999) 81.

In the first ten years after the establishment of the Company no effort was made to establish colonies at any of the locations where fortresses had been erected. It therefore appears that the Directors of the Company did not interpret Article XXXV of the charter as giving it the power to extend its territorial sovereignty to the areas surrounding the established fortresses.²² Such a conclusion is compatible with the fact that in the charter granted to the Dutch West India Company ('WIC') in 1621, the States-General expressly provided that the WIC should establish colonies.²³ The absence of a similar clause in the charter of the Company indicates that the States-General did not specifically confer the power to establish colonies on the Company.²⁴

Further evidence for this conclusion is the remark, made in 1684 by a director-shareholder of the Company, Coenraad van Beuningen, that the Company was not only a trading company but had evolved into a state.²⁵ He did not regard this situation as a positive development for the Company. The territorial expansion that had taken place had resulted in a huge financial burden for the Company. Van Beuningen and his colleagues regarded the money spent on the government of the

²² Article XXXV of the charter does not prohibit the Company from extending its territory around the fortresses that had been established. The Article therefore does not have a clear meaning in this regard and is open to interpretation. Van Warmelo illustrates that making use of the principle of interpretation in terms of which, where a clause in a contract is ambiguous, the subsequent conduct of the parties to the contract may be taken into account, has its roots in Roman law. P van Warmelo 'Die uitleg van kontrakte' (1960) 77 *South African Law Journal* 76 and footnote 38 on 76. In 1609, a court asked to interpret Article XXXV of the charter, would have been able to rely on this principle of interpretation to come to the conclusion that it was not the intention of the parties to the charter to authorise the Company to establish colonies in the East Indies.

²³ http://avalon.law.yale.edu/17th_century/westind.asp (accessed 12 October 2017). The English translation of Article 2 of the WIC charter provides as follows:

That, moreover, the aforesaid Company may, in our name and authority, within the limits herein before prescribed, make contracts, engagements and alliances with the princes and natives of the countries comprehended therein, and also build any forts and fortifications there, to appoint and discharge Governors, people for war, and officers of justice, and other public officers, for the preservation of the places, keeping good order, police and justice, and in like manner for the promoting of trade; and again, others in their place to put, as they from the situation of their affairs shall see fit: *Moreover, they must advance the peopling of those fruitful and unsettled parts, and do all that the service of those countries, and the profit and increase of trade shall require*: and the Company shall successively communicate and transmit to us such contracts and alliances as they shall have made with the aforesaid princes and nations; and likewise the situation of the fortresses, fortifications, and settlements by them taken. (Emphasis added.)

THPM Thomassen 'Instrumenten van de macht. De Staten-Generaal en hun archieven 1576-1796' unpublished Doctoral dissertation, University of Amsterdam, 2009 224; CH van Zyl 'The Batavian and the Cape plakaten An historical narrative' (1907) 24 *South African Law Journal* 139.

²⁴ Van Zyl (n 23 above) 138.

²⁵ FS Gaastra *De geschiedenis van de VOC* (1982) 53.

Company's colonies as money that should have formed part of the profits of the Company.²⁶

Boxer remarks that notwithstanding the non-expansionist sentiments of the Company Directors and some of the Governors-General of the Company in the East Indies, expansion did take place. He contends that once the Company became involved in the indigenous politics on Java, the expansion of its territory was inevitable.²⁷ The spread of the Company's influence in the Indian Ocean area is described by Ward as a network that developed between different nodes. The reason for the spread of the network and the establishment of nodes was the prospect of the profit that could be made at various locations. Some of these nodes were mere trading posts or factories that never developed beyond the establishment of a fortress, while others that were also established as trading posts developed into colonies like Batavia.²⁸ It can therefore be contended that the colonial expansion of the Company was caused by the circumstances that prevailed in Asia and not in terms of a right conferred by its charter.

5.2.2 The British sovereign's charters for trading and exploration

The charters that the British crown granted to persons interested in trading in Asia differed in important respects from those conferred on persons interested in trading and occupying land in North America. The different types of charters are discussed in this section.

5.2.2.1 The charters of the English East India Company

The London businessmen who initiated the establishment of the English East India Company ('English Company') sought to secure the trade with Asia as their

²⁶ Gaastra (n 25 above) 53; Boxer remarks that the conquest of Jakarta, which was the start of the Company's territorial expansion, was mainly to satisfy the governor-general JP Coen's ambitions as an empire builder and not pursuant to a policy adopted by the Directors of the Company. CR Boxer *The Dutch seaborne empire 1600-1800* (1965) 190.

²⁷ Boxer (n 26 above) 190, 193-194; Gaastra (n 25 above) 53-54. It is a historical fact that colonies did develop around some of the fortresses that were established by the Company. However, the reasons why these colonies developed are not discussed in this thesis.

²⁸ K Ward *Networks of empire: Forced migration in the Dutch East India Company* (2009) 55-56. Boxer, Gaastra and Ward's remarks indicate that the development of the Company's colonies was not pursuant to authority obtained from the charter. It is accepted that colonies developed on, for example, Java and Ceylon, and at the Cape due to the circumstances that prevailed there. G Oostindie & B Paasman 'Dutch attitudes towards colonial empires, indigenous cultures, and slaves' (1998) 31 *Eighteenth-Century Studies* 351.

exclusive domain. To achieve this purpose it was essential to include this privilege in a charter obtained from the British sovereign.²⁹ The charter guaranteeing the exclusive right to trade with Asia to the English Company was granted on 31 December 1600. This charter did not include any political rights comparable to the rights contained in Article XXXV of the Company's charter.³⁰ Several charters were granted to the English Company in the years up to 1661, but none included such political rights.³¹ This situation was changed by the charter granted to the English Company on 3 April 1661.³² In this charter the English Company obtained the power to appoint governors and subordinate officers who were authorised to erect and build 'castles, fortifications, forts, garrisons, colonies or plantations' at the places where the English Company had acquired the right to conduct trade.³³

The 1661 charter clearly provides that the English Company had the power to establish colonies or plantations. Therefore, the said charter conferred greater powers on the English Company than the powers conferred on the Company by its charter. In contradistinction to the Directors of the Company, the British sovereign realised that it was inevitable that colonies would develop around fortresses and granted the English Company the right to govern these colonies. It must be emphasised that the 1661 charter did not authorise the English Company to appropriate land on which colonies could be established. In an article discussing the charters granted by the British sovereign for exploration and settlement in North America, Carr remarks that, with two exceptions, the charters granted to the English Company were concerned only with trade and did not provide for land tenure.³⁴

In Asia, and more specifically the Indian subcontinent, the English Company had to obtain powers from local rulers or the emperor of the Mughal Empire in addition to the political powers granted to them in the British sovereign's charters.

²⁹ N Robins *The corporation that changed the world: How the East India Company shaped the modern multinational* (2012) 30-31; S Sivramkrishna 'From merchant to merchant-ruler: A structure-conduct-performance perspective of the East India Company's history, 1600-1765' (2014) 56 *Business History* 798.

³⁰ J Shaw *Charters relating to the East India Company: From 1600 to 1761* (1887) vi.

³¹ Shaw (n 30 above) iv.

³² Shaw (n 30 above) vi.

³³ Shaw (n 30 above) vi, 44, 45; Robins (n 31 above) 31; PJ Stern "'A Politie of Civill & Military Power": Political thought and the late seventeenth-century foundations of the East India Company-State' (2008) 48 *Journal of British Studies* 262-263.

³⁴ CT Carr 'Our manor of East Greenwich' (1913) 29 *Law Quarterly Review* 352.

Stern remarks that it was the grants received from Indian rulers that formed the basis for the establishment of the English Company's settlements and cities in India. The expansion into the interior from the three principal cities of the English Company was also made possible by grants received from Indian rulers.³⁵

5.2.2.2 Charters granted for exploration and settlement in North America

The first charters granted to explorers like John Cabot and his sons did not as a rule contain clauses granting ownership of the newly discovered lands to the explorer. The Cabots were commissioned to acquire ownership in such land for the British sovereign.³⁶ The charters granted to individuals like Humphrey Gilbert and Walter Raleigh during the sixteenth century required that they do homage to the Queen in exchange for the grant of any newly discovered land to them in terms of the English law of the period.³⁷ The charters that were granted to these individuals during the sixteenth century did not lead to the establishment of lasting colonies in North America.³⁸

At the beginning of the seventeenth century the British sovereign decided that granting charters to corporations would be a more successful strategy for colonising North America.³⁹ On 10 April 1606 the British sovereign, James I, granted a charter to two companies to establish colonies on the east coast of North America.⁴⁰ In terms of the first paragraph of this charter, these companies were given the royal licence to establish colonies on any territory not already occupied by a Christian ruler on the coast between 34° and 45° northern latitude.⁴¹ The charter purported to grant to the respective companies all the 'Lands, Woods, Soil, Grounds, Havens, Ports,

³⁵ Stern (n 33 above) 264-265. The three cities concerned are the cities which are today known as Mumbai (Bombay), Kolkata (Calcutta) and Chennai (Madras).

³⁶ Carr (n 34 above) 349.

³⁷ Carr (n 34 above) 349-350.

³⁸ JC Appleby 'War, politics and colonization 1558-1625' in N Canny (ed) *The origins of empire: British overseas enterprise to the close of the seventeenth century* (1998) 63-65.

³⁹ AED Howard 'The bridge at Jamestown: The Virginia charter of 1606 and constitutionalism in the modern world' (2007) 42 *University of Richmond Law Review* 10-11.

⁴⁰ The charter was granted to two companies respectively named the Virginia Company of Plymouth, which was granted the northern part of the territory concerned, and the Virginia Company of London that was to operate in the southern part of the territory. JM Blum et al *The national experience Part one: A history of the United States to 1877* (1981) 19.

⁴¹ 'The First Charter of Virginia; April 10, 1606' http://avalon.law.yale.edu/17th_century/va01.asp (accessed 25 October 2017).

Rivers, Mines, Minerals, Marshes, Waters, Fishings, Commodities, and Hereditaments' within 50 English miles from where the first settlement was made.⁴²

Carr remarks that the corporations that received grants were not natural persons who could do homage to the British sovereign in return for the grant. In order to provide for the legal relationship between the sovereign and the companies a special formula was included in the charter.⁴³ The final provisions of the charter granted to the Virginia companies in 1606 included a formula which provided as follows:⁴⁴

And finally, we do for Us, our Heirs, and Successors, and agree, to and with... of the said first colony, that We, our Heirs and Successors, upon Petition in that Behalf to be made, shall, by Letters Patent under the Great Seal of England, GIVE and GRANT unto such Persons, their Heirs and Assigns, as the Council of that Colony, or the most part of them, shall, for that Purpose, nominate and assign all the lands, Tenements, and Hereditaments, which shall be within the Precincts limited for that Colony, as is aforesaid, To BE HOLDEN of Us, our heirs and Successors, as of our Manor at East-Greenwich, in the County of Kent, in free and common Soccage only, and not in Capite.

The important part of this formula is that the companies would hold the land granted to them as of the royal manor at East Greenwich. These words introduced the doctrine of tenures into North America as it made it clear that the companies held the land as the tenants of the British sovereign.⁴⁵ The sovereign was able to grant land in North America because in terms of the doctrine of discovery the land formed part of the royal domain.⁴⁶ English legal theory provides that the sovereign holds all the waste land that forms part of the royal domain and may in terms of the royal prerogative grant parcels of such land to his subjects. As tenants of the sovereign, the charter obliged the companies to render service to him in the form of a fifth part of the yield of any gold or silver mines in the granted territory.⁴⁷

⁴² First Charter (n 41 above); J O'Mara 'Town founding in seventeenth-century North America: Jamestown in Virginia' (1982) 8 *Journal of Historical Geography* 3.

⁴³ Carr (n 34 above) 350.

⁴⁴ First Charter (n 41 above).

⁴⁵ Carr (n 34 above) 350, 352. Carr refers to various other charters granted by the British sovereign in which the 'manor of East Greenwich' formula is used. He also remarks that the charters granted to the English Company were concerned with trading rights and not tenure. Carr (n 34 above) 352.

⁴⁶ BH McPherson 'Revisiting the manor of East Greenwich' (1998) 42 *American Journal of Legal History* 37-38. With regard to the doctrine of discovery see the remarks in note 11 of Chapter 3.

⁴⁷ McPherson (n 46 above) 42.

The land granted to the companies would have been of limited value if the companies, as tenants, were not able to freely alienate parcels of land to new colonists arriving in North America. If a person or a company was a tenant in chief of the sovereign he had to obtain a licence from the sovereign to alienate the land. Failure to obtain such a licence could lead to forfeiture of the land.⁴⁸ In the case of the Virginia companies, the words 'not in capite' were included in the charter to exclude the necessity of obtaining such a licence.

In *Johnson*⁴⁹ Chief Justice Marshall described the legal effect of the charters granted by the British sovereign as follows.⁵⁰

These various patents cannot be considered as nullities, nor can they be limited to a mere grant of the powers of government. A charter intended to convey political power only would never contain words expressly granting the land, the soil, and the waters. Some of them purport to convey the soil alone, and in those cases in which the powers of government as well as the soil are conveyed to individuals, the Crown has always acknowledged itself to be bound by the grant.

To arrive at this conclusion, Marshall's point of departure was that the British sovereign had acquired the 'absolute ultimate title' to the land in North America in terms of the doctrine of discovery.⁵¹

5.3 The power to grant land in terms of the domestic law of the Cape Colony

The concept of a grant of land fits in comfortably with the British system of colonisation in North America as discussed in section 5.2.2.2. However, from the discussion in sections 5.2.1 and 5.2.2.1 of the charters of the Company and the English Company, it appears that the authority to grant land did not form part of the said Companies' charters. In this section the assumption that land was granted to the non-indigenous settlers at the Cape and the nature of grants of land are discussed.

⁴⁸ McPherson (n 46 above) 39, 44.

⁴⁹ See note 3 above.

⁵⁰ *Johnson* (n 3 above) 580.

⁵¹ *Johnson* (n 3 above) 592.

5.3.1 Conventional approach to land grants in the Cape Colony

Writers commenting on the events of 21 February 1657, when land was first given in ownership to non-indigenous settlers at the Cape, remark that the Company granted the land to the settlers.⁵² Historians dealing with these so-called grants have not questioned the power of the colonial government to grant land to the non-indigenous settlers. There has been no attempt by them to enquire whether the Company's charter gave it the power to appropriate land as its property and alienate it to other persons. However, in view of the discussion of the Company's charter in paragraph 5.2.1, I contend that the charter is not open for an interpretation that it conferred such rights on the Company. Therefore, the legal basis for the following statement by JA Truter, made on 28 June 1811, must be considered.⁵³

Another preliminary remark is, that the mother country must be considered by the law of nature and of nations to be the owner of the ground of this colony, so that all the right which individuals possess to lands must be conceived to have sprung from the bosom of the Supreme Government, that is the Sovereign.

Truter's remarks presuppose the existence in the Cape Colony of a domestic law doctrine similar to the doctrine of tenures. However, no territory was granted to the Company in terms of its charter. Consequently, the charter also did not provide for the alienation of land by the Company to other persons.

5.3.2 The power of the Company to grant land in the Cape Colony

In the absence of an underlying grant of territory to the Company, the question whether the Company could, in terms of the domestic law of the Cape Colony, grant land to the non-indigenous settlers is discussed in this section.

⁵² Visagie (n 6 above) 80; JWS Heyl *Grondregistrasie in Suid Afrika* (1977) 6. The Afrikaans authors refer to the grants as 'toekennings'. JRL Milton 'Ownership' in R Zimmermann & D Visser (eds) *Southern Cross: Civil law and common law in South Africa* (1996) 660; Carey Miller (n 1 above) 3.

⁵³ GM Theal *Records of the Cape Colony from March 1811 to October 1812* (1901) 94. These remarks formed part of Truter's report to Caledon regarding his investigation into the land use system in the Cape Colony under the rule of the Company. This report and others commissioned by the British colonial government in the years from 1809 are discussed in Chapter 6. As will appear from my remarks throughout this thesis there is a strong case to be made that writers on land law in South Africa tended to use this investigation of the British colonial government as a guideline regarding land tenures in South Africa during the colonial period.

5.3.2.1 Definition of a grant of land

The dictionary definition of the word 'grant' in the context of grants of land is:⁵⁴

To bestow or confer (a possession, right, etc.) by a formal act. Said of a sovereign or supreme authority, a court of justice, a representative assembly, etc. Also, in *Law*, to transfer (property) from oneself to another person, especially by deed.

The essence of this definition of a grant is that a person or institution gives a thing to another person or institution in a formal manner. The ordinary dictionary definition does not purport to indicate what rights the grantor confers on the grantee when the thing is transferred. The first legal dictionary for South Africa was published in 1910 and defined a 'grant' as follows:⁵⁵

In connection with land a *grant* is an original title issued by the Crown, with diagram attached, and duly registered in the Deeds Office. A *grant* contains all the conditions upon which the land is granted to the grantee. The *grant* of land is the fundamental title upon which all subsequent transfers of such land are based.

Although this definition gives a clear description of what the grantor confers on the grantee, namely the title in land, it does not explain why the grantor (the Crown) may confer the title in the land to the grantee. From the charters granted to the Virginia companies and the definitions of the concept of a grant, quoted above, it is clear that a grantee holds his land from the sovereign.⁵⁶ This is the central principle of the English common law doctrine of tenures.

5.3.2.2 The English common law doctrine of tenures

The classical formulation of the doctrine is contained in Blackstone's *The commentaries on the laws of England* and states as follows:⁵⁷

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

⁵⁴ 'grant, v.' *OED Online*. June 2017. Oxford University Press. <http://www.oed.com/uplib.idm.oclc.org/view/Entry/80766?rskey=XoYBHq&result=3> (accessed 14 July 2017).

⁵⁵ WHS Bell *South African legal dictionary* (1910) 251.

⁵⁶ McPherson (n 46 above) 38;

⁵⁷ RM Kerr *The commentaries on the laws of England of Sir William Blackstone, Vol II* (1876) 88-89.

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

In terms of this expression of the English common law, it is only the Crown that can have ownership of land in the British Isles while the Crown's subjects hold the land of the Crown as its tenant.⁵⁸ From Blackstone's remarks it can be deduced that the doctrine of tenures developed in the English common law as a direct result of the feudal system that was introduced into England after 1066 by William the Conqueror.⁵⁹

5.3.2.3 Nature of the relationship between the States-General and the Company

For the Company to have been able to grant land to the non-indigenous settlers in 1657 in the manner contemplated by Truter, it must have obtained such land as the vassal of a sovereign ruler.

5.3.2.3.1 *Theory that the Company was the feudal vassal of the States-General*

Hahlo remarks that the relationship between the States-General and the Company was analogous to the feudal relationship of lord and vassal. He remarks that the States-General was the owner (*'dominium eminens'*) of the Cape while the

⁵⁸ K Gray & SF Gray *Elements of land law* (2009) 64.

⁵⁹ SM Lobingier 'The rise and fall of feudal law' (1932-1933) 8 *Cornell Law Quarterly* 198-199; G Nettheim 'Wik: On invasions, legal fictions, myths and rational responses' (1997) 20 *University of New South Wales Law Journal* 495; JC Sonnekus 'Grondeise en die klassifikasie van grond as *res nullius* of as staatsgrond' (2001) *Tydskrif vir die Suid-Afrikaanse Reg* 98; U Secher 'The doctrine of tenure in Australia post-*Mabo*: Replacing the 'feudal fiction' with the 'mere radical title fiction' - Part 1' (2006) 13 *Australian Property Law Journal* 119-120.

Company, as its vassal, had the right to utilise the Cape (*'dominium utile'*).⁶⁰ In support of this statement Hahlo refers to the remarks made by Commissioner De Mist in the *Memorie houdende de consideratiën en advys van het Departement tot de Indische zaaken, omtrend den voet en wyze, waarop de Regeering van de Caab de Goede Hoop, eventueel zal behooren te worden ingericht* which he prepared for the Batavian government. De Mist's remarks are made in the context of an argument that he advances that the Batavian government was authorised to make radical changes to the previous form of government of the Cape under the Company. It appears that, although the Company had been dissolved, there were still parties in the Netherlands with vested interests and rights at the Cape who would have preferred it if the Cape Colony continued to be governed as it was under the Company. These parties apparently raised legal objections against a 'new Charter' being granted for the Cape Colony by the Batavian government.⁶¹ It is assumed that these objections were based on the argument that the Batavian government did not have the constitutional power to institute a new form of government for the Cape Colony.

The remarks of De Mist, referred to by Hahlo, are aimed at refuting any allegation that the Batavian government could not establish a new government in the Cape Colony. Consequently, he contends that the Company established its settlements on behalf of the States-General, the sovereign that commanded the allegiance of the Company. De Mist then states that the States-General acquired the ownership (*dominium eminens*) in the land of the territories that were acquired on its behalf.⁶² De Mist furnishes no reason why he applies the feudal concept of *dominium eminens* in this context.⁶³ De Mist remarks as follows after his discussion of the relationship between the States-General and the Company:⁶⁴

⁶⁰ HR Hahlo 'The genesis of South African law' in HR Hahlo & E Kahn (eds) *South Africa: The development of its law and constitution* (1960) 10-11.

⁶¹ KM Jeffreys *The memorandum of Commissary J.A. de Mist containing recommendations for the form and administration of government at the Cape of Good Hope, 1802* (1920) 171-172.

⁶² Jeffreys (n 61 above) 172.

⁶³ Sonnekus advances a detailed and well motivated argument contradicting the contention that traces of feudal law were received as part of the Roman-Dutch law that forms part of the common law of South Africa. Sonnekus (n 59 above) 92-93, 98. See also B Beinart 'The English legal contribution in South Africa: The interaction of civil and common law' (1981) *Acta Juridica* 31-32.

⁶⁴ Jeffreys (n 61 above) 172.

By virtue, then, of this supreme territorial sovereignty, and according to every possible interpretation of our Constitution, the State Government is fully qualified, and, (with all due respect be it said) is in duty bound *instantly* to revise and to change the form of government obtaining in the State Colonies, *should the force of circumstances render this necessary*. These reforms or changes should be framed to meet the needs of the State, and should take into consideration the greatest advantage of those who are entitled to the *Dominium Utile* of these Colonies. (Emphasis supplied in the original text.)

From these remarks it is clear that although De Mist used terminology that may be interpreted as referring to the feudal relationship of a landlord and his subordinate vassal holding land of him, he was in fact dealing with the question of sovereignty. In other words, he wished to make it clear that the States-General had been the sovereign of the Company and that the Batavian Republic as its successor acted as sovereign in the colonial territories of the former Company. As these remarks were made to confirm the sovereignty of the government of the Batavian Republic, Hahlo's remarks that they prove that the Company was the vassal of the States-General cannot be accepted.

5.3.2.3.2 *States-General as sovereign*

The States-General, as sovereign ruler of the United Provinces, cannot be equated with the British sovereign who was regarded as the feudal lord in whom all land in Great Britain vested. Fisher remarks that by the time the Dutch provinces rose up in revolt against the Spanish king, feudalism in the Netherlands was dead. The nobility and the clergy had by then been replaced by an urban middle class that was concentrated in the cities of Holland.⁶⁵ After Philip II of Spain was deposed as ruler of the Netherlands the States-General was entrusted with the responsibility of exercising his sovereign powers. The seven constituent provinces of the United Provinces conferred these powers on the States-General.⁶⁶ The States-General had no inherent sovereign powers, but performed the duties that the provinces delegated to it. The constituent provinces remained sovereign entities within the union of the provinces, but chose to limit their own sovereignty by delegating some of their

⁶⁵ HAL Fisher *A history of Europe* (1936) 596.

⁶⁶ Thomassen (n 23 above) 84-85.

powers to the States-General.⁶⁷ This arrangement meant that apart from certain conquered territories in the Netherlands, referred to as the *Generaliteitslanden*, the States-General did not have a domain like the British sovereign had. It could therefore not act as feudal lord over the whole territory of the United Provinces.

The *Generaliteitslanden* were territories conquered from neighbouring states or territories that previously formed part of one of the provinces, but were not given back to the province once they were re-conquered. In these territories the powers of the defeated sovereign were transferred to the States-General after the formal cession of the territory.⁶⁸ It is therefore clear that the States-General only had the power to dispose of land in conquered territories such as the *Generaliteitslanden*.

5.3.2.4 Conclusion with regard to the power of the Company to grant land in the Cape Colony

The definition of the word 'grant' in Bell's *South African Legal Dictionary* makes it clear that in 1910, when the *Dictionary* was first published, the concept of a grant of land was based on the English common law doctrine of tenures. Prior to 1795 that doctrine did not form part of the domestic law of the Cape Colony.

From the discussion of the powers of the States-General it is clear that, as sovereign, it did not have the inherent power to acquire ownership of land as a feudal overlord. It only had the power to dispose of land in territory that it had obtained by conquest. If the Company had acquired the land at the Cape by conquest it would, on cession of the conquered territory, have obtained the title to the land that belonged to the previous owner. However, it is common cause that the Company did not conquer the territory at the Cape.⁶⁹

Consequently, the States-General and the Company were not the private law owners of the land that was granted to the non-indigenous settlers. In view of the Roman law maxim *nemo plus juris transferre potest quam ipse habet* ('no one can

⁶⁷ Thomassen (n 23 above) 85-86.

⁶⁸ Thomassen (n 23 above) 204.

⁶⁹ See the remarks in section 3.2 of Chapter 3. See also the remarks in section 12.2 of Chapter 12 about the approach adopted in this thesis with regard to the conquest of territory in the Cape Colony.

transfer more rights to another than he himself has') it was legally impossible for the Company to transfer the right of ownership in the land to the non-indigenous settlers.⁷⁰ I am therefore of the opinion that referring to the events of February 1657 as the granting of land by the Company to the non-indigenous settlers is not correct. The use of the word 'grant' to describe these transactions leads to terminological confusion with the concept of a grant of land in terms of English common law. In the following paragraphs I consider an alternative approach and terminology to describe the transactions between the Company and the non-indigenous settlers.

5.4 Obtaining private law ownership of land in terms of the domestic law of the Cape Colony before 1795

The question of the legal grounds on which the Company could give the land at the Cape to non-indigenous settlers has, as far as I could determine, not been addressed.⁷¹ The purpose of the following sections is to discuss the legal principles that provided the Company with the authority to give land to the non-indigenous settlers. The conclusion in the preceding section, that the Company could not have been the private law owner of the land at the Cape, precludes an answer that the land cultivation transactions conferred ownership in the land, as the concept is understood today, on the non-indigenous settlers. Instead of accepting that the land was given to the non-indigenous settlers in 'freehold', the nature of the transaction between the colonial government and the non-indigenous settlers is analysed.⁷²

⁷⁰ The Roman law principle contained in this maxim has been described in modern textbooks as the 'golden rule' of the law of property. PJ Badenhorst et al *Silberberg and Schoeman's The law of property* (2003) 80.

⁷¹ It must be noted that Milton touched upon the subject of the Company's power to dispose of the right of ownership in land in the Cape Colony. He remarks that D van der Merwe appears to be of the opinion that the Company believed that it had this right based on occupation of the land. However, Milton does not investigate this assertion but merely states that the 'Company clearly proceeded on the basis that it enjoyed this power'. Milton (n 52 above) 660 footnote 14. Van der Merwe remarks that the Company 'assumed the right to dispose of the land'. He is of the opinion that the Company asserted the right because they regarded the land as uninhabited. D van der Merwe 'Land tenure in South Africa: A brief history and some reform proposals' (1989) *Tydskrif vir die Suid Afrikaanse Reg* 666. However, he does not expressly state that the Company had this right because it had occupied the land. Milton suggests that Van der Merwe believes that the Company may have obtained ownership of the land by '*occupatio*' and could therefore grant the land concerned.

⁷² Milton remarks that it is not clear what the colonial government meant when it spoke of 'ownership' in the context of the giving of the land to the non-indigenous settlers. He ventures the opinion that, because the colonial government consisted of laymen, instead of conferring ownership it had in mind 'some sort of quasi-feudal tenure'. Milton (n 52 above) 660. In these sections I expand on Milton's tentative suggestion that the non-indigenous settlers did not in fact become owners of the land concerned.

5.4.1 Use of Roman law principles in connection with acquisition of private law ownership in land

Van Warmelo remarks that Roman law assumed a subsidiary role in the civil law systems of Europe where Roman law was received. With the development of legal science in Europe, certain rules were developed that determined when the application of Roman law rules instead of the common law rules of a country was acceptable. The basic rule was that where the common law of a country did not have a rule to apply to a situation, the applicable Roman law rule would apply if it had not been abrogated by the law or custom of the country or was not repugnant to the common law of that country.⁷³ Kaser remarks that the Roman-Dutch law writers did not only refer to the *Corpus Iuris Civilis* as developed by Justinian but also relied on the classical Roman law principles when they provided a better solution to legal controversies of the day.⁷⁴ In view of this practice, Kaser is of the opinion that South African legal practitioners should also be willing to look beyond Roman-Dutch law principles when addressing legal problems for which the Roman-Dutch law does not offer a clear solution.⁷⁵ He therefore recommends that in cases where Roman-Dutch law does not offer clear answers to legal problems, suitable Roman law principles should be applied.⁷⁶

Writing in 1958, Van Warmelo remarks that 'even in modern times' it happens that a South African court will apply Roman law in its subsidiary role when there is not an applicable Roman-Dutch law rule to apply to the case before the court.⁷⁷ I contend that the further back one goes in the legal history of South Africa, the more common the use of Roman law is in its subsidiary role in our courts.⁷⁸

⁷³ P van Warmelo 'The function of Roman law in South African law' (1958-1959) 33 *Tulane Law Review* 567.

⁷⁴ M Kaser 'Klassieke Romeinse reg in die Suid-Afrikaanse praktyk' (1964) 27 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 178.

⁷⁵ Kaser (n 74 above) 178.

⁷⁶ As above.

⁷⁷ Van Warmelo (n 73 above) 573.

⁷⁸ In *E. Duffil v Executors of C.C. Duffil* 1900 21 NLR 1 the court remarked as follows at 4:
Where community of property prevails and this was the general --- almost universal ---rule in Holland no question of this character can practically arise. When community has been excluded entirely as was done upon this marriage, then, so far as the antenuptial contract does not apply, resort must be had to the Roman Law upon this subject. (Van Leeuw., Cens. Forens. 1.12.1); (Groen. Ad Leg. Ab. Ad Cod., 5.12.30), and it is I think clear from the authorities that the Roman Law as to the prohibition of donations between husband and wife applies to marriages governed by such antenuptial contracts as the present.

5.4.2 Roman law principles relating to occupation of movable things made applicable to the occupation of land in the Cape Colony

Benton and Straumann remark that Cicero, in his philosophical work *On duties*, anticipated the later development that the principles of Roman private law, like acquisition of property by occupation, would be applied analogously to public international law.⁷⁹ They refer to the writings of the Spanish scholar Vittoria as an example of the analogous application of the Roman private law principles of *res nullius* and *occupatio* to explain the acquisition of territory in terms of international law.⁸⁰

Although the Roman private law relating to the acquisition of things by occupation deals only with movable things, Benton and Straumann remark that it does not appear that only a closed list of things was susceptible to acquisition by occupation.⁸¹ I am of the opinion that if the Roman law principles of *res nullius* and *occupatio* can by analogy be made applicable to acquisition of territory in terms of public international law, it can for the reasons stated in the following paragraph also be made applicable to acquisition of land in terms of private law.

Van der Merwe remarks that it is unclear whether land can be *res nullius* and therefore susceptible to *occupatio*.⁸² He considers the question in the context of land being abandoned by its owner and becoming susceptible to being occupied by

This case was decided in 1900 and illustrates that questions regarding marriages excluding community of property were governed by Roman law. *Regina v Ungwaja* 1891 12 NLR 284 is another example of the application of Roman law in South African courts where Roman-Dutch law principles did not provide for the case. In this case the Chief Justice of Natal relied on Roman law principles to decide that incitement to commit murder even when no murder was in fact committed is a punishable crime. I am of the opinion that in the seventeenth and eighteenth century, when there was less legislation and Roman-Dutch law principles were still being formulated, the application of Roman law principles to situations would have occurred more often.

⁷⁹ L Benton & B Straumann 'Acquiring empire by law: From Roman doctrine to early modern European practice' (2010) 28 *Law and History Review* 13.

⁸⁰ Benton (n 79 above) 21.

⁸¹ Benton (n 79 above) 15. In his discussion of acquisition of ownership by occupation, Gaius does not refer to the acquisition of immovable things but only to the acquisition of wild animals and bees. EA Whittuck *Gai Institvtiones or institutes of Roman law by Gaius* (1904) 165. Commentators on the Institutes of Gaius, like Sohm, consequently also refer only to movable things that can be acquired by occupation but refer to more things than wild animals and bees. JC Ledlie *The institutes of Roman law by Rudolph Sohm* (1892) 237.

⁸² CG van der Merwe *Sakereg* (1989) 227.

another person. Although the Appellate Division, in *Minister of Landbou v Sonnendecker*,⁸³ by implication admits that abandoned land may become derelict, Van der Merwe points out that the majority of writers are of the opinion that such land becomes vacant land (*'bona vacantia'*) which accrues to the state.⁸⁴ Badenhorst considers the possibility that land can be acquired by private citizens by occupation in terms of domestic law. He is of the opinion that such acquisition can only take place if there is land available within the boundaries of the country that belongs to no-one (*res nullius*).⁸⁵ Pienaar is of the opinion that the forms of original acquisition of things in terms of Roman law, such as occupation, are not applicable to original acquisition of immovable property.⁸⁶ Badenhorst rules out the possibility that land can be acquired by occupation, as he contends that all unallocated land in South Africa is the property of the state. He specifically refers to the land within the boundaries of South Africa. The implication of his statement regarding boundaries must be that when a territory does not have fixed boundaries it will not be possible to identify the waste land within the territory. Logically, that means that in an unbounded territory, land that is not the property of a person or the state has to be waste land (*res nullius*).⁸⁷ In section 3.4.1 of Chapter 3 I refer to the fact that until 1798 the Cape Colony did not have a proclaimed northern boundary. Therefore, in the Cape Colony of the seventeenth and eighteenth centuries, Badenhorst's reason for rejecting occupation as a way of acquiring private law ownership of land falls away. In view of the above, I contend that Pienaar's viewpoint can only be accepted if his remarks are applied only to South African law of today.⁸⁸

⁸³ 1979 2 SA 944.

⁸⁴ Van der Merwe (n 84 above) 227. In a more recent publication Van der Merwe remarks that abandoned vacant land 'in all probability' accrues to the state. CG van der Merwe 'Things' in WA Joubert (ed) *Law of South Africa Volume 27 - Second Edition Volume* paragraph 263.

⁸⁵ Badenhorst (n 70 above) 140.

⁸⁶ G Pienaar 'The effect of the original acquisition of ownership of immovable property on existing limited real rights' (2015) *Potchefstroom Electronic Law Journal* 1481

⁸⁷ In this chapter the subject of acquisition of land is approached from the viewpoint of the Company, which was a European colonial power that implemented the Western-orientated Roman-Dutch legal system in its colonies. It must be borne in mind that the colonial government officials were not trained lawyers and were definitely not aware of the rights in land of the indigenous communities living at the Cape. The reference to the unallocated land as *'res nullius'* does not mean that I contend that the indigenous communities did not have rights in such land, but only that the colonial government officials were not aware of such rights.

⁸⁸ I am of the opinion that the different approaches adopted by writers on the subject of *bona vacantia* as discussed by Pienaar are not relevant for the purposes of this thesis. Pienaar (n 86 above) 1483 footnote 17. In other words, the fact that the majority of the writers contend that immovable property that becomes *bona vacantia* belongs to the state and does not become *res nullius* does not have persuasive force when discussing unallocated land in the Cape Colony prior to

5.4.3 Roman law requirements for acquisition of land by occupation

In view of my conclusion in section 5.4.2, I deem it appropriate to apply the Roman law principles relating to the acquisition of movable things by occupation to the acquisition of land by occupation at the Cape. Sohm remarks that in terms of Roman law, acquisition by occupation takes place when a person takes possession of a thing which belongs to no-one with the intention to become the owner thereof.⁸⁹

One of the characteristics of a thing is that it must be independent, in other words, it must be able to exist on its own. Academic writers agree that land is only a thing when it is identifiable as something distinct from the rest of the earth. Land can only be regarded as being independent when it is identifiable by means of a clear description or is depicted in a diagram.⁹⁰ There is no record that land occupied at the Cape was ever properly described or depicted on a diagram prior to the giving of land in ownership to the non-indigenous settlers in 1657. At the Cape the Company did not deem it necessary to survey the land on which it built its fortress and where it planted its garden. On the other hand, it cannot be doubted that the land on which the fortress was built had specific boundaries. Such land was therefore identifiable as something distinct from the rest of the earth. The same applies for any other buildings that the colonial government erected to conduct the Company's official business. I am of the opinion that the only manner in which the Company could become the private law owner of the land on which it erected its buildings was by occupation. As time went by the Company's garden was enclosed and its other enterprises, like the outposts where agricultural enterprises took place, assumed a fixed perimeter. Enclosing these premises or clearly demarcating the extent of the Company's land made these parcels of land sufficiently distinct to be regarded as things independent from the earth. Therefore, by the time that the Cape was

1798. Due to the absence of boundaries any claim that the unallocated land belonged to the Company would have meant that a large proportion of the African continent could be claimed as the private law property of the Company. See also the discussion in section 3.3.1 of Chapter 3 of the international law rules relating to effective occupation of territory, in terms of which a similar principle prevents huge territorial claims based on occupation of a small location on the coast of a continent.

⁸⁹ Ledlie (n 81 above) 237.

⁹⁰ Van der Merwe (n 82 above) 25; Badenhorst (n 70 above) 28-29; Sonnekus (n 59 above) 84; EF Watermeyer 'Mr. Justice Watermeyer's judgment in *Visser v. Du Toit*.' (1914) 31 *South African Law Journal* 37-38; C von Bar 'Why do we need *grundstücke* (land units), and what are they? On the difficulties of divining a European concept of 'thing' in property law' (2014) 22 *Juridica International* 4-5, 6.

surrendered to the British in 1795, the Company had acquired the government buildings (that were not bought from the non-indigenous settlers) and outposts that were still in its possession by occupation.

The colonial government either did not know or did not acknowledge that the indigenous communities living at the Cape had any rights in the land that it occupied. In terms of the domestic law that was applied by the Company at the Cape, the land did not belong to anyone.⁹¹ Sohm's definition of acquisition of a thing by occupation is therefore applicable to the land that the colonial government occupied.

In 1791 the Directors of the Company ordered the closure of the Company's outposts in the Cape Colony. Sleigh remarks that eight of the 33 posts still in existence at that stage were identified to be sold to the non-indigenous settlers.⁹² From this decision and the sale and transfer of the outposts to the non-indigenous settlers, it can be deduced that the Company from the start had the intention to become the owner of the land at the outposts and therefore had the right to sell the land.

I am of the opinion that all the essential requirements for the acquisition of a thing by occupation were met by the Company. In terms of the domestic law of the Cape Colony, the Company became the owners, in a private law sense, of all the land that was appropriated from the indigenous communities for the purposes of government buildings and outposts where agricultural activities took place.⁹³

5.5 Legal nature of the land cultivation transactions between the Company and the non-indigenous settlers

When the Company decided that there was a need for greater cultivation of the land at the Cape, it also decided that it would release its employees from their contracts to fulfil this function. The existence of an employer and employee relationship

⁹¹ The rights in land of the indigenous communities viewed from the perspective of the international law rules of the seventeenth century are discussed in note 67 of Chapter 3.

⁹² D Sleigh *Die buiteposte: VOC-buiteposte onder Kaapse bestuur 1652-1795* (2007) 730-731.

⁹³ See the discussion of the land used as pasture at the Cape as a public thing in section 8.5.1.2.2 of Chapter 8. The manner in which the colonial government dealt with land prior to 1657 is discussed in sections 8.2.2.1 and 8.2.2.2 of Chapter 8.

between the Company and the prospective non-indigenous settlers played an important part in determining the nature of the land cultivation transactions.⁹⁴ The Company negotiated with the prospective non-indigenous settlers from a position of strength and ensured that it would not be prejudiced by the release of the settlers from its employ. The contracts concluded between the Company and the non-indigenous settlers on their release from their employment contracts are discussed in the following sections.

5.5.1 Conditions on which land was given to the non-indigenous settlers

The purpose of the release of the non-indigenous settlers from their employment contracts in 1657 was not in the first place to give them land. This is clear from the entry in Van Riebeeck's journal for 21 February 1657. Van Riebeeck describes in broad terms the process that was followed to identify the land that had to be cultivated by the non-indigenous settlers, and which settlers were to be assigned to the two identified areas.⁹⁵ He then remarks that as the prospective settlers wanted to obtain their freedom as soon as possible and the Directors of the Company had indicated that they wanted the settlers to start to cultivate the land, they had decided, subject to the approbation of the Directors, to release the settlers on certain conditions. By proceeding in this manner the colonial government could ensure that the non-indigenous settlers would be able to get seed in the ground before the planting season ended.⁹⁶

⁹⁴ Van Kralingen sketches a stark picture of the circumstances of employees of the Company at the Cape. She remarks that due to the debts that the employees owed the Company they found it very difficult to get released from their employment contracts before these ended. She also remarks that even when the non-indigenous settlers were released from their employment contracts they remained bound to the Company by the debts they had incurred. L van Kralingen 'Justice and the Company: Economic imperatives in the *Journal of Jan van Riebeeck (1652-62)*' in A Bartels et al (eds) *Postcolonial justice* (2017) 257-259. It is accepted that after the land cultivation transactions of 1657, subsequent transactions involving non-indigenous settlers that were not employees of the Company included the same conditions. There was no reason why the colonial government would have deviated from including the same conditions in the contracts. In this regard see the remarks of Theal and Guelke regarding the giving of land in Stellenbosch. GM Theal *History of South Africa under the administration of the Dutch East India Company [1653 TO 1795] Vol I* (1897) 247-248. L Guelke & R Shell 'An early colonial landed gentry: Land and wealth in the Cape Colony 1682-1731' (1983) 9 *Journal of Historical Geography* 266. The reason for giving land to the non-indigenous settlers remained the Company's desire to make the Cape Colony self-sufficient by producing its own staples like wheat.

⁹⁵ DB Bosman & HB Thom *Daghregister gehouden by den oppercoopman Jan Anthonisz van Riebeeck Deel II 1656-1658* (1955) 100. The entry in Van Riebeeck's journal is repeated in essentially the same form in the Resolutions of the Council of the Cape of Good Hope for the same date. *Resolutions of the Council of Policy of Cape of Good Hope C. 1*, pp. 209-216.

⁹⁶ The relevant part in Van Riebeeck's journal reads as follows:

From these remarks it appears that the Company and colonial government's main concern was to ensure that the newly released non-indigenous settlers commence their farming activities. The relatively low importance attached to the act of giving land to the non-indigenous settlers is evident from the provisional conditions on which they were released from their service contracts. The boundaries of the land that was given to the first non-indigenous settlers were not defined or described in these conditions.⁹⁷ The conditions of their release stated that all the land that they were able to bring under the plough in a three-year period starting on 1 March 1657, would become theirs. The conditions provided that the land would be received in ownership (*in vollen eygendom sullen aenvaerden*).⁹⁸ However, the conditions suspended for three years the enjoyment of some of the rights that are accepted as forming part of the right of ownership. The conditions are in fact contradictory. In the first place it is stated that the land may be freely sold, leased or alienated after giving the necessary notice to the colonial government. The next sentence states that the land may not be alienated, sold or leased for a period of three years. From these contradictory provisions it appears that the colonial government had to tread a fine line between encouraging its employees to apply for release from their contracts and ensuring that the released employees would continue to do the Company's bidding. In other words, the colonial government knew that the non-indigenous settlers would be reluctant to work diligently at cultivating the land if they did not have the guarantee that the land would not be taken from them. On the other hand, if the colonial government allowed the non-indigenous settlers to deal with the land as they

Ende dewijle dan bovenstaende personen ten eynde voorsz. met bysondren ernst haer vrijdom sijn solliciteerende, ende de Compagnie haer aen de vorderinghe der culture door vrijeluyden, als gesegt, oock veele laten gelegen sijn, ende waertoe ons Haer Ed. per derselver generaele ende particuliere brieven wel expresselijck ordre hebben gesonden, mitsgaders oock bevolen den vrijeluyden in alle 'tgene nodich sij de handt te bieden, ten eynde 'tselve te eer ende beter begin ende voortganck mochte nemen, soo is, vermits den tijt hard naeckte om voor deselve dit saysoen noch partije coren in d' aerd te krijgen, oock goed gevonden de gemelte personen voorsz. haer vrijdom te vergunnen onder de navolgende condition, doch alles tot nader ordre ende approbatie van onsen Heeren Principalen meergemelt...

Bosman (n 95 above) 100. For the English translation of this passage see HB Thom *Journal of Jan van Riebeeck Volume II 1656-1658* (1954) 90-91.

⁹⁷ The areas where the two companies had to operate were identified. Presumably this was not done to indicate the boundaries of the land but to ensure that they did not interfere with each other. In terms of Roman-Dutch law the Company would not have been able to confer ownership on the non-indigenous settlers as the land was not demarcated and therefore did not constitute a thing. Sonnekus (n 59 above) 84.

⁹⁸ Thom (n 96 above) 91; Bosman (n 95 above) 100.

saw fit, the Company would be precluded from compelling them to cultivate the land and produce the crops that the Company needed.⁹⁹

With the visit of Commissioner Rijkloff van Goens to the Cape from 16 March to 19 April 1657, the conditions on which land was given to the non-indigenous settlers, discussed above, were apparently retracted as new conditions were issued on 14 April 1657.¹⁰⁰ The conditions on which the non-indigenous settlers would receive the land that they had to cultivate were now stated in a formal manner. The vague provision that the non-indigenous settlers would get all the land that they could cultivate in a three-year period was substituted with a proper description of the land, with measurements and a diagram made by a surveyor which was attached to the letter of freedom.¹⁰¹ However, the contradictory provisions that appeared in the conditions of 21 February 1657 were not removed. The argument that the non-indigenous settlers received this land in ownership as contemplated in South African common law is again contradicted by the condition that the land may not be alienated, let or sold for a period of 12 years. The English translation of this condition in the letters of freedom provides as follows:¹⁰²

that the same land, that is fit for the purpose, may without delay, be at once sown with wheat, rye, rice and other grain, and be taken possession of in freehold, and held without any tax for the space of 12 years, provided that the grantees shall not be permitted to sell, let or alienate the same, before the said 12 years shall have expired, and only then with the knowledge and consent of the Council aforesaid, instead of mortgage deeds...

The meaning of the phrase 'instead of mortgage deeds' in the conditions appears to be that the Company was willing to make loans of implements and provisions to the non-indigenous settlers against the security of being able to compel them to remain on the land given to them and produce crops that had to be sold to

⁹⁹ The rights that the non-indigenous settlers obtained in the land given to them by the colonial government are discussed in Chapter 10. It is contended in that chapter that as the non-indigenous settlers occupied a thing that belonged to no-one with the intention to own it, they acquired ownership in the land by occupation.

¹⁰⁰ Heyl (n 52 above) 6-7.

¹⁰¹ HCV Leibbrandt *Precis of the archives of the Cape of Good Hope: Letters despatched from the Cape, 1652-1662 Volume III* 262.

¹⁰² Leibbrandt (n 101 above) 262.

the Company.¹⁰³ The condition that the non-indigenous settlers would forfeit the land given to them if they did not ‘display sufficient diligence’ in cultivating their land was also included in the conditions of 14 April 1657. Another condition was that the non-indigenous settlers had to allow high roads to run over their land if the colonial government deemed it necessary.

5.5.2 Legal nature of the document containing the conditions

Analysis of the conditions on which land was given to the prospective non-indigenous settlers shows that the argument that the Company intended to give land to the settlers in ‘full’ ownership (*vollen eygendom*) cannot be sustained. As Milton points out, the imposition of irksome conditions together with the so-called grants reduced the alleged full ownership to ‘some sort of quasi-feudal tenure’.¹⁰⁴ The idea that these transactions were intended to transfer ownership from the Company to the non-indigenous settlers is also not supported by the analysis. The Company’s purpose with the conditions was to create an opportunity for the prospective non-indigenous settlers to be released from their employment contracts, while at the same time binding the released non-indigenous settlers by contract to still do as the Company demanded. The conditions created a contractual relationship between a non-indigenous settler and the Company or between groups of non-indigenous settlers and the Company.¹⁰⁵ The object of this contract was to ensure cultivation of the land units¹⁰⁶ given to the non-indigenous settlers and not to grant them land.

Thomassen remarks that the sovereign powers of the States-General included the power to grant its subjects *vergunningen, ontheffingen en vrijstellingen*.¹⁰⁷ The charter of the Company also conferred these powers on the

¹⁰³ HM Robertson ‘Some doubts concerning early land tenure at the Cape’ (1935) 3 *South African Journal of Economics* 163.

¹⁰⁴ Milton (n 52 above) 660. Although Milton’s argument that it was “feudal tenure” cannot be accepted in view of the remarks in paragraph 5.3.2.3, his remark that it was not full ownership that was conferred on the non-indigenous settlers must be accepted.

¹⁰⁵ Milton remarks that between 1657 and 1672, in every case where land was given to the non-indigenous settlers, the Company included conditions in the contracts which resulted in revenue accruing to the Company. Milton (n 52 above) 661. This revenue was not tax revenue stemming from legislation but revenue arising from the conditions in the contracts. The letters of freedom of 14 April 1657 exempted the non-indigenous settlers from paying tax on the land.

¹⁰⁶ Von Bar tentatively suggests that ‘land units’ may be an appropriate English translation of the German concept of ‘*grundstück*’. Von Bar (n 90 above) 4.

¹⁰⁷ Thomassen (n 23 above) 85.

Company by providing that it must make provision for the good government of the trading posts that it established. The Company deemed it necessary that land had to be cultivated by non-indigenous settlers that were not employed by the Company. As sovereign at the Cape the Company could enter into a contract that gave the prospective non-indigenous settlers the opportunity to obtain ownership in the land given to them.¹⁰⁸ The question regarding the nature of the rights in the land occupied by the non-indigenous settlers only arose when transfer of the land by a non-indigenous settler to another person took place.¹⁰⁹

5.5.3 Land cultivation transactions and Roman-Dutch law of contract

My contention that the land cultivation transactions of 1657 were based on a contract between the Company and the non-indigenous settlers diverges from the accepted view that the Company granted the land to the non-indigenous settlers in freehold. In this context I consider in the following sections the question whether Roman-Dutch law made provision for a contract in which land that was not its property could be used by the Company to compensate the non-indigenous settlers for the services rendered by them.¹¹⁰

5.5.3.1 Roman-Dutch law of contract applicable in the Cape Colony

Lee remarks that De Groot's *Inleiding tot de Hollandsche Rechts-geleertheyd (Inleidinghe)* was published in 1631 and 'at once took rank as a legal classic'.¹¹¹ He also remarks that this work of De Groot was made the basis of instruction in the lectures of prominent legal scholars and professors such as Scheltinga and Van der Keessel.¹¹² It can therefore be accepted that the Roman-Dutch law of contract that was in operation at the Cape in 1657 can be obtained from *Inleidinghe*.

De Groot characterises a contract as follows:¹¹³

¹⁰⁸ The political powers referred to in section 5.2.1.1 that were conferred on the Company in its charter made the Company the sovereign at the Cape.

¹⁰⁹ The nature of the rights that the non-indigenous settlers could transfer is discussed in section 10.2.1 in Chapter 10.

¹¹⁰ See the remarks in section 5.5.3.2.

¹¹¹ RW Lee *The jurisprudence of Holland by Hugo Grotius Vol I* (1926) vii.

¹¹² Lee (n 111 above) viii.

¹¹³ Lee (n 111 above) 295.

By 'contract' we mean a voluntary act of a man whereby he promises something to another with the intention that such other shall accept it and thereby acquire a right against the promisor.

De Groot points out that the rights conferred in a contract do not constitute real rights such as rights in property, but personal rights. Therefore, although a personal right may be directed at the acquisition of a thing, such a personal right will not give the right to ownership of that thing.¹¹⁴

In his general discussion of the type of contract where compensation is given in contradistinction to a gift, De Groot deals, amongst others, with a contract where one party performs certain acts and receives something in return from the other party. Lee translates his remarks in this regard as follows:¹¹⁵

Again, a dealing may be with compensation in the sense that something is done on one side, and something given on the other: then, if what is given is money, the contract is called letting and hiring, just as when money is given for the use of a thing; but if what is done consists in taking upon oneself another person's risk, the contract is called assurance: if the compensation for what is done consists in something other than money, and what is done takes the form of an hereditary duty of homage, military service, or other service, then the contract is termed a feudal grant: otherwise it has no special name.

5.5.3.2 Application of Roman-Dutch law of contract to the land cultivation transactions

In view of the purpose of the land cultivation transactions as discussed in sections 5.5.1 and 5.5.2, I am of the opinion that the transactions fall within the category of contracts where compensation is given and cannot be regarded as a gift. The non-indigenous settlers performed the service of cultivating land. This was a boon for the Company, because it could deploy its employees to fulfil other essential services, and its expenditure on salaries and wages was lowered. It must be borne in mind that the Company was the only purchaser of the crops produced by the non-

¹¹⁴ Lee's translation of De Groot's remarks in this regard reads as follows:

This personal right is sometimes directed to the acquisition of a thing: not that personal right gives ownership, complete or incomplete, or possession, but it gives the right to demand from a person the ownership or free possession; and in that case the duty is termed an obligation to give.

Lee (n 111 above) 295.

¹¹⁵ Lee (n 111 above) 337.

indigenous settlers and could therefore fix the price at a level that ensured that it profited from the deal.¹¹⁶

In return for the services that the non-indigenous settlers provided to the Company they were compensated with the right to occupy certain land units. In contradistinction to the events of the eighteenth century, when the non-indigenous settlers were able to occupy land in the interior of the Cape Colony without the permission of the colonial government, the said government controlled the land in the South-Western Cape where the land cultivation transactions took place. The subjects of the Company could not occupy any land there without the permission of the colonial government. Therefore, although the Company was not the owner of the land at the Cape, as sovereign it had the power to give authorisation to the non-indigenous settlers to occupy such land. The authorisation was compensation for the services rendered by the non-indigenous settlers, because as soon as they had obtained ownership of the land by occupation and the restrictive conditions regarding the alienation of the land fell away, they had a valuable asset.¹¹⁷

As I remarked in Chapter 4, the circumstances with regard to land at the Cape were unique in the experience of the Company both in the Netherlands and in its colonial territories. These circumstances made it possible for the Company to enter into a contract with the non-indigenous settlers that was also unique. From De Groot's remarks quoted in section 5.5.3.1, it is clear that this was a type of contract that fell in the same category as the contracts of letting and hiring, assurance and a feudal grant, but had no special name.

¹¹⁶ Fourie explains the use of this economic strategy by the Company in the context of the sale of meat at the Cape as follows:

The Company also intervened in the market to its own advantage: it gave out contracts to specific butchers, for example, who sold meat to the Company at a given, low price, and were recompensed for these losses by having a monopsony on meat sales to foreign ships, thus charging monopolistic prices.

J Fourie 'The quantitative Cape: 'Notes from a new historiography of the Dutch Cape Colony' Economic Research Southern Africa working paper (2013) 3.

¹¹⁷ In this and subsequent Chapters I refer to the giving of authorisations to cultivate the land by the Company as giving land to the non-indigenous settlers in order to avoid the use of the cumbersome phrase 'authorisations to cultivate land'. It must therefore be borne in mind that when I say that land was given to the non-indigenous settlers in terms of the land cultivation transactions, I mean that the authority to cultivate the land was given to them.

5.6 Conclusion

Neither international law nor the domestic law of the Netherlands or the Cape Colony provides a legal basis for a claim by the Company to be the private law owner of waste land at the Cape. Legal historians have either not investigated the question whether such a basis existed, or were satisfied that Truter's remarks regarding grants of land also covered the conduct and rights of the Company with regard to waste land.

In terms of the international law rules of the seventeenth and eighteenth century, as discussed in Chapter 3, the Company effectively occupied the Cape. However, in terms of the domestic law of the Cape Colony, the Company only acquired ownership of buildings and land units that were demarcated as things. This conclusion is based on the contention that the States-General, as sovereign of the United Provinces, was not a feudal landlord like the British sovereign. The English common law doctrine of tenures could therefore never be applied to land occupied by the Company in the name of the States-General. It was only in cases where territory was acquired by conquest that the States-General could obtain the sovereign rights of the defeated sovereign on formal cession of the territory. Furthermore, the Company could not obtain private law ownership of the land that it occupied, as its charter did not confer the political power of acquiring land for the establishment of colonies on it.

Although the Company controlled the waste land at the Cape it never became the private law owner of such land. From a legal viewpoint it could not grant land to the non-indigenous settlers. The Company was, however, able to enter into contracts with the non-indigenous settlers that authorised them to occupy the waste land that it controlled. These contracts contained conditions that cast serious doubt on the contention that it was the intention of the Company to confer full ownership of the land on the non-indigenous settlers. The condition suspending for a period of years the right of the non-indigenous settlers to dispose of their land, deprived them of an important entitlement forming part of the right of ownership.¹¹⁸

¹¹⁸ Badenhorst (n 70 above) 92-93.

The facts surrounding the allocation of land to the non-indigenous settlers at the Cape from 1657 onward, in my opinion, cannot support the theory that the Company granted the land concerned to the said settlers. As an alternative theory I contend that land was given to the non-indigenous settlers in terms of contracts that did not purport to confer ownership rights in the land on them, but conferred a conditional personal right to occupy the land on them.

In chapter 7 I discuss the introduction of elements of the English common law doctrine of tenures into the domestic law of the Cape Colony. The circumstances that led to the introduction of the fiction that the British sovereign is the ultimate lord of the land are discussed and the impact of the implementation of the doctrine of tenures on the rights in land of the indigenous communities in the study area, is discussed. In section 12.3.2 of Chapter 12 and section 14.4.1 of Chapter 14, I contend that the dispossession of land of the indigenous communities in the Northern Cape was the direct result of the introduction of the survey and sale of land in that region. I also contend that this form of dispossession was made possible by the erroneous introduction of the doctrine of tenures into the domestic law of the Cape Colony. The conclusion in this chapter that the Company never became the owner of the waste land in the Cape Colony, is crucial for this contention. The reasons given in Chapter 6 why the British colonial government believed that they were justified in introducing the doctrine of tenures in the Cape Colony are also important for the purposes of Chapter 7.

6 Investigation into the domestic land law system developed by the Company

6.1 Introduction

This chapter deals with the investigations of the British colonial government into the manner in which the Company gave land to the non-indigenous settlers.¹ During the first British occupation² the British colonial government took note of the existence of the loan place system³ without making any changes to the system.⁴ Similarly, during the Batavian period,⁵ the reform of the loan place system was considered but no material changes were made to it.

During the second British occupation the Governor, the Earl of Caledon, became aware of the problems that existed in the Cape Colony with regard to occupation of land and initiated an investigation into land matters.⁶ The findings and recommendations that were made with regard to the loan place system and submitted to Caledon are discussed in this chapter.

Caledon departed from the Cape Colony very shortly after the completion of the investigation. Consequently, no immediate action was taken to reform the land tenure system in line with the recommendations made by the fiscal JA Truter in his report. Caledon's successor as governor of the Cape Colony, Sir John Cradock, was the one who initiated the process of land reform. This process, which culminated in the publication of the Perpetual Quitrent Proclamation of 6 August 1813,⁷ is discussed in this chapter.

¹ The manner in which the Company gave land for cultivation to the non-indigenous settlers is discussed in Chapter 5, while the manner in which land used as pasture and grazing was given to non-indigenous settlers is discussed in Chapters 8 and 9.

² This chapter deals with the first British occupation from 1795 to 1803 and the second British occupation from 1806 to 1814. The word 'occupation' refers to the periods of British rule prior to the permanent cession of the Cape Colony to Great Britain.

³ The loan place system was one of the unique features of the land law system that developed during the Company's period of rule. The existence of the loan place system was one of the main reasons why the British colonial government instituted the investigations discussed in this chapter.

⁴ H Giliomee *Die Kaap tydens die eerste Britse bewind 1795-1803* (1975) 138

⁵ The Batavian period commenced on 21 February 1803 and ended on 18 January 1806.

⁶ JC Weaver 'Exploitation by design: The dismal science, land reform, and the Cape Boers, 1805-22' (2001) 29 *The Journal of Imperial and Commonwealth History* 12.

⁷ For the text of the Conversion of Loan Places to Perpetual Quitrent Proclamation see EM Jackson *Statutes of the Cape of Good Hope 1652-1905 Vol I, 1652-1879* (1906) 12-15.

Like Caledon before him, Cradock also deemed it expedient to consult persons with knowledge of the legal system and customs in the Cape Colony on the land tenure question. Cradock first requested inputs from the Colonial Secretary and Deputy Colonial Secretary and again consulted with Truter. The inputs of the President of the Court of Justice, WS van Ryneveld, were also requested.

After Cradock received permission from the Committee of Privy Council for Trade⁸ to proceed with his proposed reforms with regard to the granting of land and the loan place land tenure system, he drafted a memorandum in which he described the practical measures that had to be taken to commence with the reform process. The Perpetual Quitrent Proclamation, which was the result of the measures implemented by Cradock, provided in detail for the conversion of loan places into perpetual quitrent places.

Finally, the significance of the investigations discussed in this chapter is considered. I conclude that the investigations formed the basis for the extensive reform of the domestic land law system of the Cape Colony after 1814.⁹

6.2 Investigations during the first British occupation

The instructions issued to the Earl of Macartney, the first civil governor of the British colonial government, required him to furnish the British government with a comprehensive report on the basis on which land should be granted to non-indigenous settlers in the Cape Colony. From these instructions it appears that the British government intended to formulate a new policy with regard to the alienation of land in the colony.¹⁰ However, Macartney did not make any specific recommendations to the British government with regard to the alienation of land that could be used to formulate a new land grant policy.¹¹

⁸ I use the name of this Committee as given in the heading of the copy of the letter in Theal's *Records of the Cape Colony*. GM Theal *Records of the Cape Colony from March 1811 to October 1812* (1901) 494. In the rest of this chapter the Committee is referred to as the 'Privy Council Committee'.

⁹ The reforms made to the domestic land law of the Cape Colony are discussed in Chapter 7.

¹⁰ GM Theal *Records of the Cape Colony from December 1796 to December 1799* (1898) 14.

¹¹ Giliomee (n 4 above) 138.

On 5 January 1801, Sir George Yonge, the second British civil governor of the Cape Colony, in a letter to the Secretary for War raised the matter of the basis on which land should be granted in the colony. At the outset he remarked that, as was the case with the British colonial possessions in the East, the British colonial government of the Cape Colony was the owner of all the land in the colony. However, large areas of this territory had been granted to the non-indigenous settlers in loan at a trifling quitrent.¹² He stated that, notwithstanding the practice that the non-indigenous settlers could transfer the land loaned to them, it remained resumeable by the British colonial government.¹³ Yonge was of the opinion that the main factors inhibiting cultivation of the loaned land were the precariousness of the loan place system and the peculiar Roman-Dutch system of succession.¹⁴ He further remarked that large parts of the Karoo and the Cape Flats had not been granted to the non-indigenous settlers and belonged to the British colonial government.¹⁵ General Francis Dundas, who acted as governor of the Cape Colony after Sir George Yonge, was asked to give his comments on Yonge's recommendations with regard to the granting of land that belonged to the British colonial government. Dundas did not have any knowledge regarding Yonge's observations on the granting of loan lands and could therefore not comply with the British government's request. Instead he ventured his own opinion that, contrary to the accepted view, there were no major shortcomings in the existing loan place system. He conceded that once the British colonial government was no longer bound by the Articles of Capitulation,¹⁶ improvements could be made in the manner of granting loan land, but he did not recommend material alterations to the manner in which land was occupied.¹⁷

¹² GM Theal *Records of the Cape Colony from December 1799 to May 1801* (1898) 384-385.

¹³ Theal (n 12 above) 385. Yonge used the word 'resumeable' in his letter to indicate that the government had the right to take back land given in loan. According to the entry for the word 'resumable' in the *Oxford English Dictionary* the spelling used by Yonge and the Deputy Colonial Secretary was the accepted form during the eighteenth century. 'resumable, adj.' *OED Online*. March 2016. Oxford University Press.

<http://0-www.oed.com.innopac.up.ac.za/view/Entry/164077?redirectedFrom=resumable> (accessed 18 May 2016).

¹⁴ Theal (n 12 above) 385. Giliomee (n 4 above) 138.

¹⁵ Theal (n 12 above) 385.

¹⁶ The Articles of Capitulation leading to the first British occupation were signed on 16 September 1795 (see GM Theal *Records of the Cape Colony from February 1793 to December 1796* (1897) 127-130).

¹⁷ GM Theal *Records of the Cape Colony from May 1801 to February 1803* (1899) 119, Giliomee (n 4 above) 138.

6.3 Investigations during the Batavian period

In 1802, prior to the commencement of the Batavian period, JA de Mist drafted a report in which he made certain suggestions with regard to the future government of the Cape Colony under the Batavian Republic.¹⁸ When considering the improvements that should be made to agriculture in the Cape Colony, De Mist remarked that the precariousness of the loan place system made it imperative to dispense with it. He referred to the right of the non-indigenous settlers in loaned land as *dominium utile*.¹⁹ Consequently, he recommended that the loan place system should be abandoned in favour of a freehold system which would encourage the non-indigenous settlers to develop the land for agricultural purposes.²⁰ When De Mist arrived in the Cape Colony as Commissioner-General he implemented some of the suggestions that he had made in the report. His approach was that the Batavian colonial government should, apart from land used for essential public purposes, sell the land to the non-indigenous settlers.²¹ The public purposes contemplated by De Mist were land used as outspans or as pasture for working cattle in the vicinity of the cultivated farms in the Cape and Stellenbosch and Drakenstein districts.²²

The initial intention of the Batavian colonial government to abolish the loan place system as suggested by De Mist in his report of 1802 did not materialise. This is evidenced by the instructions that Governor Janssens issued to field cornets in 1805. From these instructions it is clear that the field cornets were still required to conduct an investigation when an application for a loan farm was submitted to the landdrost in the interior of the Cape Colony. The instructions provided that the field cornets had to ensure that the middle point of the loan place applied for was not within half an hour's walk in all directions of other land held in ownership, on quitrent or loan.²³ The field cornets also had to ensure that the middle point of the applicant's

¹⁸ For more information about this report as well as the Dutch title thereof see section 5.3.2.3.1 of Chapter 5.

¹⁹ The phrase '*dominium utile*' is defined in WHS Bell *South African Legal Dictionary* (1910) 188 as 'useful, indirect or equitable ownership; the term applied to the right of the emphyteuta in emphyteusis or quitrent tenure'. The applicability of '*emphyteusis*' in the Cape Colony is discussed in section 10.6.2 of Chapter 10.

²⁰ KM Jeffreys *The memorandum of Commissary J. A. de Mist containing recommendations for the form and administration of government at the Cape of Good Hope 1802* (1920) 207-208.

²¹ JP van der Merwe *Die Kaap onder die Bataafse Republiek 1803-1806* (1926) 140.

²² Van der Merwe (n 21 above) 141.

²³ TRH Davenport & KS Hunt *The right to the land* (1974) 3-4. Janssens' instructions formalised the practice that from the central beacon of the loan place there had to be an area covered by half an

loan place was not within half an hour of government land that was used or could be used for public purposes.²⁴

6.4 Investigation into the loan place system during Caledon's period of office

In the Laubscher case²⁵ the widow Laubscher and a neighbouring landowner contested the limits of the land outside the boundaries of their farms that they believed they had the permanent right to use as grazing.²⁶ The underlying cause of the dispute was that the executors of the deceased estate of Laubscher were desirous that the assets in his estate should be assessed at their maximum value. In order to achieve this outcome they petitioned the British colonial government to confirm that they were in fact the owners of the land concerned.²⁷ It appears that this land may have formed part of a loan place that was converted in terms of the control measure implemented in terms of Van Imhoff's instructions.²⁸ The claim may have been based on the argument of the non-indigenous settlers, that allowing them to sell their homesteads at a price that included the value of the land used for

hour's walk to the nearest land held in ownership, quitrent land, any other loan place or government land reserved for outspans. In this chapter I refer to this practice as the half-hour principle. In the report of the office of the Receiver-General of Revenue (discussed in section 6.4.1) an erroneous interpretation is given to the half-hour principle. If regard is had to governor Janssens' 1805 instructions to field cornets (see W Harding *The Cape of Good Hope Government Proclamations, from 1806 to 1825, as now in force and unrepealed; and the ordinances passed in Council, from 1825 to 1838 Vol I* (1838) 81-82), it is clear that it does not limit the extent of a loan farm. The instruction was merely to ensure that the central beacon of a new loan place was not awarded in the area within half an hour's walk from already occupied land. The instruction does not say that the boundary of the loan place, in a direction from the central beacon where there were no other loan places or government land, had to be only half an hour away. In other words, if a non-indigenous settler applied for land in a region where there was no other occupied land the half-hour principle did not apply.

²⁴ Davenport (n 23 above) 4.

²⁵ The Laubscher case involved the executors of the estate of the late J Laubscher. The case was about a dispute regarding the conversion into ownership of land used as grazing by the late Laubscher outside the boundaries of his property. Weaver (n 6 above) 29. As I was not able to locate an official report on the Laubscher case, my comments on this case are based on the remarks contained in the report of the Office of the Receiver-General and Truter's report as discussed in this chapter, as well as Weaver's comments.

²⁶ Weaver (n 6 above) 12. I use the phrase 'permanent right' as the non-indigenous settlers did not contend that the land that they used as grazing was granted to them in ownership or that it was leased to them. In other words, the non-indigenous settlers did not contend that the rights concerned were those of ownership or of lease. As the farms concerned were apparently converted in terms of Van Imhoff's instructions, the non-indigenous settlers presumed that they had a permanent right in the land they used as grazing around such farms for which they paid recognition. See also the remarks in the report of the office of the Receiver-General of Revenue to the Deputy Colonial Secretary. GM Theal *Records of the Cape Colony from May 1809 to March 1811* (1900) 431-432.

²⁷ Weaver (n 6 above) 12.

²⁸ See section 9.4.2 of Chapter 9 for the details regarding the control measure implemented in terms of Van Imhoff's instructions.

agricultural purposes and as grazing was a tacit concession by the colonial government that this land belonged to them.²⁹ Accepting the arguments of the non-indigenous settlers and admitting such a claim would have meant that the British colonial government conceded that—

- (a) the non-indigenous settlers obtained permanent rights in the land used as grazing under this control measure; and
- (b) the government could not contend that it was waste land that belonged to the British sovereign.

Governor Caledon realised that the contentions of the executors in the Laubscher case were based on views commonly held by the non-indigenous settlers who had loan places, with regard to their rights in the land used as grazing. As he regarded such claims as dangerous and absurd, he decided that a proper investigation had to be conducted into the legal basis of the loan place system.³⁰ He therefore approached the office of the Receiver-General of Revenue to conduct an investigation into the tenure systems of the Cape Colony.

6.4.1 Investigation by the office of the Receiver-General of Revenue

The report that was prepared by the office of the Receiver-General of Revenue was not presented in any logical sequence and is therefore analysed by dealing with the different subjects addressed in the report under appropriate headings.

6.4.1.1 Purpose of the *Oude Wildschutte Boeken* and description of the entries made therein

The report presented to the Deputy Colonial Secretary on 23 November 1810 by the office of the Receiver-General of Revenue lacks clarity. It does not present any logical arrangement of facts and conclusions based on these facts. Although the author³¹ of the report starts off with a reference to the points raised by the governor, he does not reveal what these points were.³² As a starting point the author refers to

²⁹ See section 9.5 in Chapter 9 with regard to the arguments of the non-indigenous settlers.

³⁰ Weaver (n 6 above) 12.

³¹ It is not known who the author of this report was, but it was signed by MC Gie of the office of the Receiver-General of Revenue on behalf of the Receiver-General JP Baumgardt, who was indisposed.

³² Theal (n 26 above) 428. Only a brief mention is again made of the governor's points at the end of the report (see the beginning of the second paragraph on page 433). However, it is only by

grants of an unspecified nature that were apparently made to inhabitants of Cape Town and which were recorded in the *Oude Wildschutte Boeken*.³³ It appears that these so-called grants were in fact hunting licences granted to the non-indigenous settlers to hunt in the interior of the Cape Colony.³⁴ Without explaining the connection between such hunting licences and the use of land as pasture, the author then remarks that as the inhabitants of the town increased, the availability of pasture decreased. The supposition is made in the report that, because the colonial government could not rely on the indigenous communities to provide the Company with livestock, the inhabitants of the town were encouraged to start breeding livestock. To this end the non-indigenous settlers who were so inclined could choose locations in the interior of the Cape Colony where they could breed livestock. When choosing locations as grazing for their livestock, the non-indigenous settlers were required to ensure that the land they applied for did not encroach on locations that had previously been given. The details regarding the locations which were used as grazing by the non-indigenous settlers were noted in the *Oude Wildschutte Boeken*.³⁵

6.4.1.2 Description of the nature of authorisations to utilise land issued after 1703

The next subject discussed by the author of the report is the authorisations to utilise land which were given out from 1703.³⁶ These authorisations are described as leases given by the governor and as grants for periods ranging from three to twelve months. The author was not precise in his use of terminology. He uses the words 'lease' and 'grant' without indicating whether he means that the form of tenure applicable to the granted land was that of lease or whether it was a different

reading a subsequent letter of the Deputy Colonial Secretary to Truter that it becomes apparent that the points are mentioned in the report (see Theal 467). See my discussion of this letter in section 6.4.2.1.

³³ The *Oude Wildschutte Boeken* are discussed in section 9.3.2.2.1 in Chapter 9.

³⁴ Theal (n 26 above) 428-429.

³⁵ Theal (n 26 above) 429. I am of the opinion that the only possible explanation for dealing with hunting licences in the report is that the *Oude Wildschutte Boeken* contained the details of both the hunting licences and the locations used as grazing.

³⁶ In this thesis I use the phrase 'authorisations to utilise' or the word 'authorisations' instead of licence or grant for the transactions concerning land that were registered in the *Oude Wildschutte Boeken*. I am of the opinion that using the word 'licence' in the context of grazing may cause confusion. Licensing today is concerned with motor vehicle and driver's licences and trading licences and does not relate to matters in connection with land. M Dendy 'Licensing' in WA Joubert (ed) *Law of South Africa Volume 15(2)* Paragraph 2.

transaction. He noted that the conditions on which the authorisations to utilise were made, differed according to whether the non-indigenous settlers were authorised to use the land for agricultural purposes or only as grazing. The type of authorisation to utilise was however the same in so far as—

- (a) the non-indigenous settlers were not required to give anything in consideration for the land;
- (b) the extent of the land that could be used as grazing was not defined; and
- (c) the non-indigenous settlers were prohibited from encroaching on each other's land used as grazing.³⁷

The part of the report dealing with authorisations to utilise land is concluded with a short discussion of the resolutions of 17 April and 3 July 1714 and 18 June 1715.³⁸

6.4.1.3 Investigation into the application of the half-hour principle

The author of the report tried to determine how the half-hour principle had been established.³⁹ The only fact that he could determine with certainty was that the colonial government had not adopted any legislation to establish the half-hour principle. He concludes that the principle had been applied for such a long time that it had become an established custom. He supports this conclusion by referring to the fact that the landdrosts and heemraden of the interior districts and the Commissioners of the Court of Justice decided disputes between non-indigenous settlers regarding the extent of a loan place by applying the half-hour principle.⁴⁰ He also refers to the instructions issued to the field cornets by the Batavian colonial government in 1805 to strengthen his argument that the half-hour principle had become an accepted practice. It appears that the author of the report regarded the acceptance by the colonial government of the half-hour principle as a contributing factor to the non-indigenous settlers' conviction that they had obtained permanent rights in the land loaned to them as grazing.⁴¹

³⁷ Theal (n 26 above) 429.

³⁸ See sections 9.3.1.3.1, 9.3.2.2.2 and 9.4.1.1 of Chapter 9.

³⁹ Theal (n 26 above) 430.

⁴⁰ Theal (n 26 above) 430.

⁴¹ Theal (n 26 above) 430-431.

6.4.1.4 Factors that convinced the non-indigenous settlers that they had permanent rights in the land given in loan

The author of the report discussed the actions of the colonial government that created the conviction with the non-indigenous settlers that the loaned land would not be resumed by the colonial government. The non-indigenous settlers were also confident that if the colonial government needed to resume the loaned land they would be recompensed for the improvements made on the land. The author of the report refers to the transfer duty resolution of 20 July 1790⁴² as a tacit confirmation by the colonial government that the non-indigenous settlers had permanent rights in the loaned land.⁴³ Although the colonial government had the right to revoke the loan of land, it was not a common occurrence for it to exercise this right. It was usually only exercised when it was necessary to utilise the loaned land for an important public purpose like the building of a drostdy.⁴⁴ In these cases the colonial government ensured that the non-indigenous settler who had to relinquish his loaned land was indemnified. The confidence of the non-indigenous settlers that the colonial government would act in an equitable manner when dealing with loaned land was not diminished by the revocation of the loans in such circumstances.⁴⁵

6.4.1.5 Discussion of the reasons why the non-indigenous settlers utilised the land outside their demarcated land as grazing

When discussing the conversion of loan places in terms of Van Imhoff's instructions, the author of the report considers the reason for the continued imposition of the 24 rixdollars recognition fee after the conversion.⁴⁶ He is of the opinion that the recognition was paid for maintaining the right to use part of the loan place as

⁴² See the discussion of this resolution and the effect thereof in section 9.5 in Chapter 9.

⁴³ Theal (n 26 above) 431.

⁴⁴ CG Botha 'Early Cape land tenure' (1919) 36 *South African Law Journal* 158

⁴⁵ See the remarks of W S van Ryneveld in his letter of 24 January to the Deputy Colonial Secretary. Theal (n 8 above) 259.

⁴⁶ See note 26. In terms of Van Imhoff's instructions the non-indigenous settlers could apply to the colonial government to have the homesteads and cultivated areas of their loan places converted into ownership. The non-indigenous settler could be asked to pay a once-off amount, based on the value of the converted homestead and cultivated land and a yearly recognition fee for the continued use of the remainder of the loan place. The Dutch monetary unit 'rixdollar' is defined in the *Oxford English Dictionary* as 'coin used as a monetary unit in Dutch colonies, esp. those under the control of the Dutch East India Company, or as the principal unit in Dutch colonial trade.' 'rix-dollar, n.' *OED Online*. March 2016. Oxford University Press.

<http://0-www.oed.com.innopac.up.ac.za/view/Entry/166484?redirectedFrom=Rixdollar> (accessed 20 March 2016).

grazing, after the 60 morgen of the loan place containing the homestead and agricultural land had been converted into freehold.⁴⁷ According to the author of the report, even in cases where non-indigenous settlers had been granted land in freehold or on quitrent, they used land as grazing that was situated outside the boundaries shown on the diagrams of their freehold or quitrent grants. The colonial government did not stop this practice of the non-indigenous settlers, who accepted that the use of land as grazing outside the boundaries of the land they owned or leased was allowed.⁴⁸ The author of the report also bases this conclusion on the fact that the landdrosts and heemraden of the interior districts and the Commissioners of the Court of Justice accepted the arguments of the non-indigenous settlers in this regard.⁴⁹

6.4.1.6 Discussion of the Laubscher case

The author of the report dedicated the majority of the report to the perceived rights of the non-indigenous settlers in the loaned land and the unallocated land outside the boundaries of their freehold land. At the end of his report he turns his attention to the Laubscher case. He states that the farm that Laubscher had held in freehold had a defined surface area and that there was no indication on the title deed that Laubscher had the right to use the land concerned as grazing. There was also no evidence that he had rented the land in question outside the boundaries of the farm.⁵⁰ The author of the report therefore concludes that Laubscher had no legal right to utilise land outside the boundaries of his freehold farm. However, he speculates that one of Laubscher's predecessors in title of the freehold farm may have had permission from the Governor to use the land outside the boundaries of the farm, as it was probably not utilised by any other person. That predecessor then used the land as grazing for such a long time that he assumed that he was entitled to the land. When the land was eventually bequeathed to Laubscher, he in turn assumed that he had the right to use the land and neglected to petition the colonial government to obtain the land concerned in freehold or on quitrent. The author of the report ventures the opinion that, because the widow Laubscher would have been

⁴⁷ Theal (n 26 above) 432. See also sections 9.4.2.1 and 9.4.2.2 of Chapter 9.

⁴⁸ Theal (n 26 above) 432.

⁴⁹ As above.

⁵⁰ As above.

disadvantaged due to her late husband's failure to formalise his rights in the land concerned, the Governor could make the benevolent decision to grant the said land to her.⁵¹

6.4.1.7 General observations by the author of the report

The report concludes with some general observations. For the purposes of this thesis, it is important to note that the author of the report observes that the colonial government followed a very irregular system of granting land to non-indigenous settlers and that the non-indigenous settlers did not pay heed to the admonition, made in 1732, not to encroach upon government land. The author also makes a recommendation with regard to the manner in which encroachment on government land could be controlled. Since the British colonial government did not give effect to this recommendation it is not necessary to discuss it.⁵²

6.4.1.8 Reaction to the report

From a letter of the Deputy Colonial Secretary to the Fiscal JA Truter dated 21 December 1810, it is clear that Caledon was not satisfied with the report submitted by the Receiver-General of Revenue and that he required a second opinion on the points raised by him.⁵³

6.4.2 Investigation by the Fiscal JA Truter

The dissatisfaction of Governor Caledon with the report of the Receiver-General of Revenue prompted the Deputy Colonial Secretary to look for a person who had specialist knowledge of the law applied in the Cape Colony, and of the customs that had developed with regard to the occupation of land, to conduct the investigation.⁵⁴ The Fiscal, JA Truter, fulfilled these requirements admirably. Truter was born in the Cape Colony and received his schooling in Cape Town. After obtaining his doctorate in law at the University of Leiden he chose to return to the Cape Colony rather than further his career in the Netherlands.⁵⁵ He became an officer of the Company and

⁵¹ Theal (n 26 above) 432-433.

⁵² Theal (n 26 above) 433.

⁵³ Theal (n 26 above) 467-468, 470, 471.

⁵⁴ Theal (n 26 above) 467.

⁵⁵ CG Botha 'Sir John Andries Truter, KT., LL.D, 1763-1845, Chief Justice of the Cape of Good Hope' (1918) 35 *South African Law Journal* 136-137.

was appointed to the office of the Fiscal Independent. In 1793 he was appointed as secretary of the Court of Justice. In the 10 years that he served in this post he became familiar with the legal procedure in the Cape Colony and acquired the knowledge of the local customs that he needed to further his legal career at the Cape.⁵⁶ After the second British occupation Truter left government service and practised as an advocate until his appointment as fiscal in 1809.⁵⁷

6.4.2.1 The Deputy Colonial Secretary's letter requesting Truter's assistance
The letter requesting Truter to investigate the land tenure systems at the Cape contains the specific points that the Governor raised with the office of the Receiver-General of Revenue. These points flowed from the papers submitted to the Governor by the executors of Laubscher's estate and were the following:⁵⁸

- (a) What was the origin of the loan place tenure system and what rights were acquired by the non-indigenous settlers in the loan places?
- (b) What was the origin of the perpetual loan place tenure system⁵⁹ and what were the rights acquired by the non-indigenous settlers under this system of tenure?
- (c) Where loan places had been converted into freehold property and a title deed and diagram registered accordingly, did the owner of the freehold property obtain any rights in the land falling outside the boundaries indicated in the diagram?⁶⁰
- (d) Did the non-indigenous settlers to whom freehold land was granted obtain any rights in the waste lands or commonage outside the boundaries of their freehold property? If so, did such rights depend on the size of the freehold property?
- (e) What were the exceptions to the rules under which the non-indigenous settlers could claim their rights in terms of the land tenure systems current in the Cape Colony?⁶¹

⁵⁶ Botha (n 55 above) 137-138.

⁵⁷ Botha (n 55 above) 140.

⁵⁸ I have redrafted the points in the form of questions to make it more user-friendly for the purposes of this thesis.

⁵⁹ The perpetual loan place tenure system is the control measure implemented in terms of Van Imhoff's instructions. It is discussed in Chapter 9.

⁶⁰ Truter addressed points (b) and (c) together in his report. Theal (n 8 above) 100.

⁶¹ Theal (n 26 above) 467.

In addition to furnishing Truter with the points on which the Governor wanted information, the Deputy Colonial Secretary included some of his own views on the situation with regard to the land tenure systems of the Cape Colony. He was of the opinion that the Directors of the Company had not issued regular and detailed instructions with regard to the allocation of land in the colony. On the basis of this opinion he contended that the colonial governors granted land to the non-indigenous settlers, which the last-mentioned probably knew to be nominal cessions that were resumeable at pleasure.⁶² As far as the loan place system is concerned, it appears that the Deputy Colonial Secretary was of the opinion that this tenure system resulted in land not being used optimally.⁶³ He raised one specific point of criticism on the report of the Receiver-General of Revenue. He remarked that one argument in the report could not be accepted. This was that the practice of the non-indigenous settlers to encroach on the land falling outside the boundaries of their freehold or quitrent property received tacit acceptance from the colonial government. According to him the author of the report placed too much reliance on the inaction of officers like landdrosts in the interior of the Cape Colony who did not enforce the prohibition of 1732 against encroachment. His point was that the officials of the Company were as a rule not diligent enough and that such dereliction of duty could not lead to the derogation of the colonial governments' rights in the land that was not owned or leased by the non-indigenous settlers.⁶⁴

Although the Deputy Colonial Secretary admitted that he did not have the necessary skills or knowledge regarding the contents of the old colonial records to deal with or to express an opinion on the points raised by the Governor,⁶⁵ his views regarding the rights that the British colonial government had in the land may have had an influence on Truter in conducting his investigation.⁶⁶

⁶² Theal (n 26 above) 468.

⁶³ Theal (n 26 above) 469.

⁶⁴ Theal (n 26 above) 470.

⁶⁵ Theal (n 26 above) 471.

⁶⁶ Weaver (n 6 above) 11. This view is strengthened by the fact that Truter supported the Deputy Colonial Secretary's criticism of the Receiver-General of Revenue's report with arguments that are irrelevant to the points raised by the Receiver-General (see Theal (n 8 above) 104-105).

6.4.2.2 Truter's investigation and report

Truter submitted his answer to Caledon's enquiry regarding the tenure systems of the Cape Colony on 28 June 1811, only one week before Caledon left the colony. His approach was much more systematic than that of the Receiver-General of Revenue. In the first part of the report he sets out the principles that he believed were important when distributing land in the Cape Colony. He also conducted a historical overview of the land tenure systems in the colony and identified the 'principal titles of possession'.⁶⁷

6.4.2.2.1 *Background information in the report*

The opening statements of Truter's report deal with his views on how land should have been distributed in the Cape Colony so as to have contributed to the prosperity of the colony. He contends that there had to be regularity in the manner in which land was distributed and that the non-indigenous settlers had to be certain that their possession of the land was secure.⁶⁸ After a brief discussion of the ways in which the colonial government allocated land to the non-indigenous settlers, Truter states that he will address the points raised by Caledon against the background of the three 'principal titles of possession' in the colony, namely freehold property, quitrent property and loan places.⁶⁹ Having stated the general premises on which he wanted to proceed, Truter sets out the points raised by Caledon in exactly the same manner as was done by the Deputy Colonial Secretary in his letter of request.⁷⁰

Before addressing the said points Truter deems it necessary to give an explanation of how he understood the concept of a 'right' in land. In his opinion each title of possession had a certain nature and the rights of the possessor were determined by that nature. As I understand this statement, Truter meant that, for

⁶⁷ In order to avoid unnecessary repetition of facts I do not include historical background facts mentioned in Truter's report that are discussed elsewhere in this thesis. For example, Truter dealt with the origins of loan places by stating that the origin of the system was the giving out of loan land without any consideration being given in return. See Theal (n 8 above) 95. I discuss the giving of loan land for no consideration in sections 9.3.1.1.2 and 9.3.1.1.3 of Chapter 9. I limit the discussion in this section to new facts uncovered by Truter in his investigation and to his assumptions and conclusions with regard to all the available facts.

⁶⁸ Theal (n 8 above) 92.

⁶⁹ Theal (n 8 above) 93-94.

⁷⁰ See section 6.3.2.1.

example, the nature of the title of possession of freehold property was that it was granted subject to standard restrictions like the following—

- (a) the land had to be cultivated to its fullest capacity or it could be forfeited to the colonial government;
- (b) the owner had to pay the colonial government a tenth of the harvest; and
- (c) the government could build a road on the freehold property without indemnifying the owner.⁷¹

The colonial government could only exercise the rights in the freehold land that were specifically conferred on them by the grant. In other words, the greater the rights of the holder of the title of possession, the smaller were the rights of the colonial government.⁷² His interpretation of a right in land obviated the need to investigate whether the non-indigenous settlers obtained any rights, in terms of the domestic law, by occupying and cultivating the loan places.⁷³

Another important preliminary matter addressed by Truter is his assumption regarding the ownership of land not held in freehold in the Cape Colony. By merely stating that all such land in the Cape Colony belonged to the Crown in terms of the law of nature and of nations, he obviated the need to discuss the rights in land that the predecessor in title of the British sovereign, the Company, had had.⁷⁴

6.4.2.2.2 *Truter's analysis of the loan place system*

The first assumption Truter makes in addressing the first point raised by Caledon⁷⁵ is that in terms of the resolutions of 17 April and 3 July 1714

the grant, which to that time *was a gratuitous loan for use* was converted into a letting, that is a concession of the use of the land for a certain time on payment of a fixed sum.⁷⁶

⁷¹ JRL Milton 'Ownership' in R Zimmermann & D Visser (eds) *Southern Cross: Civil law and common law in South Africa* (1996) 661.

⁷² Theal (n 8 above) 94.

⁷³ Truter accepted that the British sovereign was the owner of the land that had been given out as loan places. Consequently, the non-indigenous settlers had such precarious rights in land that it was not necessary to try and determine the nature of such rights.

⁷⁴ Theal (n 8 above) 94. See section 5.3.2 of Chapter 5 for the discussion of the applicability of the doctrine of tenures, on which Truter's contention in this regard is based, in the Cape Colony prior to 1795.

⁷⁵ Rephrased as question (a) in section 6.4.2.1.

⁷⁶ Theal (n 8 above) 95. The part of the quotation in italics appears in italics in the reproduction of Truter's report in Theal's *Records of the Cape Colony*.

Truter does not give any reason for making this assumption. I therefore accept that he relied on his preliminary assumption that the British sovereign was the owner of all waste land in the Cape Colony. This enabled him to place the British colonial government in the position of a landlord that could lease its land to the non-indigenous settlers, subject to the conditions that it wished to impose. When making this assumption, Truter states that the land was leased by the colonial government to the non-indigenous settlers—

- (a) for a certain time; and
- (b) at a fixed sum.

Truter's conception of the non-indigenous settlers' rights in land under the loan place system also becomes clear from his discussion of the first point raised by Caledon. Prior to 1714 the authorisations to utilise land were a gratuitous concession by the colonial government to the non-indigenous settlers to use land. Truter remarks that

as long as the loan places were only gratuitous concessions the withdrawing of such grants and the ceding of such places to others required nothing more than the simple will of the Government without that the person who for the time had gratis the use of Government ground could, with even a shadow of reason, demand a longer enjoyment of such mere favor [sic] contrary to the will of Government.⁷⁷

Truter therefore contends that, prior to 1714, the rights that the non-indigenous settlers had in a loan place under the loan place system were very insecure. This is evident from his remark that the non-indigenous settlers occupied a loan place as a mere favour from the colonial government. In the light of the remarks quoted above, Truter's definition of a right in land, as discussed in section 6.4.2.2.1, can be illustrated in equation form as follows:

Nature of loan place land tenure prior to 1714 = Gratuitous concession
 Rights conferred on non-indigenous settlers by a gratuitous concession =
 Favour retractable at the will of the colonial government = Mere right to use
 land in a certain location as grazing without encroachment by other settlers.

⁷⁷ Theal (n 8 above) 95.

According to Truter, the resolutions of 1714 made the rights of the non-indigenous settlers in the loan places more secure.⁷⁸ After the publication of the resolutions in 1714, the non-indigenous settlers were obliged to pay recognition and a percentage of the crops produced for the loan places. These payments ensured that the non-indigenous settler could use the loan place for agricultural purposes and as grazing for a year.⁷⁹ This meant that the colonial government could no longer withdraw the loan of land *at will* as was the case prior to 1714. However, Truter was clearly reluctant to conclude that the non-indigenous settlers had any rights in a loan place that prevented the colonial government from taking back the land.⁸⁰ In his opinion there was not the slightest doubt that the British colonial government had, in circumstances where the welfare of the colony or the interests of the government required it, the right to withdraw the grant of a loan place.⁸¹ The only limitation that he was willing to admit to was that, where improvements like homesteads and cultivation had been made on the land, the British colonial government would have to indemnify the non-indigenous settler whose grant was withdrawn.⁸²

Truter's report is the first that refers to mineral rights. He observes that the non-indigenous settlers were only authorised to use the loan places for agricultural purposes and as grazing and that if any minerals were discovered, the right to exploit the minerals belonged to the colonial government as owner of the land.⁸³

6.4.2.2.3 *Truter's analysis of the perpetual loan place tenure system*

Truter did not regard the control measure instituted in terms of Van Imhoff's instructions as a separate title of possession.⁸⁴ He remarks that he initially regarded the perpetual loan place tenure system as viable and that he was of the opinion that the payment of the 24 rixdollars' recognition indisputably entitled the non-indigenous

⁷⁸ See the discussion of the 1714 resolutions in sections 9.3.1.3 and 9.3.2.2.2 in Chapter 9.

⁷⁹ As above.

⁸⁰ Theal (n 8 above) 96.

⁸¹ Theal (n 8 above) 97-98. As an example of an instance where the interests of the colonial government required that a loan of land had to be revoked, Truter refers to the resolution of 26 February 1793 which determined that the official butchers of the Company needed the pasture at Groene Cloof. Consequently, the colonial government resolved that the grant of the loan place Yzer Fontein would be withdrawn and that another loan place would be given to the non-indigenous settler concerned.

⁸² Theal (n 8 above) 98.

⁸³ Theal (n 8 above) 98.

⁸⁴ See note 59 for the meaning of the perpetual loan place tenure system.

settlers to use the remainder of the converted loan place as grazing.⁸⁵ However, he changed his mind when he started his in-depth investigation into the system. According to the report, he could find no argument in support of the contention that the non-indigenous settlers obtained such a right in the remainder of the converted loan place. Consequently, he concludes that the land converted in terms of the perpetual loan place tenure system became freehold property. Truter's interpretation of the *erfgrondbriefs* that he studied was that the owners of loan places converted to freehold in terms of the Van Imhoff control measure, did not obtain any more rights, such as a right to grazing, than those held by other freehold owners of land.⁸⁶

6.4.2.2.4 *Truter's discussion of the use of waste land outside the boundaries of freehold and quitrent property*

Truter's remarks with regard to the use of waste land outside the boundaries of freehold and quitrent property are important, because they elucidate his conception of the rights of the British sovereign in waste land. The approach adopted by Truter in order to address Caledon's question was to study the written documents in terms of which land was granted in freehold. From these documents he determined that the non-indigenous settlers did not obtain the right to use land as pasture outside the boundaries of their freehold land. He remarks that the exceptions that were made in certain circumstances proved that no general right to use land outside the boundaries of freehold and quitrent properties was conferred on the non-indigenous settlers.⁸⁷

The exceptions that he refers to are cases in the more densely populated and fertile places like Rondebosch, Wagenmakersvalleij and Drakenstein, where pasture was scarce, because there was no land available between the agricultural land that had been given out in ownership and on quitrent. In these locations land was apparently given out on request on a case by case basis. Truter explains that promoting agriculture in the Cape Colony was an important policy of the British

⁸⁵ Theal (n 8 above) 100.

⁸⁶ As above.

⁸⁷ Theal (n 8 above) 101. The remarks of Truter dealt with land outside property held in ownership in the South-Western Cape. For this reason, I refer to pasture and not grazing as most such land in the South-Western Cape was used communally and is therefore classified as pasture rather than grazing. See note 5 of Chapter 2 for the distinction made between grazing and pasture in this thesis.

colonial government. Naturally, the promotion of agriculture went hand in hand with ensuring that the non-indigenous settlers who were engaged in grain farming and viticulture had a healthy stock of working cattle. The farms used for such agricultural purposes were not large enough to provide sufficient pasture for working cattle.⁸⁸ The concessions were given either free of charge or for payment of recognition. In the less densely populated and less fertile areas, the owners of land also did not have a general right to use the available pasture outside the boundaries of their land. According to Truter, the fact that the non-indigenous settlers in these areas used waste land as pasture as if it belonged to them, did not confer any rights in such land on them. He therefore concludes that no general right of pasturage existed in the Cape Colony.⁸⁹

6.4.2.2.5 *Truter's recommendations with regard to the Laubscher case*

If Caledon had had the opportunity to consider Truter's report before his departure from the Cape Colony, he would probably have been pleased with the much more definite answer provided by Truter in connection with the Laubscher case than the equivocal answer given in the Receiver-General of Revenue's report.⁹⁰ Truter's view was that acceding to the request of the executors of Laubscher's estate that the land in dispute should be granted in freehold to the estate would create a dangerous precedent.⁹¹ Even granting, on payment of recognition, a right to use the land within half an hour from the freehold property as grazing would create a dangerous precedent. As I understand Truter's remarks, he was concerned that such a concession would give credence to the non-indigenous settlers' contention that the payment of recognition to use the remainder of the converted loan place as grazing, gave them permanent rights in such land.⁹²

⁸⁸ Theal (n 8 above) 102-103. An example of an authorisation to use waste land as pasture is the resolution of the Batavian colonial government of 29 September 1803. SD Naudé *Kaapse argiefstukke: Kaapse plakkaatboek Deel VI (1803-1806)* (1951) 77, 80.

⁸⁹ Theal (n 8 above) 102.

⁹⁰ See section 6.4.1.6.

⁹¹ Theal (n 8 above) 107.

⁹² As above.

6.5 Reform of the loan place system under Cradock

Whereas governor Caledon's commissioning of reports on the land tenure system in the Cape Colony was prompted by the Laubscher case, the instructions issued to Cradock prior to his arrival at the Cape as Governor contained specific reference to reporting on the use of land in the Cape Colony. In addition to these instructions, Cradock was presented with the situation that he had to consider a number of applications for allocation of land shortly after he assumed office.⁹³ This prompted him to start investigations into the land tenure systems of the Cape within six months of his arrival.

6.5.1 British government's instructions to Cradock regarding land

It appears that the British government was aware of the previous investigations that had been conducted in the Cape Colony with regard to land tenure, as it required accurate information about the land belonging to the government insofar as such information had not yet been gathered.⁹⁴ The British government apparently still did not have information on any written regulations that the Company may have adopted regarding the management and disposal of land. Cradock was therefore instructed to acquaint himself with such regulations and to submit a full report thereon. The report had to contain specific recommendations on the manner in which the land belonging to the British colonial government could be disposed of.⁹⁵ The British government indicated that it would base its policy decisions with regard to the granting of land in the Cape Colony on the report and recommendations made by Cradock. The instructions did not contain any specific request for a report on or investigation into the reform of the loan place system.⁹⁶

6.5.2 Cradock's initial appraisal of the tenure systems in the Cape Colony

Cradock arrived in the Cape Colony on 5 September 1811 and assumed office on 6 September 1811. He almost immediately turned his attention to the land tenure system and during October he studied the reports on this subject that the Deputy

⁹³ *Report of the Surveyor-General on the tenure of land, on the land laws and their results, and on the topography of the Colony Cape of Good Hope* 1876 8.

⁹⁴ Theal (n 8 above) 36.

⁹⁵ As above.

⁹⁶ As above.

Colonial Secretary had in his possession.⁹⁷ On 6 December 1811 Cradock shared his vision with regard to the changes that should be made to the land tenure system with the Colonial Secretary.⁹⁸ Cradock requested the Colonial Secretary's assistance to determine the best way to approach the numerous applications for land that were awaiting the Governor's decision.⁹⁹ Cradock was of the opinion that the problems with regard to the reform of the land tenure system could be arranged under two questions. As far as he was concerned the reform of the land tenure system had to be approached from a long term and a short term perspective: a long term vision where the focus was on reform of land tenure in principle and a short term vision in terms of which immediate problems had to be dealt with effectively and speedily.¹⁰⁰

Before discussing the two approaches to land tenure reform, Cradock expressed his strong disapproval of the loan place system. He contended that the payment that the government received for the loan of land was inadequate and that it was a system that led to inequality. The biggest problem that he foresaw was that the British colonial government would never concede that the non-indigenous settlers had the rights in the loaned land that they themselves believed they had. His standpoint was therefore from the outset that the loan place system had to be 'wholly discontinued'.¹⁰¹

The outline of the policy that would eventually result in the Perpetual Quitrent Proclamation¹⁰² was already stated in this letter. He proposed to grant waste land that was applied for in perpetuity and at a quitrent that related to the actual value of the land at the time of the grant.¹⁰³ He considered it as an option that payment of the quitrent could be postponed for five or seven years and at the end of such a period the non-indigenous settler could decide not to retain the grant. Cradock was of the opinion that whatever form of tenure was accepted in the future, the land concerned

⁹⁷ Weaver (n 6 above) 13.

⁹⁸ According to a sentence following the governor's signature on the copy of the letter in Theal's *Records of the Cape Colony*, a similar letter was sent to the Deputy Colonial Secretary. Theal (n 8 above) 206.

⁹⁹ Theal (n 8 above) 200.

¹⁰⁰ As above.

¹⁰¹ Theal (n 8 above) 202.

¹⁰² See note 7.

¹⁰³ Theal (n 8 above) 203.

would have to be accurately described and the boundaries should as far as possible be fixed.¹⁰⁴

With regard to the reform of the loan place system, Cradock expresses the hope that the non-indigenous settlers who had loan places would realise the advantage of exchanging the insecure loan place system for the more secure title that the British colonial government was willing to grant. His assumption was that the non-indigenous settlers would have to accept that they had not obtained the secure and permanent rights in land that they believed they had and that the British colonial government had the legal right to resume the settlers' loaned land.¹⁰⁵

Although Cradock states his intention to consult with the President of the Court of Justice, WS van Ryneveld, and with the Fiscal Truter, because of their local experience, he reveals at the end of his letter his strong bias to have the land tenure system of the Cape Colony conform to that of England.¹⁰⁶ In this regard he remarks that he

conceive(s) that a prudent introduction of every British principle and practice, besides an allowable confidence in their excellence, forms precisely so many steps towards the attainment of belief in inseparable English connection.¹⁰⁷

6.5.3 Reports provided by Van Ryneveld and Truter

The Colonial Secretary and his deputy both replied to Cradock's request for assistance, on 31 December 1811 and 13 January 1812 respectively, but did not offer any major new insights into the problem of the reform of the system.¹⁰⁸ The Deputy Colonial Secretary reiterated his standpoint that the loan place land tenure system was 'wasteful and improvident' and only added that he was of the opinion that the colonial government had not ceded any rights in the land given in loan to the non-indigenous settlers. Consequently, the British colonial government would be acting within its rights if it decided to grant that same land on a general basis to the

¹⁰⁴ Theal (n 8 above) 204.

¹⁰⁵ As above.

¹⁰⁶ Theal (n 8 above) 205-206.

¹⁰⁷ Theal (n 8 above) 206.

¹⁰⁸ Theal (n 8 above) 226, 244.

non-indigenous occupiers under a different form of land tenure.¹⁰⁹ The Colonial Secretary had a far more conservative approach to the granting of land than his colleague. A colony that was as sparsely populated as the Cape Colony could not afford to continue granting land to non-indigenous settlers that dispersed to regions where they could live independently from the government. According to him, further grants of land would lead to the creation of an independent class of non-indigenous settler who would rather live on the labour of slaves or indigenous servants than become an 'industrious labouring' man.¹¹⁰

For new and further insights into the question of reform of the land tenure systems of the Cape Colony, the Governor had to rely on the inputs of the President of the Court of Justice, WS van Ryneveld, and Truter.

6.5.3.1 The report by WS van Ryneveld

Right from the start of his report, Van Ryneveld made it clear that he did not concur with the views of the Deputy Colonial Secretary and Truter with regard to the loan place system. He differed from them in that he did not regard the loan place system to be as insecure as postulated by them. In line with this approach he states that it cannot be accepted as a principle that the British colonial government had the 'positive and indisputable right' to resume the land given in loan without any specific cause.¹¹¹ He did not dispute that the loan place tenure system appeared to confer very precarious rights on the non-indigenous settlers. However, he contended that due to the fact that this type of tenure had existed for more than a century, the rights of the non-indigenous settlers had become more permanent. In his opinion, the fact that successive colonial governments had allowed the non-indigenous settlers to bequeath the land and to sell the homesteads on the loan places strengthened their conviction that they had obtained permanent rights in the loan places.¹¹²

Van Ryneveld motivated his standpoint by referring to the transfer duty imposed on the transfer of homesteads subsequent to a sale thereof or pursuant to a

¹⁰⁹ Theal (n 8 above) 228.

¹¹⁰ Theal (n 8 above) 245.

¹¹¹ Theal (n 8 above) 257.

¹¹² As above. See the discussion of non-indigenous settlers' perceptions regarding their rights in loaned land in section 9.5 of Chapter 9.

bequest in a will. In Van Ryneveld's opinion, the contention that the non-indigenous settlers only sold or bequeathed the homesteads on their loan places was a fiction. According to him, the colonial governments were well aware that homesteads that were mere huts with a very low value were sold for large amounts of money. The colonial governments did not question such transactions and after 1790 imposed a transfer duty on those large amounts of money.¹¹³ This meant that although the non-indigenous settlers with loan places were ostensibly prohibited from alienating their loan places, the colonial governments not only allowed the practice but utilised it for their own financial benefit.¹¹⁴ Van Ryneveld concludes that in view of these facts the British colonial government would have to handle the revocation of a grant of a loan place with delicacy and that there would have to be very good reasons for such a revocation. Even when such a good reason for revocation of a grant existed, the non-indigenous settler would still expect to be indemnified for the loss of the homestead and agricultural improvements on the loan place.¹¹⁵ The conduct of the colonial governments had the effect that the non-indigenous settlers came to have full confidence that the grants of loan places would not be revoked. This is evidenced by the fact that Van Ryneveld on his travels found homesteads and cultivated land on loan places that were comparable with the level of development found on farms held in terms of ownership transactions.¹¹⁶

Van Ryneveld took a very practical approach to the question of what form of land tenure would be the best to adopt in the Cape Colony. He points out that, although agricultural development was essential for the future prosperity of the Cape Colony, the vast expanses of available land could not all be utilised for that purpose. Only the land relatively close to markets in Cape Town and other villages was suitable for agricultural purposes. The best form of land tenure for such land was undoubtedly freehold. However, the best form of land tenure for the majority of the land that could only be used as grazing was the loan place system.¹¹⁷ As Cradock also raised the question whether the existing loan place system could be reformed, Van Ryneveld discussed the question whether the existing loan places could be

¹¹³ See section 9.5 of Chapter 9.

¹¹⁴ Theal (n 8 above) 258.

¹¹⁵ As above.

¹¹⁶ Theal (n 8 above) 259.

¹¹⁷ Theal (n 8 above) 260.

converted into freehold property. Taking into account that the British colonial government would lose even the limited right of revocation it still had if the loan places were converted into freehold property, Van Ryneveld expressed the opinion that the loan place system should be retained.¹¹⁸ However, he suggested that in cases where the non-indigenous settlers had used some of the loaned land for agricultural purposes, a variation of the Van Imhoff control measure should be implemented. In order to encourage agriculture, Van Ryneveld suggested that the cultivated part of the loan place and some extra land for agricultural development should be separated from the rest and granted to the non-indigenous settler on payment of a reasonable amount of money. The remainder of the loan place should still be used as grazing by that non-indigenous settler.¹¹⁹

6.5.3.2 The second report by Truter

From the references that Truter makes to his first report on land tenure, it appears that the second report is based on the principle expounded in the first report that the land not granted in freehold to non-indigenous settlers was the property of the British colonial government. More specifically, Truter uses this principle as the reason for his contention that land loaned to non-indigenous settlers was resumable by the British colonial government on payment of indemnification where necessary.¹²⁰

Using the same methodical approach adopted in the first report, Truter starts by referring to the two approaches regarding land tenure reform that Cradock mentioned in his letter to the Colonial Secretary.¹²¹ After some initial remarks regarding the deficiencies of the loan place system and the quitrent tenure system, he discusses the form of tenure that he believes will best advance the prosperity of the Cape Colony. The first prerequisite for a future land tenure system was that the loan place land tenure system with its inherent uncertainty due to the fact that the land was resumable, should be replaced by a more secure land tenure system.¹²² This object could be achieved by creating a form of land tenure where the non-indigenous settler would be able to bequeath his land to his descendants and to 'sell

¹¹⁸ Theal (n 8 above) 261-262.

¹¹⁹ Theal (n 8 above) 262-263.

¹²⁰ Theal (n 8 above) 269, 276.

¹²¹ See section 6.5.2.

¹²² Theal (n 8 above) 270.

or otherwise alienate' his land after giving notice of this intention to the British colonial government.¹²³ Truter keeps in mind that the British colonial government should also benefit from the granting of land to non-indigenous settlers. This consideration ruled out the option of granting land in freehold. He suggested the implementation of the perpetual quitrent land tenure system. This entailed the payment of a reasonable yearly rent determined by the extent and the nature of the land concerned. The grant of land under the perpetual quitrent land tenure system would be subject to the same conditions that were usually included in the title deeds of land granted in freehold. Truter regarded the greater security that the perpetual quitrent system would give to the non-indigenous settlers as the main advantage of such a system. There would then only be two land tenure systems, namely freehold property and perpetual quitrent property, which would be virtually the same. The only difference between the systems would be the payment of the yearly quitrent in terms of the perpetual quitrent land tenure system.¹²⁴

Truter's answer with regard to the short term solution to the land tenure problem is that the existing loan places should be converted into land held in terms of the perpetual quitrent land tenure system. The conversion of the loan places should take place in terms of a rule that Truter formulates as follows:¹²⁵

All loan places shall be altered into perpetual quit rent under a yearly rent proportionate to the extent and nature of the land, by granting in perpetual Quit Rent to the holder of each loan place such part of the same as on an impartial valuation can be calculated to stand at the time of the valuation, in the fullest measure equal to such value as the opstal of that loan place would fetch if at that very time put up for sale agreeable to custom, and on a certainty that the loan lease would be continued, taking into consideration the capital which would be required to yield the rent imposed.

The main feature of this proposed rule is that the existing loan places had to be divided into two parts. The one part was the land that was used for agricultural purposes (the 'opstal'¹²⁶ referred to in the rule) and was to be converted into

¹²³ As above.

¹²⁴ Theal (n 8 above) 271.

¹²⁵ Theal (n 8 above) 272-273.

¹²⁶ I am of the opinion that in his rule Truter gave an extended meaning to the word 'opstal' to include the cultivated land and the homestead. For a similar use of the word, see CG Sampson et al

perpetual quitrent property. The other part was the land used as grazing, that had to be leased to the owner of the converted perpetual quitrent property under the conditions that applied to the loan place. This interpretation of the rule is confirmed by Truter's remarks regarding cultivated land directly following the rule so formulated.¹²⁷ With these remarks he indicated that his proposed conversion was dependent on the existence of cultivated land on loan places.

The rest of Truter's report is concerned with a detailed plan on how the land in the Cape and Stellenbosch and Drakenstein districts should be surveyed and a record compiled of all the different land tenure types that were in use in those districts.¹²⁸ He concludes his report with suggestions about the loan places that could not immediately be converted in terms of his proposed rule. These loan places should, subject to the right of resumption by the British colonial government, continue in existence until the said government deemed it expedient also to convert the places into perpetual quitrent places. Truter was of the opinion that where non-indigenous settlers did not comply with the conditions of the grants of their loan places, the loan places should immediately be resumed to discourage the idea that the non-indigenous settlers had permanent rights in the loan places.¹²⁹

6.5.4 Cradock's report to the British government and its response

Cradock complied with his instructions with regard to a report on the land tenure in the Cape Colony with a short letter to the Secretary of State for War and the Colonies on 4 March 1812. He included with this letter all the documentation commissioned by Caledon,¹³⁰ as well as his correspondence with the Deputy Colonial Secretary and Colonial Secretary, their responses and the reports of Van Ryneveld and Truter.¹³¹ He pointed out that it was evident from the reports that the imposition of a form of quitrent tenure in preference to the prevailing system of loan place land tenure was recommended. The conversion of loan places in line with this

'An early Dutch settlement pattern on the North East frontier of the Cape Colony' (1994) 3 *Southern African Field Archaeology* 75. See also Bell (n 19 above) 400.

¹²⁷ Theal (n 8 above) 273.

¹²⁸ Theal (n 8 above) 273-275.

¹²⁹ Theal (n 8 above) 276.

¹³⁰ Discussed in section 6.4.

¹³¹ Discussed in sections 6.5.3.1 and 6.5.3.2.

recommendation, if performed with delicacy and circumspection, would according to Cradock lead to—

- (a) an increase in permanent income for the British colonial government; and
- (b) increased general happiness of the non-indigenous settlers, because of the greater security of tenure they would enjoy in their converted loan places.¹³²

With these comments Cradock indicated to the British government that he preferred the approach adopted by Truter to the more conservative approaches adopted in the report of the Receiver-General of Revenue and by Van Ryneveld.

The Privy Council Committee considered Cradock's report and reported to the Under-Secretary for War and the Colonies on 30 September 1812. The first concern of the Privy Council Committee was that any proposed changes to the land tenure system of the Cape Colony that had an effect on the government's property, could be detrimental to the interests of any successor of the British government in the Cape Colony and could therefore be contrary to the law of nations. At this stage the Privy Council Committee was unsure as to whether the Cape Colony would on conclusion of peace with France be returned to the Netherlands or be ceded to France which was in control of the Netherlands at that stage.¹³³ However, the Privy Council Committee was of the opinion that changes to the land tenure system that encouraged the non-indigenous settlers to be more industrious and led to the improvement of their land and the economy of the Cape Colony would not be contrary to the law of nations. They specifically referred to any change in the land tenure system that would make land divisible and inheritable as not being contrary to the interests of a succeeding sovereign. Consequently, the Privy Council Committee advised that the proposed reforms of the land tenure system that would bring about the abovementioned changes should be implemented.¹³⁴ The Privy Council Committee expressed the opinion that in the future land granted by the British colonial government should be for a long period, but should be terminable.¹³⁵ The conclusions of the Privy Council Committee were returned to Cradock via the Secretary of State for War and the Colonies on 26 November 1812.¹³⁶

¹³² Theal (n 8 above) 348.

¹³³ Theal (n 8 above) 495-496. See also the discussion in section 7.3.1.1.2 of Chapter 7.

¹³⁴ As above. Weaver (n 6 above) 13.

¹³⁵ Theal (n 8 above) 497.

¹³⁶ Weaver (n 6 above) 13.

6.5.5 Commencement of the reform of the land tenure system of the Cape Colony

The British government did not give specific instructions to Cradock on how he should proceed with the implementation of the new land tenure system in the Cape Colony. Confronted with the challenge of transforming ideas on paper into practice, Cradock prepared a memorandum in which he set out his plans. He realised that the circumstances regarding the allocation of land were unique to the Cape Colony and that similar processes conducted in other jurisdictions would not provide guidance.¹³⁷ The principle on which the granting of land was to be based was that land should be granted in perpetual quitrent. By granting land in terms of this principle, the non-indigenous settlers obtained freehold title in the land while they remained dependent on the British colonial government. The British colonial government was also advantaged by the increase of revenue on land granted to non-indigenous settlers.¹³⁸ Cradock realised that the factors that would be taken into consideration when making grants of land in terms of the perpetual quitrent principle had to be communicated to all the interested parties. To this end, a Government Advertisement addressed to all persons applying for grants of land and to the landdrosts and heemraden who had to process the applications was published on 23 July 1813.¹³⁹

Apart from placing the procedure for the granting of land on a firm footing, Cradock set out the procedures to be followed to implement the reform of the loan place land tenure system. He requested the Colonial Secretary to consider the matter and, together with the Chief Justice¹⁴⁰ and Fiscal, prepare a proclamation that would provide for the conversion of loan places into perpetual quitrent places.¹⁴¹ Cradock identified two 'great principles' which were to guide the drafters of the proclamation, namely benefit to the individual and advantage to the state.¹⁴² These principles were enunciated, because Cradock was aware that the proclamation would be met with resistance from the non-indigenous settlers who occupied loan

¹³⁷ GM Theal *Records of the Cape Colony from October 1812 to April 1814* (1901) 194.

¹³⁸ Theal (n 137 above) 195.

¹³⁹ Theal (n 137 above) 196, 203-204.

¹⁴⁰ The Chief Justice at this stage was Truter who had succeeded Van Ryneveld.

¹⁴¹ Theal (n 137 above) 196.

¹⁴² As above.

places. He emphasised that the conversion of loan places had to take place on a voluntary basis.¹⁴³ On the other hand, the disadvantages of the loan place tenure system, especially the fact that such places could be resumed by the British colonial government without any indemnification being paid, had to be brought to view.¹⁴⁴

6.5.6 The Perpetual Quitrent Proclamation

The Proclamation commissioned by Cradock was published on 6 August 1813 and was entitled 'Conversion of Loan Places to Perpetual Quitrent'.¹⁴⁵ Notwithstanding Truter's involvement in the drafting of the Perpetual Quitrent Proclamation, the perpetual quitrent tenure system did not resemble the rule suggested by him in his second report. The approach adopted in the Proclamation was that the extent of the land granted on perpetual quitrent would be the same as the land legally occupied by the non-indigenous settler on loan. However, the extent would not exceed 3000 morgen except if authorised by the governor.¹⁴⁶ The quitrent that had to be paid was to be determined by the 'the situation, fertility, and other favourable circumstances of the land', but could not exceed 250 rixdollars per year.¹⁴⁷ On conversion of a loan place, the land had to be surveyed before the title deed to the land would be issued to the owner. The landdrost of the district where the land was converted had to send the diagram of the surveyed land to Cape Town and had to certify that no other person had been prejudiced by the survey and that the land did not exceed 3000 morgen.¹⁴⁸

The drafters paid heed to Cradock's request that the right of the British colonial government to resume loan land had to be emphasised by including a section in the Proclamation that provided that in the cases where non-indigenous settlers chose not to convert their loan places, the government still had the right to resume the land as before.¹⁴⁹

¹⁴³ In his letter to the Secretary for War and the Colonies, dated 23 August 1813, Cradock gives a more complete exposition of this principle. Theal (n 137 above) 224.

¹⁴⁴ Theal (n 137 above) 196-197.

¹⁴⁵ Jackson (n 7 above) 12.

¹⁴⁶ Jackson (n 7 above) 12-13.

¹⁴⁷ Jackson (n 7 above) 13.

¹⁴⁸ Jackson (n 7 above) 14.

¹⁴⁹ As above.

6.6 Conclusion

The reform of the domestic land law of the Cape Colony resulting from the investigations discussed in this chapter forms a pivotal part of the history of the occupation of land by non-indigenous settlers. Although the different ways in which land was occupied by the non-indigenous settlers were considered in the various reports compiled for the British colonial government, the rights of the Company in the land were not considered.

In Chapter 5 I conclude that the Company did not have private law ownership rights in the land given to non-indigenous settlers or the waste land of the Cape Colony. Consequently, the Company did not grant the land to the non-indigenous settlers but gave it to them in return for cultivating such land.¹⁵⁰ The fact that the Company did not have private law ownership rights in waste land, precludes any argument that such land in the Cape Colony could have belonged to the Company. Although it is understandable that the British colonial government did not investigate the rights of the Company in the land of the Cape Colony, this had far-reaching consequences for the domestic land law of the Cape Colony.¹⁵¹ By accepting that the Company must have been the owner of the land that it gave to the non-indigenous settlers and the waste land in the Cape Colony, the investigations of the British colonial government officials paved the way for the introduction of the doctrine of tenures as discussed in Chapter 7.

As a result of their unquestioning acceptance of Truter's conclusion that there were three tenure systems in the Cape Colony, namely freehold, quitrent and loan places, legal historians neglected to address the question of whether the Company could have been the owner of the land.¹⁵² I am therefore of the opinion that the investigations discussed in this chapter form the basis of the theory that the

¹⁵⁰ See the discussion of the land cultivation transactions in section 5.5 of Chapter 5 and the remarks in note 119 of Chapter 5.

¹⁵¹ It is understandable because it is highly likely that Truter and Van Ryneveld, who also served under the Company, never doubted that the Company had private law rights in the land of the Cape Colony. In this regard, see my remarks in section 4.5 of Chapter 4. See also section 5.1 of Chapter 5 for additional reasons why the Company was regarded as the owner of land in the Cape Colony.

¹⁵² As is clear from the discussion of the doctrine of tenures in section 5.3.2.2 of Chapter 5, the basic principle of the doctrine is that all title in land must be held by a sovereign power who grants the title in land to its subject.

sovereign rulers of the Cape Colony¹⁵³ were the owners of the land that it gave or allocated to the non-indigenous settlers and the waste land in the Cape Colony.

¹⁵³ See the remarks in section 5.1 of Chapter 5 with regard to this theory. The sovereign rulers were the Company, the Batavian Republic and the British sovereign.

7 Introduction of the doctrine of tenures in the Cape Colony

7.1 Introduction

In Chapter 5 I discussed the legal principles that support my argument that it was legally impossible for the Company to have been the private law owner of the land that was given to the non-indigenous settlers during the seventeenth and eighteenth centuries. Those legal principles also make it impossible for the Company to have been the private law owner of the land that was not given to the non-indigenous settlers. As far as I could determine, the private law ownership of waste land by the Company has not previously been questioned. My approach to the ownership of waste land by the Company raises the following question: If the Company was not the private law owner of the waste land in the Cape Colony in 1795, how did it come about that waste land has always been regarded as the property of the Crown and, after 1961, as the property of the state? In this chapter I address this question.

An overview of the policies with regard to the disposal of waste land adopted by the successive colonial governments reveals that the idea that waste land in the Cape Colony could be used as a source of revenue only developed after 1795.

The law of property, which includes land law, never became one of the fields of law where questions regarding the use of Roman-Dutch law principles in preference to those of English common law were raised. It is generally accepted that in the law of property, Roman-Dutch law rules have in most cases prevailed over English common law rules.¹ After the Second World War a heated debate developed in legal circles regarding the application of English common law principles and Roman-Dutch law principles in South African courts.² I develop the argument in this chapter that, in spite of the general trend that Roman-Dutch law principles prevailed in the law of property, an important element of English land law, namely the doctrine

¹ HR Hahlo 'The genesis of South African law' in HR Hahlo & E Kahn (eds) *South Africa: The development of its law and constitution* (1960) 42; R Zimmermann & D Visser 'Introduction: South African law as a mixed legal system' in R Zimmermann & D Visser (eds) *Southern Cross: Civil law and common law in South Africa* (1996) 28.

² E Cameron 'Legal chauvinism, executive-mindedness and justice— L C Steyn's impact on South African law' (1982) 75 *South African Law Journal* 43 and footnote 20 on 43.

of tenures,³ became part of the domestic law of the Cape Colony and subsequently of the law of South Africa.

Since there was no act under the royal prerogative or any legislation that introduced the doctrine of tenures in the Cape Colony, the only way of determining how this came about is by studying the conduct of the British colonial government with regard to waste land. To this end I consider—

- (a) the terminology used by the British colonial government officials with regard to land in the Cape Colony when communicating with their superiors in London;
- (b) the measures taken with regard to the disposal of waste land prior to the cession of the Cape Colony to Great Britain in 1814;
- (c) the legislation adopted by the British colonial government to regulate the disposal of waste land; and
- (d) the role of the colonial courts in accepting that waste land granted by the British colonial government had belonged to the British sovereign.

The practical course followed by the British colonial government officials and legislators when disposing of waste land or making laws for its disposal was to accept that such land belonged to the British sovereign. The colonial courts adopted the same approach when dealing with waste land that had been granted by the British colonial government officials. In this way the doctrine of tenures was established in the Cape Colony.

The land claim lodged by the Richtersveld community for the restitution of a certain part of the Richtersveld in terms of the Restitution of Land Rights Act⁴ ('Restitution Act') resulted in the first court case in which the question of the ownership of the waste land in the Cape Colony was raised. The diverging opinions expressed by the Land Claims Court ('LCC') and the Supreme Court of Appeal ('SCA') on this question necessitate a critical analysis of the SCA's finding that the Richtersveld community's rights in the claimed land were not extinguished by its annexation. As part of this analysis a case study is conducted of the manner in which the British colonial government dealt with land at Port Nolloth in the Richtersveld. My

³ The doctrine of tenures is discussed in section 5.3.2.2 of Chapter 5.

⁴ 22 of 1994.

conclusion after considering the conduct of the British colonial government with regard to waste land and undertaking the case study, is that notwithstanding the SCA's finding, waste land in the Cape Colony was the private law property of the British sovereign.

7.2 Different approaches to the disposal of land in the Cape Colony

An investigation into the land policy of the Company, the British Government and the government of the Batavian Republic in the Cape Colony, shows that they adopted different approaches to the disposal of waste land. These approaches are discussed in this section.

7.2.1 The Company's approach to waste land

One of the features of the land cultivation transactions that were concluded by the Company and the first non-indigenous settlers in February 1657, was that no mention was made of payment by the settlers for the land they received.⁵ When these transactions were revised at the behest of Commissioner Van Goens in April 1657, he did not seek to make an alteration to them in this regard.⁶ From these facts it appears that, in 1657, the Company did not regard the land at the Cape as a potential source of revenue. Although Robertson deals mostly with the gratuitous loans of land to the non-indigenous settlers, he enumerates some of the reasons why demanding payment from the non-indigenous settlers for the land given to them would not have been a sound policy. Firstly, they were very poor and would not have been able to raise the money to pay for the land. The second reason for giving land without charge is that the Company needed some of its employees to leave the service of the Company and start developing the land.⁷

The Company did not change its policy with regard to payment for land after the initial land cultivation transactions of 1657. When the new settlement of

⁵ The land cultivation transactions between the Company and the non-indigenous settlers are discussed in sections 5.3 and 5.5.1 of Chapter 5.

⁶ HB Thom *Journal of Jan van Riebeeck Volume II 1656-1658* (1954) 90-93; HCV Leibbrandt *Precis of the archives of the Cape of Good Hope: Letters despatched from the Cape, 1652-1662 Volume III* 262. See section 5.5.1 of Chapter 5 for the discussion of the changes made by Van Goens.

⁷ HM Robertson 'Some doubts concerning early land tenure at the Cape' (1935) 3 *South African Journal of Economics* 161-162. The motivation of the Company to enter into land cultivation transactions is discussed in section 5.5 and 5.5.1 of Chapter 5. The giving of land without charge by the Company is also discussed in section 9.3.1.1.3 of Chapter 9.

Stellenbosch was established, the non-indigenous settlers received the land without having to pay for it. Guelke points out that even though there was still plenty of land available for cultivation in Stellenbosch, the colonial government decided to suspend the allocation of land in the area in 1687. It persisted with this policy as new areas were made available for settlement.⁸ In 1717 the Company decided to cease giving land in ownership.⁹ At that stage only 400 farms had been given on contract in the area governed by the Company. Even taking into account the large parts of the country that were not suitable for cultivation, there was, in 1717, still more than enough land available that could have been given for that purpose.¹⁰

Fourie and others conducted an overview of the public finances of the Cape Colony during the period of Company rule.¹¹ This overview does not mention the giving of waste land as a source of revenue in the Cape Colony. The only revenue that accrued to the Company from the land that had been given to non-indigenous settlers on contract, was the transfer duty that was imposed on land transactions between non-indigenous settlers in 1686.¹² From the discussion in this section it

⁸ L Guelke 'Blanke boere en grensbewoners 1652-1780' in H Giliomee & R Elphick (eds) *'n Samelewing in wording: Suid Afrika 1652-1840* (1990) 74-75.

⁹ Guelke (n 8 above) 75, 79-80. In view of the discussion in section 5.5 of Chapter 5 I refer to these transactions as land cultivation transactions. Land used for agricultural purposes previously given in loan could, on request to the colonial government, be given to them in terms of a land cultivation transaction. These requests had to state the size of the land that was requested and had to be accompanied by a diagram. The requester also had to state the period that the land had been occupied and that the recognition payments for that period had been made. *Resolutions of the Council of Policy of Cape of Good Hope Cape Town Archives Repository, South Africa* C. 60, pp. 30-40, C. 61, pp. 16-26, C. 63, pp. 80-88. From the transactions referred to in these Resolutions it is clear that the prohibition of 1717 only related to the giving out of waste land that had not previously been occupied.

¹⁰ Guelke (n 8 above) 75.

¹¹ J Fourie et al 'Public finances under private company rule: The Dutch Cape Colony (1652-1795)' (2013) 68 *New Contree* 51.

¹² *Resolutions of the Council of Policy of Cape of Good Hope* C. 17, pp. 96-100. Fourie (n 11 above) 61. Fourie remarks that the Company did generate revenue from rental collected on loaned and quitrent land. (See Fourie (n 11 above) 62.) However, in my opinion this revenue must be regarded as a tax rather than rental. The conclusions reached in this section regarding the sale of land as a source of revenue are only applicable to waste land outside the area where Cape Town was developing. It must be accepted that when the Company decided to no longer give out land on contract from 1717, the measure only applied to waste land. This assumption is supported by the documents relating to the revenue of the Cape Colony for the period from 1 September 1793 to 31 August 1795. In his 'Observations on the Revenue of the Cape Colony', Major-General Craig, the military governor of the Cape Colony after 1795, remarks that the revenue obtained from land 'is by far the most considerable' source of revenue for the Colony. He enumerates four types of revenue related to land. Of these the recognition payments for the loan places constituted the main revenue, while the rents for leases under the quitrent system were a less important source of income. He specifically mentions that land used for building houses in Cape Town and other towns is valued by a commission in Cape Town and by the landdrost and heemraden in other towns. The sale of these

must be concluded that the Company did not regard waste land as its private law property that could be sold to the non-indigenous settlers.

7.2.2 The approach of the government of the Batavian Republic to waste land

During the Batavian colonial government's rule Commissioner-General De Mist had plans for extensive reform to the system of land allocation. His viewpoint was that the Batavian colonial government would reap the greatest reward from a system where waste land was sold to the highest bidder.¹³ Van der Merwe and Duly are both of the opinion that Governor Janssens was not able to implement De Mist's plans effectively.¹⁴

Van der Merwe remarks that the Batavian colonial government implemented reforms to the process that had to be followed when applying for land in ownership. The colonial government demanded that more detailed particulars about the requested land, such as its precise location and size, be furnished. Once such a request was received, a certified government surveyor had to survey the land.¹⁵ Subsequent correspondence between the first British civilian governor, Caledon, and Viscount Castlereagh reveals that the non-indigenous settlers were required to pay the assessed value of the surveyed land to the Batavian colonial government before the land could be registered in their name.¹⁶

plots constituted a minor source of income for the Colony. GM Theal *Records of the Cape Colony From February 1793 to December 1796* (1897) 132-133; 255-256.

¹³ JP van der Merwe *Die Kaap onder die Bataafse Republiek 1803-1806* (1926) 140. De Mist did not form part of the Batavian colonial government under Governor Janssens but was the representative of the Batavian Republic's government in the Cape Colony. Van der Merwe (above) 17; LC Duly *British land policy at the Cape, 1795-1844: A study of administrative procedures in the Empire* (1968) 36-37. See the discussion in section 5.3.2.3.1 of Chapter 5 where it is contended that De Mist, in order to strengthen his argument regarding the sovereign powers of the Batavian Republic, used the feudal law concepts of *dominium eminens* and *dominium utile* without taking into account that these feudal law concepts did not form part of the domestic law of the Cape Colony. His conception of the States-General and the government of the Batavian Republic as a feudal landlord can therefore not be accepted.

¹⁴ Van der Merwe (n 13 above) 145; Duly (n 13 above) 37.

¹⁵ Van der Merwe (n 13 above) 144.

¹⁶ Caledon had to provide reasons to Viscount Castlereagh for having denied the application by DG van Reenen to receive the title to land that he claimed to be his property. GM Theal *Records of the Cape Colony From July 1806 to May 1809* (1900) 501-502. Caledon remarked that he had refused Van Reenen's request because the process as provided for by the Batavian colonial government had not been completed. Although Governor Janssens had approved Van Reenen's request for the land, the survey and payment of the sum for the assessed value had not been made. Caledon emphasised that conceding to Van Reenen's request would establish a precedent that would harm the interest of the British sovereign in the land. GM Theal *Records of the Cape Colony From*

7.2.3 The British government's approach to waste land

From the instructions that were given to the first civilian governors appointed by the British government in the Cape Colony, respectively in 1796 and 1806, it is clear that the British government had a greater interest in waste land than the Company. The two sets of instructions relating to waste land are couched in virtually the same terms. The new governors were required to gather accurate information about the land that belonged to the British government. They then had to make recommendations regarding how such land could be granted or leased out. These recommendations had to be made after the regulations that had been adopted by the Company to manage and dispose of such land had been considered.¹⁷

While nothing was done during the first British occupation to determine the regulations adopted by the Company with regard to waste land, the investigation discussed in Chapter 6 was conducted during the second British occupation. This investigation provided the basis for the British government's approach to the allocation of waste land in the Cape Colony.

7.3 The British sovereign's rights in the waste land of the Cape Colony

From the discussion of the international law rules applicable to the acquisition of territory at the Cape in Chapter 3, it is clear that there are no international law rules on which the British government could have relied to justify the assertion that it was the owner of all waste land in the Cape Colony. In Chapter 5 I contend that the Company only became the private law owner of the demarcated land that it occupied and not of the waste land at the Cape. This means that in 1795, the British colonial government as successor of the Company could only become the private law owner of the demarcated land and not of the waste land in the Cape Colony. This situation did not change during the first British occupation or the Batavian period.

May 1809 to March 1811 (1900) 217-218. The fact that the Batavian colonial government sold land to non-indigenous settlers is also confirmed by the *plakaat* of 14 December 1803 that contained the conditions on which Paarden Eiland were sold to DG van Reenen. SD Naudé *Kaapse argiefstukke: Kaapse plakkaatboek Deel VI (1803-1806)* (1951) 103.

¹⁷ GM Theal *Records of the Cape Colony From December 1796 to December 1799* (1898) 14; Theal *July 1806* (n 16 above) 13.

The only acceptable legal ground on which it can be contended that the British sovereign became the private law owner of all the waste land in the Cape Colony is that the doctrine of tenures, as discussed in section 5.3.2.2 of Chapter 5, became part of the domestic law of the Cape Colony. Sonnekus relies on the well-known English case of *Campbell v Hall*¹⁸ to contend that, in terms of the English common law, the domestic law of the Cape Colony remained in force until expressly repealed or amended by the British government. He states that English common law rules relating to the doctrine of tenures never became part of the domestic law of the Cape Colony.¹⁹ Sonnekus contends that the references to Crown land after 1806 must be attributed to the fact that many of the legal practitioners in the Cape Colony received their training in England in English common law. According to him, these practitioners mistakenly accepted that the prerogative rights of the British sovereign became part of the domestic law of the Cape Colony as if by magic.²⁰ In my opinion, Sonnekus's contentions in this regard cannot be accepted without consideration of the conduct of the British colonial government officials when dealing with waste land and the legislation enacted with regard to waste land.

7.3.1 Introduction of English land law in the Cape Colony

Chitty remarks that when the British sovereign obtained a colony by conquest, he had the prerogative power, subject to certain restraints, to change the laws extant in the conquered territory and the manner in which the colony was governed. One of the restraints placed on the sovereign's power to change the laws and government of a conquered territory, was that he could not disregard or violate the articles of capitulation by which such a territory was surrendered.²¹ Hahlo remarks that it is a matter of controversy whether Roman-Dutch law was preserved in the Cape Colony by the Articles of Capitulation signed on 10 and 18 January 1806. However, he also remarks that, because Roman-Dutch law was not expressly or tacitly abrogated by

¹⁸ (1774) 1 Cowper 204.

¹⁹ JC Sonnekus 'Grondeise en die klassifikasie van grond as *res nullius* of as staatsgrond' (2001) *Tydskrif vir die Suid-Afrikaanse Reg* 103. See also E Fagan 'Roman-Dutch law in its South African historical context' in R Zimmermann & D Visser (eds) *Southern Cross: Civil law and common law in South Africa* (1996) 56.

²⁰ Sonnekus (n 19 above) 103. Sonnekus's remarks in Afrikaans are as follows:

Die stellings kon slegs gemaak word deur diegene wat onder die dwaal verkeer het dat getrou aan die prerogatiwe van die Britse kroon daardie feodale reste plotseling magies deel van die Suid-Afrikaanse reg geword het.

²¹ J Chitty *A treatise on the law of the prerogatives of the crown; and the relative duties and rights of the subject* (1820) 29.

the British sovereign or Parliament, it remained the basis of the domestic law of the Cape Colony.²²

Cameron suggests that the status of Roman-Dutch law in the Cape Colony after 1795 may be described in the following manner.²³

The point seems misconceived. It was no part of the doctrine in *Campbell v Hall* that the legal system of a conquered territory should be preserved in petrified form as it existed at the time of conquest. Nor need one suppose that the British authorities negotiating the 1806 Articles of Capitulation could have been so malevolent as to seek to freeze the burghers' rights in the moulds in which they were cast at the time of the British take-over. All that the doctrine in *Campbell's* case and the terms of surrender can have meant historically was that existing legal forms and sources were not scrapped but could continue to provide a fruitful basis for whatever development and explication might naturally be expected to occur in the subsequent life of the system so retained. Indeed, the effect of the doctrine was to retain the legal system concerned as an organic and living entity, thereby precluding both abrogation on the one hand and petrification on the other. *The doctrine and the terms certainly did not exclude the possibility that by accretion, by growth, by infiltration, by imposition, English law could become an integral source of South African law.* This is in fact precisely what occurred. To denounce the process on the basis of an interpretative technicality is not only historically unsound; it is absurd. (Emphasis added)

The question whether elements of English land law, such as the doctrine of tenures, became part of the domestic law of the Cape Colony in one of the ways listed by Cameron above, is considered in the following sections.

7.3.1.1 The British colonial government's conduct with regard to waste land in the Cape Colony

As far as I could determine, the reasons why it became an accepted part of South African law that all unappropriated land belongs to the State have not been investigated.²⁴ It has either been stated as a fact or, as is the case with Sonnekus's

²² Hahlo (n 2 above) 17.

²³ Cameron (n 1 above) 44-45.

²⁴ See the remarks in section 5.3.1 of Chapter 5. See also Duly's remarks that the new system of perpetual quitrent grants introduced by Cradock was based on a 'superficial examination' of the land practices that prevailed in the Cape Colony. Duly (n 13 above) 47.

article referred to in section 7.3, denied.²⁵ In this section the conduct of the British colonial government when dealing with waste land is discussed, in order to explain how and to what extent an English land law principle became part of the domestic law of the Cape Colony.

7.3.1.1.1 *The use of English land law terminology for Cape Colony domestic law concepts*

From the beginning of the first British occupation of the Cape Colony it is clear from correspondence between British colonial government officials and the British government that English land law terms were used for domestic land law concepts. Already in 1795 the military governor of the Cape Colony, Major-General Craig, referred to the loan place system as a form of tenure. The use of the word 'tenure' implies that Craig believed that the occupiers of loan places were tenants of the Company.²⁶ The remarks of Yonge and his successor, Major-General Dundas, that land could be granted to the non-indigenous settlers, imply that they accepted that the Company was the landlord of all waste land in the Cape Colony.²⁷ In a letter addressed to Viscount Castlereagh, dated 16 October 1809, Caledon refers to land given to the non-indigenous settlers on a permanent basis as 'land held in perpetuity' or 'freehold'.²⁸

Gray remarks that English land law recognises certain estates in land known as freehold estates.²⁹ Of these estates the estate in fee simple can be equated with freehold land as referred to by Caledon in his letter of 16 October 1809. Gray describes the estate in fee simple as follows:³⁰

The estate in fee simple has long been the primary estate in land. As an estate of potentially unlimited duration, it represents the amplest estate which any tenant can hold. ... Although the terminology is strictly inappropriate to the common law conceptualism of estates, the fee simple is "for all practical purposes, equivalent to

²⁵ With regard to the acceptance of the principle, see section 7.3.1.2.2.

²⁶ Theal (n 12 above) 255-256. See sections 10.4 and 10.5 of Chapter 10 with regard to the nature of the rights of the non-indigenous settlers in the loan places.

²⁷ GM Theal *Records of the Cape Colony From December 1799 to May 1801* (1898) 385-386; GM Theal *Records of the Cape Colony From May 1801 to February 1803* (1899) 119. See the remarks in section 5.3.1 of Chapter 5 with regard to the use of the word 'grant' in the context of the domestic law of the Cape Colony prior to 1795.

²⁸ Theal May 1809 (n 16 above) 184, 185.

²⁹ K Gray & SF Gray *Elements of land law* (2009) 59.

³⁰ As above.

full ownership of the land itself". Although in theory each tenant in fee simple merely holds a notional estate in land as a "tenant in chief" of the crown, the plenary rights of the fee simple can endure forever.

The use of the word 'freehold' in the context of the land allocated to the non-indigenous settlers by the Company indicates a misconception by Caledon of the nature of the land cultivation transactions discussed in section 5.5 of Chapter 5. It is also an indication of the British colonial government's assumption that the Company was the private law owner of the waste land in the Cape Colony.

When JA Truter and other British colonial government officials had the opportunity to clear up the terminological confusion caused by the indiscriminate use of English land law concepts for domestic land law concepts, they failed to do so.³¹ Instead, Truter produced reports in which it is contended that three forms of land tenure were developed by the colonial government during the eighteenth century. These three tenures were freehold, quitrent and loan places.³² Truter's identification of these three forms of tenure has subsequently been accepted by South African writers dealing with land law as a true reflection of domestic land law of the Cape Colony prior to 1795.³³

³¹ The investigations conducted by Truter and other British colonial government officials are discussed in Chapter 6.

³² GM Theal *Records of the Cape Colony From March 1811 to October 1812* (1901) 91-107, 268-277.

³³ GM Theal *Records of the Cape Colony from August 1822 to May 1823* (1903) 329; W Bird *State of the Cape of Good Hope in 1822* (1966) 101-102; *Report of the Surveyor-General on the tenure of land, on the land laws and their results, and on the topography of the Colony Cape of Good Hope 1876* 5-10; 'Transfer and registration' (1887) 1 *Cape Law Journal* 317-319; AFS Maasdorp *The institutes of Cape law being a compendium of the common law, decided cases, and statute law of the Colony of the Cape of Good Hope: Book II The law of things* (1907) 73; CG Botha 'Early Cape land tenure' (1919) 36 *South African Law Journal* 149; Robertson (n 7 above) 158; Duly (n 13 above) 13-20; GG Visagie *Regspleging en reg aan die Kaap van 1652 tot 1806* (1969) 79; TRH Davenport & KS Hunt *The right to the land* (1974) 2-3; TRH Davenport 'Some reflections on the history of land tenure in South Africa, seen in the light of attempts by the state to impose political and economic control' (1985) *Acta Juridica* 54; CG van der Merwe *Sakereg* (1989) 584-585; W du Plessis & N J J Olivier 'Enkele sakeregtelike aspekte met betrekking tot grond aan die vroeë Kaap' (1994) *Tydskrif vir die Suid-Afrikaanse Reg* 132; TW Bennett 'African land - a history of dispossession' in R Zimmermann & D Visser (eds) *Southern Cross: Civil law and common law in South Africa* (1996) 68; JRL Milton 'Ownership' in R Zimmermann & D Visser (eds) *Southern Cross: Civil law and common law in South Africa* (1996) 659-664; DL Carey Miller & A Pope *Land title in South Africa* (2000) 4-5. It is probable that Truter had the doctrine of tenures in mind when he referred to tenures in his reports. The current definition of tenure is much wider and reads as follows:

It is a term incorporating the different rights of ownership and limited real rights to land, but simultaneously it more broadly refers to institutional and legal considerations of how land and its associated natural resources are held and used, and how these entitlements are limited.

H Mostert et al 'Land' in WA Joubert (ed) *Law of South Africa Volume 14(1)* paragraph 8. It is therefore possible that the modern writers referred to above did not connect Truter and his contemporaries' classification of tenures to the doctrine of tenures.

7.3.1.1.2 *Conduct of the British colonial government with regard to waste land before 1814*

During the first British occupation of the Cape from 1795 to 1803 the domestic law of the Cape Colony with regard to allocation of land was not changed. During the period from 1806 to 1814 major changes to land allocation were prevented by the possibility that the Colony would be returned to the government of the Netherlands.³⁴ The British government therefore initially ordered that the domestic law of the Cape Colony should continue to be applied as was done during the Batavian colonial government's rule.³⁵

Caledon preferred to bring about gradual change to the land allocation system by curtailing and later suspending the allocation of land in terms of the control measures adopted by the Company.³⁶ His attitude regarding the giving of land in freehold is reflected in his remarks regarding the revenue of the Cape Colony in the abovementioned letter to Viscount Castlereagh of 16 October 1809. The purchase money received for land sold in 1808 was a mere 275 rixdollars. Caledon remarks that he had given out very little land in freehold as he was not yet acquainted with the colony.³⁷ According to Duly, Caledon is referring to requests for land in or near Cape Town.³⁸ Duly's comment indicates that at this early stage in British colonial government of the Cape Colony, the sale of waste land was not part of British land policy.

Before Caledon's successor, Cradock, departed for the Cape Colony from England, he received a copy of the reply of the Office of Committee of Privy Council for Trade ('Privy Council Committee') to Caledon's letter of 16 October 1809 to Viscount Castlereagh.³⁹ In this reply the Privy Council Committee made it clear that land in the Cape Colony could not be alienated before the formal cession by the

³⁴ I refer to the Netherlands or the 'successor of the Batavian government' because the Batavian Republic came to an end in 1806 and was replaced by the Kingdom of the Netherlands under Louis Bonaparte, which was eventually incorporated in the French Empire in 1811. G Edmundson *History of Holland* (1922) 357-361.

³⁵ Duly (n 13 above) 32-34.

³⁶ Duly (n 13 above) 40-41, 43. The control measures are discussed in Chapter 9.

³⁷ Theal May 1809 (n 16 above) 186-187.

³⁸ Duly (n 13 above) 40.

³⁹ Duly (n 13 above) 44.

successor of the Batavian Republic of the territory of the Cape Colony to the British sovereign.⁴⁰ The fact that the Privy Council Committee was of the opinion that a succeeding sovereign could be prejudiced if land was alienated, indicates that it believed that all waste land in the Cape Colony had belonged to the Batavian government. Cradock interpreted the Privy Council Committee's reply to mean that there was a possibility that the Cape Colony might be abandoned after cessation of the war with Napoleon. His reaction to this perceived attitude of the Privy Council Committee was to try to ensure that the British government realised that the Cape Colony was of such strategic importance that it would not allow it to be abandoned. He believed that by introducing superior British institutions into the Cape Colony, the Dutch inhabitants would be convinced that it would be to their advantage if the British government remained in charge.⁴¹

In order to convince the Dutch inhabitants of the advantages of British rule, Cradock believed that a land alienation system that would benefit the non-indigenous settlers and the British government should be introduced.⁴² He argued that a system of perpetual quitrent grants was not the same as granting land in freehold and that such a system would not be in contravention of the international law rule that the Privy Council Committee did not want to breach.⁴³ In a letter to the colonial secretary of the Cape Colony, Cradock remarked that the perpetual quitrent system would create an estate in land for the non-indigenous settlers and give them greater security in the land.⁴⁴ In the Privy Council Committee's response to Cradock's recommendations regarding the alienation of land it reiterated the remarks in its previous response to Caledon. However, the Privy Council Committee was of the opinion that the proposed perpetual quitrent system did not constitute an absolute

⁴⁰ Theal (n 33 above) 14.

⁴¹ Duly (n 13 above) 45.

⁴² As above.

⁴³ Duly (n 13 above) 46;

⁴⁴ Theal (n 32 above) 205. Cradock's reference to 'an estate' in land proves his conviction that English land law was in force in the Cape Colony. In contradistinction to the domestic law that was in force in the Cape Colony, English land law did not give rights in the land but conferred an estate in the land on the owner. This is in line with the doctrine of tenures which provides that only the British sovereign has the right of ownership in the land forming part of his domain. JC Weaver *The great land rush and the making of the modern world* (2003) 66; Gray (n 30 above) 57. Section 17 of the Perpetual Quitrent Proclamation of 1813 refers to the Proclamation granting to the occupiers of loan places 'possession of an estate'. EM Jackson *Statutes of the Cape of Good Hope 1652-1905 Vol I, 1652-1879* (1906) 15.

alteration that would prejudice the British government's successor and authorised Cradock to proceed with the implementation thereof.⁴⁵

It is conceivable that section 1 of the Perpetual Quitrent Proclamation only provided for the conversion of loan places and not for the original granting of waste land on quitrent, so as to allow for the objections raised by the Privy Council Committee.⁴⁶ It is therefore clear that although the British government wished to commence with the alienation of waste land in the Cape Colony, international political circumstances prevented it.

7.3.1.1.3 *Sale and lease of waste land by the British colonial government*

From the discussion in paragraphs 7.3.1.1.1 and 7.3.1.1.2 it is clear that the British government and the British colonial government had no doubt that the British sovereign was the owner of the waste land in the Cape Colony. Therefore, once the Cape Colony was formally ceded to the British sovereign in 1814, the British colonial government proceeded to grant and sell the waste land in the Colony.

In the period from 1813 to 1843 the provisions of the Perpetual Quitrent Proclamation were applicable to the grants of land made by the British colonial government. The British government launched a concerted effort to standardise the land laws of the British Empire in 1840.⁴⁷ In order to implement the instructions received from the Colonial Land and Emigration Commissioners, the British colonial government published the 'Conditions and regulations upon which the Crown land at the Cape of Good Hope will be disposed of' ('Conditions and regulations') in the *Colonial Government Gazette* on 7 September 1843.⁴⁸ Paragraph 1 of the

⁴⁵ Theal (n 32 above) 495; JC Weaver 'Exploitation by design: The dismal science, land reform, and the Cape Boers, 1805-22' (2001) 29 *The Journal of Imperial and Commonwealth History* 13.

⁴⁶ Jackson (n 44 above) 12. Milton remarks that it was only much later that it was made clear by the courts that the Perpetual Quitrent Proclamation was also applicable to original grants of land and not only loan place conversions. Milton (n 33 above) 667-668. See section 7.3.1.2.1. In the *Report of the Surveyor-General* it is remarked that, although the British government was of the opinion that the Perpetual Quitrent Proclamation should only be applicable to the conversion of loan places, the first grants that were made by Cradock were original grants and not loan place conversions. *Report of the Surveyor-General* (n 33 above) 23.

⁴⁷ AJ Christopher *The crown lands of British South Africa 1853-1914* (1984) 11.

⁴⁸ W Harding *The Cape of Good Hope Government Proclamations, from 1806 to 1825, as now in force and unrepealed; and the ordinances passed in Council, from 1825 to 1844 Vol III* (1845) 336-337. The Conditions and regulations were re-enacted with one minor amendment in a Government Notice published in the colonial *Government Gazette* of 15 May 1844. Harding (above) 571-572.

Conditions and regulations provides in peremptory terms that the ‘unappropriated Crown Lands in this Colony will be sold in Freehold, and by Public Auction only’. The Conditions and regulations provided that applications could be made for a piece of land identified in the application to be put up for sale. After receipt of an application the Surveyor-General had to survey the land identified in the application. From paragraph 6 of the Conditions and regulations it appears that, apart from land applied for, the British colonial government could also offer land for sale on its own initiative.⁴⁹ Milton remarks that the purpose of the Conditions and regulations was to establish a uniform land tenure in the form of freehold tenure in the Cape Colony to bring it in line with the rest of the British Empire.⁵⁰

As large parts of the interior of the Cape Colony were arid and only suitable for use as grazing after good rainfall, neither the non-indigenous settlers nor the British colonial government was interested in having such land surveyed and sold by auction. However, the British colonial government was not willing to allow the non-indigenous settlers to use the land free of charge. The non-indigenous settlers therefore had to lease the land that they had been using as seasonal grazing in the interior of the Cape Colony. This land was leased to the non-indigenous settlers on an annual basis.⁵¹

When the Cape Colony obtained representative government in 1853, the newly elected Parliament set about abolishing the sale and lease system established by the Conditions and regulations. This was a protracted process that eventually resulted in the enactment of legislation dealing comprehensively with land-related matters in the Cape Colony.⁵²

⁴⁹ Christopher (n 47 above) 13-14.

⁵⁰ Milton (n 33 above) 668-669.

⁵¹ Christopher (n 47 above) 16-17. It is clear from Christopher’s remarks that the so-called ‘lease system’ was in fact a perpetuation of the loan place system. RO Herbst ‘Die Rynse Sendinggenootskap en grondkweesies in die Kareebergrensgebied in die neëntiende eeu - met spesifieke verwysing na die Amandelboomsending’ unpublished Doctoral dissertation, University of Stellenbosch, 2004 187.

⁵² Christopher (n 47 above) 41-44.

7.3.1.1.4 *Legislation of the Parliament of the Cape Colony relating to waste land*

The 'Act for Regulating the Manner in which Crown Lands at the Cape of Good Hope shall be disposed of'⁵³ ('1860 Crown Lands Act') repealed the Conditions and regulations and replaced it with a system that provided that

all waste and unappropriated Crown lands will be sold subject to an annual quitrent on each lot, and at a reserved price, sufficient at least to defray the costs of inspection, survey, erection of beacons, and title deed.⁵⁴

The 1860 Crown Lands Act reinstated the quitrent system as provided for in the Perpetual Quitrent Proclamation.⁵⁵

Although the 1860 Crown Lands Act did not contain a definition of 'Crown land', several sections provide which land is to be regarded as Crown land and which not. For purposes of this thesis I analyse these sections in order to obtain, as far as possible, a clear definition of Crown land.

Section 9 of the 1860 Crown Lands Act provides for three categories of land that were Crown land but could be subject to a claim by a non-indigenous person. For the purposes of the 1860 Crown Lands Act, land subject to such a claim could not be dealt with as waste Crown land until the Governor had decided on the claim. The three categories were land—

- (a) claimed by any registered owner of adjacent land as part of his property, by reason of any alleged defective title deed, or supposed landmarks of the said adjacent land;
- (b) occupied *bona fide* and beneficially without title deed at the date of the extension of the Colonial limits beyond it;
- (c) conditionally occupied or claimed under any general notice or regulation of the Government, or under any promise or order of a Government officer, duly authorised at the time to make such promise or give such order.⁵⁶

In order for section 9 of the 1860 Crown Lands Act to apply, a claimant had to ensure that the Colonial Secretary was furnished with due notice of the nature of the claim, and reasonable proof to substantiate the claim.⁵⁷

⁵³ Act 2 of 1860.

⁵⁴ Section 1 of the 1860 Crown Lands Act. Jackson (n 44 above) 763.

⁵⁵ Milton (n 33 above) 669.

⁵⁶ Jackson (n 44 above) 765.

In terms of sections 11 and 12 of the 1860 Crown Lands Act, municipal land and land assigned by the Governor to the residents of towns and villages to use as pasture were not waste Crown land and were excluded from the provisions of the Act.⁵⁸

Section 10 of the 1860 Crown Lands Act authorised the Governor to grant or reserve Crown land for special public purposes, subject to the approval of the Legislative Council and House of Assembly of the Cape Colony. In section 14 of the said Act the following categories of land that could only be granted in terms of section 10 are identified:

- (i) Lands known to contain valuable minerals, or situated in the neighbourhood thereof;
- (ii) Lands required for—
 - (aa) military stations;
 - (bb) defence of the frontier;
 - (cc) public outspans;
 - (dd) fishing stations on the sea coast or the banks of tidal rivers; or
 - (ee) any other public purpose;
- (iii) Land on the sea coast lying above the high-water mark and within two hundred feet of it.⁵⁹

From the 1860 Crown Lands Act it appears that the Cape Colony legislature regarded all unoccupied land within the boundaries of the Cape Colony as being waste Crown land, with the exception of the categories of land contemplated in sections 11 and 12.

The 1860 Crown Lands Act was repealed by section 1 of the Act for Regulating the Manner in which the Crown Lands of the Colony shall be Disposed of, 1878,⁶⁰ which was in turn repealed by section 1 of the Act for Regulating the Manner

⁵⁷ As above.

⁵⁸ Jackson (n 44 above) 765-766.

⁵⁹ Jackson (n 44 above) 765, 766.

⁶⁰ 14 of 1878.

in which the Crown Lands of the Colony shall be Disposed of, 1887.⁶¹ Section 9 of the 1860 Crown Lands Act was re-enacted in virtually the same form in the subsequent Acts. These Acts did not add or subtract anything from the description of Crown land in the 1860 Crown Lands Act as analysed in this section.

7.3.1.2 The role of the courts in confirming the application of English land law in the Cape Colony

When the conduct of the British government and the British colonial government with regard to the waste land in the Cape Colony is considered, there can be little doubt that these governments acted on the assumption that such land belonged to the British sovereign. However, it is equally true that in the period from 1806 to 1910 no legislation was enacted that expressly substituted English land law for the domestic land law of the Cape Colony as it existed on the date of the final capitulation of the Batavian forces on 18 January 1806. The role of the courts in accepting the principle that the waste land of the Cape Colony was the property of the British sovereign is discussed in this section.

7.3.1.2.1 *The role of the colonial courts of the Cape Colony*

The first case in which the Supreme Court of the Colony of the Cape of Good Hope ('Supreme Court') remarked on the ownership of waste land in the Cape Colony was *De Villiers v The Cape, Divisional Council*⁶² (*De Villiers*). *De Villiers* dealt with a claim by the plaintiff that the defendant had trespassed on his farm. The Chief Justice, in a dissenting judgment, also dealt with the history of the occupation of land in the Cape Colony.⁶³

As part of the facts before the Supreme Court in *De Villiers*, the Examiner of Diagrams in the Surveyor General's Office prepared a memorandum for the Court dealing with the tenures of the Cape Colony. The memorandum contained a summary of the investigations and events relating to the publication of the Perpetual

⁶¹ 15 of 1887. This Act remained in force until repealed by the State Land Disposal Act 48 of 1961

⁶² 1875 5 Buch 50.

⁶³ *De Villiers* was overturned on appeal to the Privy Council and the judgment of the Chief Justice was accepted as correct. See *Divisional Council of the Cape Division v De Villiers* (1876-77) LR 2 App Cas 567. (Also reported as *The Divisional Council of the Cape Division, Appellants v De Villiers, Respondent* 1876 6 Buch 105.)

Quitrent Proclamation in 1813.⁶⁴ Using the information in this memorandum, the Chief Justice sets out the ‘state of the law respecting the land tenures’ in the Cape Colony as it was before the entry into force of the Perpetual Quitrent Proclamation. For the purposes of this paragraph the following points mentioned by the Chief Justice are important:⁶⁵

- (a) There are three forms of tenure used in the Cape Colony, namely ‘freehold, loan, and quitrent for a limited term’.
- (b) The payment of recognition for loan places, introduced in 1714, is described by the Chief Justice as ‘a small payment or contribution in kind as a recognition from the occupier of the paramount title of the Crown’.

From the above it is clear that the Chief Justice accepted as correct the remarks in the memorandum (which was based on Truter’s report) with regard to the tenures that prevailed in the Cape Colony. His remarks regarding the ‘paramount title of the Crown’ clearly indicate that in his mind the land occupied by the non-indigenous settlers as loan places had been the property of the Company.⁶⁶

The Chief Justice also remarks that the perpetual quitrent tenure introduced by the Perpetual Quitrent Proclamation confers the same rights on the holder of the land as the rights conferred by the Roman-Dutch law tenure of *emphyteusis*.⁶⁷ By referring to the Crown as the *dominus* of the land in the context of *emphyteusis*, the Chief Justice again makes it clear that the Crown is the owner of the waste land that was granted to the non-indigenous settlers in terms of the Perpetual Quitrent Proclamation.⁶⁸

While the remarks of the Chief Justice discussed above must be regarded as *obiter*, his judgment clearly indicates that he is firmly of the opinion that the land granted to the claimant belonged to the Crown. One of the main points that had to be decided in *De Villiers* was whether the Perpetual Quitrent Proclamation was only applicable to loan places converted to perpetual quitrent tenure or whether it also

⁶⁴ *De Villiers* (n 63 above) 53-56.

⁶⁵ *De Villiers* (n 63 above) 58.

⁶⁶ It is accepted that the Chief Justice mistakenly referred to the paramount title of the ‘Crown’ in the context of the 1714 recognition payments and that he meant to refer to the title of the Company.

⁶⁷ The nature of *emphyteusis* is discussed in section 10.6.2 of Chapter 10.

⁶⁸ *De Villiers* (n 63 above) 60.

applied to original perpetual quitrent grants. The defendant contended that the Perpetual Quitrent Proclamation was also applicable to original grants and that it could therefore, in terms of the Proclamation, enter upon the claimant's land to remove stone for the purpose of constructing roads. In giving judgment for the defendant on this point, the Chief Justice discussed the Perpetual Quitrent Proclamation and remarked as follows:⁶⁹

The measure is described as a great one which had "long engaged the attention and anxious wish of each preceding Government," but it would have been a very small measure indeed if it had been intended to apply only to those lands which had been given on loan at a time when an infinitesimal portion of the land of the Colony was occupied and when the great bulk of the land was still vested in the Crown and lay waste and uncultivated.

For the purposes of this section, the most significant feature of the Chief Justice's judgment is that there is an unquestioned acceptance that the Crown was the owner of all waste land in the Cape Colony. Although the ownership of waste land was not a point in contention in *De Villiers*, the Chief Justice deemed it necessary to refer to the tenures that existed before the Perpetual Quitrent Proclamation was published. In his comments on these tenures, he accepted the information contained in the memorandum referred to above and did not question the finding that the Company was the owner of all waste land in the Cape Colony before 1795.

The facts in *Berry v the Divisional Council of Port Elizabeth*⁷⁰ (*Berry*) were similar to those in *De Villiers*, and the Eastern Districts Court ('EDC') relied on the judgment of the Chief Justice in *De Villiers* to give judgment for the defendant in the case. The EDC went further than the Chief Justice in *De Villiers*, by expressly stating that the Crown as *dominus directus* had retained rights in the perpetual quitrent land of the plaintiff. The Divisional Council's right to raise material on the perpetual quitrent farm for the purpose of constructing roads is referred to as a paramount right

⁶⁹ *De Villiers* (n 63 above) 63.

⁷⁰ 1880-1881 1 EDC 241

that cannot be equated to an easement or servitude.⁷¹ To support this statement the EDC paraphrased a rule explained by Lord Stowell in the case of *The Rebecca*:⁷²

That the rights of the Crown being conferred upon it for great purposes, and for the public use, shall not be intended to be diminished by any grant beyond what such grant by necessary and unavoidable construction shall take away.

The only cases during the colonial period where the courts specifically refer to the doctrine that ‘every title of land should originate with a grant made by the Crown’ are *Cape Town Town Council v Colonial Government and Table Bay Harbour Board*⁷³ (*Harbour Board*) and *Colonial Government and Table Bay Harbour Board v Cape Town Town Council*,⁷⁴ which confirmed *Harbour Board* on appeal. In *Harbour Board* the Supreme Court also accepts as a matter of fact that ‘the nominal title to all ungranted land remains with the Crown’.⁷⁵

7.3.1.2.2 *The role of the courts in the twentieth and twenty-first centuries*

Thorough research done in electronic databases containing reported cases of all the provincial divisions of the Supreme Court and the Appellate Division in the period from 1910 until the entry into force of the Constitution of the Republic of South Africa, 1996, (‘Constitution’) reveals that during this period it was generally accepted that waste land belonged to the Crown or state. This conclusion is confirmed in *Law of South Africa Volume 14(1)* (Second Edition Volume) by the following remarks:⁷⁶

State land (formerly referred to as Crown land) is all the land in South Africa belonging to the government. It also includes land outside the borders belonging to the government. Ownership vests in the President of the Republic. Land which has never been transferred by the state into private ownership is state land, unless there is proof to the contrary.

⁷¹ *Berry* (n 70 above) 245. In *The Colonial Government v Fryer and Huysamen (Fryer)* 1885-1886 4 SC 313 the decision of the Supreme Court contradicts the judgment of the EDC in *Berry*. The Supreme Court decided in *Fryer* that the British colonial government did not have the power to resume perpetual quitrent land where the payment of quitrent had been in arrears for more than three years. The Court remarked that perpetual quitrent tenure conferred rights akin to ownership on the occupier of the land and that the Crown lost its proprietary rights as *dominus* over the land and only retained its rights as *princeps*. *Fryer* (above) 316. However, *Fryer* does not derogate from my conclusion that the decisions in *De Villiers* and *Berry* illustrate that the Courts concerned regarded all waste land in the Cape Colony as the property of the British sovereign.

⁷² 2 Ch. Rob., 227-230; *Berry* (n 70 above) 245.

⁷³ 1906 23 SC 62 69.

⁷⁴ 1885-1906 2 Buch AC 332 335.

⁷⁵ *Harbour Board* (n 73 above) 69.

⁷⁶ Mostert (n 33 above) paragraph 35.

In support of the contention that land which has never been transferred by the state into private ownership is state land, the authors refer to *Harbour Board* amongst other authority.

It is interesting to note that after South African courts have for almost a century not had occasion to refer to the remarks in *Harbour Board* quoted in section 7.3.1.2.1, these remarks have again been referred to in our highest courts in the present century. In *Richtersveld Community and Others v Alexkor Ltd and Another*⁷⁷ (*RichtersveldLCC*), the LCC decided that the Richtersveld indigenous communities lost their rights in their land when the British government annexed the territory where they lived in 1847.⁷⁸ The LCC remarks that the law in force in the Cape Colony at the time of annexation provided that all land 'not granted under some form of tenure belonged to the Crown'.⁷⁹ The LCC also relies on *Harbour Board* to substantiate its finding with regard to the extinction of the indigenous communities' rights in land in 1847.⁸⁰ *Barnett and Others v Minister of Land Affairs and Others*⁸¹ (*Barnett*) is the most recent case in which the SCA deemed it necessary to refer to *Harbour Board* as support for the statement that 'the legal principle to be applied is that, since all land originally belongs to the State, land which has never been transferred into private ownership remains State land'.⁸²

7.3.1.3 Conclusion with regard to the introduction of English land law in the Cape Colony

Officials serving in British colonies enthusiastically pursued land tenure system reform in order to advance the agricultural production of the colonies. By doing this they hoped to advance the prosperity of the colonies. Associated with this mission

⁷⁷ 2001 3 SA 1293.

⁷⁸ *RichtersveldLCC* (n 77 above) 1315.

⁷⁹ *RichtersveldLCC* (n 77 above) 1315. The court refers to Botha's remarks that when the Company instituted the quitrent (*erfpacht*) system, the core principle was that the sovereign remained 'the lawful lord of the land', Botha (n 34 above) 152. The court appears to endorse the view that the Company was the owner of the land, without considering any evidence that the Company could in terms of the domestic law of the Cape Colony own the waste land and grant it to the non-indigenous settlers. It must also be noted that as the quitrent system did not involve a grant of land but was a lease of land, Botha's remarks do not have any persuasive force. See the discussion of the 1732 *erfpacht* system in section 10.3.2 of Chapter 10.

⁸⁰ *RichtersveldLCC* (n 77 above) 1315.

⁸¹ 2007 6 SA 313 (SCA).

⁸² *Barnett* (n 81 above) 322.

was the conviction that using vast tracts of land as grazing was injurious to the development and consequent prosperity of colonies. The reform-minded British officials derided the use of ostensibly arable land as pasture by indigenous communities and non-indigenous settlers as a waste of land.⁸³ Cradock was in sympathy with these British officials and advocated the implementation of progressive agricultural policies in the Cape Colony.⁸⁴ In order to attain this goal, the British colonial government had to have the power to control the waste land in the Cape Colony.

The British colonial government officials who had to implement the new approach to the disposal of waste land in the Cape Colony accepted that the British sovereign was the owner of the waste land. This practice was not limited to the Cape Colony, but was also adopted in other British settlement colonies like Australia. Gray remarks that the development of the concept of crown ownership of waste land was connected with the expansion of the British colonial empire during the seventeenth and eighteenth centuries.⁸⁵ Jenks explains the reason for this development as follows:⁸⁶

But the theory had almost died a natural death when it sprang to life again in the most unexpected manner with the acquisition of the great English colonies. For if, as was the case, no subject could show a recognized title to any of the countless acres of America and Australia, at a time when those countries were first opened up by white men, it followed that, according to this relic of feudal theory, these acres belonged to the Crown.

However, the history of the Cape Colony, prior to its cession to Great Britain in 1814, differed greatly from that of the 'great English colonies'. Consequently, English land law was introduced in a limited form in the Cape Colony.

The policies and legislation introduced in the Cape Colony by the British colonial government were aimed at transforming the available waste land into an

⁸³ Weaver (n 45 above) 2-3, 7.

⁸⁴ Weaver (n 45 above) 15, LC Duly 'The failure of British land policy at the Cape, 1812-28' (1965) 3 *Journal of African History* 359, 360-361.

⁸⁵ Gray (n 29 above) 58.

⁸⁶ E Jenks *A history of the Australasian colonies (From their foundation to the year 1893)* (1896) 59. The theory that Jenks refers to is the fiction that the Crown is the owner of all land in Great Britain that no other person can show a title to.

asset and source of revenue. The assumption that all waste land belonged to the Crown was a practical measure to give effect to these policies and to make it possible to enact the necessary legislation.⁸⁷ The British colonial government did not deem it necessary to introduce any other element of English land law in order to attain the goals it set itself. I am of the opinion that Sonnekus's contentions regarding Crown land, referred to in section 7.3, must be rejected. The doctrine of tenures was introduced into the domestic law of the Cape Colony by imposition and infiltration.

7.3.2 Case study: The British sovereign's rights in the waste land of the Richtersveld

Certain parts of the decision of the SCA in *Richtersveld Community and Others v Alexkor Ltd and Another*⁸⁸ ('*RichtersveldSCA*') cannot be reconciled with the conclusion reached in section 7.3.1.3. In this section the relevant part of the SCA's decision is discussed and a case study is conducted to indicate why I contend that the SCA erred in its conclusion that the land claimed by the Richtersveld community did not become the property of the British sovereign.

7.3.2.1 Relevant remarks of the SCA in *RichtersveldSCA*

The remarks of the LCC in *RichtersveldLCC*, referred to in section 7.3.1.2.2, play an important part in the LCC's decision that the Richtersveld community's claim to restitution under the Restitution Act cannot succeed. The SCA disposed of the LCC's findings in this regard as follows:⁸⁹

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

⁸⁷ It should also be borne in mind that the British colonial government officials believed that the waste land in the Cape Colony had belonged to the Batavian Republic.

⁸⁸ 2003 6 SA 104 (SCA).

⁸⁹ *RichtersveldSCA* (n 88 above) 128-129.

From these remarks it appears that the SCA, like Sonnekus, is of the opinion that, because Roman-Dutch law was not replaced by English common law, the doctrine of tenures could not have become part of the domestic law of the Cape Colony.

The SCA also referred to the remarks of the LCC with regard to the effect of the 1860 Crown Lands Act and its successors. The LCC remarked that the British colonial government made laws like the 1860 Crown Lands Act under which it had the power to dispose of the land which the Richtersveld community occupied.⁹⁰ The SCA rejected this finding with the following remarks:⁹¹

I agree with counsel for the appellant that these Acts manifested a contrary intention to that found by the LCC. They provided for the disposal of waste Crown land but expressly excluded certain categories of land, including land such as the Richtersveld, from their operation. So, for example, s 12 of Act 15 of 1887 provided, in terms similar to those of its precursors:

'Land claimed by any registered owner of adjacent land as part of his property by reason of any alleged defective title deed or supposed landmarks or beacons of the said adjacent land, land occupied *bona fide* and beneficially without title deed at the date of the extension of the colonial limits beyond it, land conditionally occupied or claimed under any general notice or regulation of the Government, or under any promise or order of a Government officer, duly authorised at the time to make such promise, or give such order, shall not be considered or treated as Crown land for the purpose of this Act, until the claim thereto, in each case, shall have been decided on by the Governor.'

The Richtersveld clearly fell in the category of 'land occupied *bona fide* and beneficially without title deed at the date of extension of the colonial limits beyond it'. These Acts accordingly manifested an intention to respect existing land rights and not to extinguish them.

It appears that the SCA did not deem it necessary to consider the meaning of the quoted section as a whole as is evidenced by the fact that it did not quote the entire section. The rest of the section following directly after the word 'Governor'; and a comma, provided as follows:⁹²

...who shall have the power of satisfying such claim, by grant of the land or compensation out of the purchase money when the said land shall have been sold or

⁹⁰ RichtersveldLCC (n 77 above) 1310-1311.

⁹¹ RichtersveldSCA (n 88 above) 129. Section 12 of Act 15 of 1887 provided exactly the same as section 9 of the 1860 Crown Lands Act discussed in paragraph 7.3.1.1.4.

⁹² EM Jackson *Statutes of the Cape of Good Hope 1652-1905 Vol. II, 1880-1893* (1906) 2466.

otherwise, as shall appear equitable:· Provided, always, that due notice of the nature of the claim, and reasonable proof that it can be substantiated, be received at the office of the Commissioner in sufficient time to admit of the withdrawal of the lot from sale, and that the claimant use reasonable diligence to lay the proofs in support thereof before the person or persons to whom the question may be referred by the Governor.

From the section as a whole it is clear that the legislature did not have in mind respecting existing land rights of indigenous communities. The domestic law of the Cape Colony did not acknowledge communal ownership of land as conferring civil or property rights on the communal owners.⁹³ As the Governor could satisfy a claim under section 12 by grant of the claimed land, such land must have been able to be registered. As no indigenous land law system of the indigenous communities in the study area acknowledged individual ownership of land, no indigenous person would have been able to lodge a claim in terms of section 12. Because of the proviso, section 12 was only applicable to land that was actually claimed by a person. There is no indication in the facts of *Richtersveld* LCC that the indigenous community concerned lodged any claim under any Crown Lands Act that the Governor could decide on.

I contend that the SCA mistakenly accepted the fact that the land claimed by the Richtersveld community was not occupied by the British colonial government or private persons not forming part of the Richtersveld community, as evidence that the said government acknowledged that the said community had customary law rights in the land.⁹⁴ My contention is strengthened by the following case study of the conduct

⁹³ Sections 8 and 9 of the Ordinance, enacted by His Excellency the Governor of the Colony of the Cape of Good Hope, with the advice and consent of the Legislative Council thereof, for constituting a Parliament or the said Colony, 1853, provide for the franchise requirements of the voters in the Cape Colony. Section 8 provides that to be eligible to vote a male person had to, amongst other things, either occupy separately or jointly 'any house, warehouse, shop or other building ... with any land within such Electoral Division' of the value of seventy-five pounds sterling or must have been 'for the space of twelve months aforesaid, really and *bona fide* in the receipt of salary or wages at and after the rate of not less than fifty pounds by the year'. From section 9 of the Ordinance it is clear that joint occupation of premises cannot be equated with communal occupation of land. Jackson (n 44 above) 498, 499. (The quoted parts of section 8 are the amended version of 1892. In 1853 the qualification was twenty-five pounds sterling.)

⁹⁴ The judgment of the SCA is also flawed by inaccurate statements and incorrect interpretation of the legislation of the Cape Colony. The Cape Colony was not ceded in terms of the Articles of Capitulation of 1806. The cession only took place on 13 August 1814 in terms of a Convention concluded in London between the British sovereign and the Prince of Orange. GM Theal *Records of the Cape Colony From April 1814 to December 1815* (1902) 170-174. The SCA concludes that in terms of the Articles of Capitulation 'the indigenous land rights of the inhabitants were recognised and

of the British colonial government with regard to the land at Port Nolloth in the Richtersveld.

7.3.2.2 Port Nolloth as case study area

In *RichtersveldLCC* the land claimed by the Richtersveld community is described as a narrow strip of land running along the Atlantic coast from the Gariep River to a point just south of Port Nolloth.⁹⁵ Although the land occupied by the town did not form part of the land claimed by the Richtersveld community, it formed part of the land that they had occupied for many years before the first non-indigenous person arrived. Carstens remarks that the site was regarded by the indigenous communities of Namaqualand as one of the best places to fish and catch seals.⁹⁶ By studying the activities of non-indigenous persons at the site of Port Nolloth from around the middle of the nineteenth century, the attitude of the British colonial government with regard to the rights in land of the indigenous communities of Namaqualand can be determined.

7.3.2.3 Settlement of non-indigenous persons at Port Nolloth

The future site of Port Nolloth became part of the Cape Colony in terms of a Proclamation published by the Governor on 23 December 1847 ('Annexation Proclamation').⁹⁷ The Annexation Proclamation provided, amongst other things, that due to the fact that the northern limits of the Cape Colony were 'ill defined and

respected'. *RichtersveldSCA* (n 88 above) 124-125. This conclusion is wrong. The Articles of Capitulation were only in force while the rights of the inhabitants had to be protected against the conqueror and occupier of the Cape Colony. With regard to the nature and effect of the Articles of Capitulation, see note 97 of Chapter 3. Once the Cape Colony was ceded in terms of the Convention, this protection of rights lapsed. The SCA also errs, because the inhabitants of the Richtersveld were not inhabitants of the Cape Colony in 1806 or in 1814. The rights of the Richtersveld community were determined by the Annexation Proclamation of 1847 (see section 7.3.2.3) and the domestic law of the Cape Colony that was extended to the annexed territory. The SCA's interpretation of section 3 of Ordinance 50 of 1828 is also incorrect. The said section does not indicate that the 'indigenous land rights' of the Richtersveld community were respected. *RichtersveldSCA* (n 88 above) 125. With regard to the interpretation of this section, Elbourne remarks that Ordinance 50 'recast land ownership in terms of individual freehold and left the crown as the ultimate owner of the land'. E Elbourne "'The fact so often disputed by the black man": Khoekhoe citizenship at the Cape in the early to mid nineteenth century' (2003) 7 *Citizenship Studies* 389. Section 3 of Ordinance 50 refers to land obtained by grant, purchase or other lawful means and therefore does not refer to land held communally. E Boonzaier et al *The Cape herders: A history of the Khoikhoi of Southern Africa* (1996) 108.

⁹⁵ *RichtersveldLCC* (n 77 above) 1299. In *RichtersveldSCA* it is mentioned that the town Port Nolloth is excluded from the claim. *RichtersveldSCA* (n 88 above) 110.

⁹⁶ PR Carstens *Port Nolloth: The making of a South African seaport* (2011) 22.

⁹⁷ The Cape of Good Hope *Government Gazette* No. 2195, Thursday, December 23, 1847.

uncertain' a 'clearer and better boundary' would be established, namely the Orange River.⁹⁸

The decision to start exploiting the rich copper deposits in the interior of Namaqualand in the 1850's also made it imperative to find a suitable harbour to export the copper ore. Although the harbour at Port Nolloth had many shortcomings it was the only suitable place that could be used for the purpose. The decision to develop a harbour at Port Nolloth started the growth of a small settlement around the harbour.⁹⁹ The major problem of transporting the copper ore from the interior to the coast was eventually solved by the construction of a railway line from Port Nolloth to Okiep (then known as O'okiep).

7.3.2.4 Legislation relating to the land used for the construction of the railway
In 1869 the Cape Colony Parliament enacted the Port Nolloth Tramway or Railway and Jetty Act¹⁰⁰ ('Railway Act'), which authorised the Cape Copper Mining Company (Limited) ('CCMC') to build a railway to the interior and to construct a jetty at Port Nolloth.¹⁰¹ Sections 2 and 4 of the Railway Act gave the CCMC the following rights and duties with regard to the land on which the railway was to be built:¹⁰²

- (a) The CCMC was authorised to enter upon and to take possession of all lands needed for the building of the railway indicated on plans submitted to the Cape Colony Parliament and to appropriate the necessary materials for the work from waste Crown lands.
- (b) The CCMC was obliged to pay compensation to private owners whose land was appropriated as well as to persons who leased Crown land whose land was appropriated and for material removed or damage caused by the removal of the necessary material.

⁹⁸ The former name of the Gariep River.

⁹⁹ Carstens (n 96 above) 85-86.

¹⁰⁰ Act 4 of 1869. Jackson (n 44 above) 1116-1123.

¹⁰¹ The Railway Act did not initially provide for the building of a railway from Port Nolloth to Okiep. However, the Port Nolloth Tramway or Railway Extension Act 3 of 1871 ('Extension Act 1') and the Act To Authorise the Cape Copper Mining Company (Limited) to construct and work a Tramway or Railway from Kookfontein to O'okiep 24 of 1873 ('Extension Act 2') provided the necessary authority to the CCMC. Jackson (n 44 above) 1178-1180, 1305-1307.

¹⁰² Jackson (n 44 above) 1117, 1119.

- (c) All waste Crown lands needed for the building of the railway or for obtaining material for the building or maintenance of the railway could be appropriated by the CCMC free of charge.

Section 3 of the Railway Act provided exhaustively for the arbitration process that had to be followed by any proprietor or person claiming compensation who felt aggrieved by the amount of compensation they received from the CCMC. When sections 2 and 3 of the Railway Act are read together, it is clear that a person claiming compensation is the same as a lessee of Crown land.¹⁰³ Extension Act 1 and Extension Act 2 conferred the same rights and duties relating to land on the CCMC as the Railway Act. These Acts further provided that in addition to proprietors and lessees of Crown lands, other persons holding land 'from and under the Crown' whose land had been appropriated by the CCMC were also entitled to compensation.¹⁰⁴

In *RichtersveldLCC* the Richtersveld community contended that they had a right to indigenous title over the whole of the Richtersveld, which includes the Richtersveld reserve, the corridor farms and the land subject to their claim.¹⁰⁵ The corridor farms are privately owned farms lying between the claimed land and the Richtersveld Reserve. The SCA remarked that, after the publication of the Annexation Proclamation, the 'Richtersveld people continued to exercise and enjoy exclusive beneficial occupation of the whole of the Richtersveld until at least the mid 1920s'.¹⁰⁶ The SCA found that the rights of the Richtersveld community to the land that they occupied were 'akin to those held under common-law ownership'.¹⁰⁷ These remarks appear to be in conflict with the factual position as it was in the period after annexation. From a geographical point of view, the CCMC would have had to appropriate land in the corridor farms to build the railway. If the British colonial government considered the Richtersveld community to have had any rights in the land, it would have provided that the community would be entitled to receive compensation for the land appropriated by the CCMC. The Railway Act and the Extension Acts only provided for compensation to private owners of land or persons

¹⁰³ Jackson (n 44 above) 1117-1118.

¹⁰⁴ Jackson (n 44 above) 1179, 1305.

¹⁰⁵ *RichtersveldLCC* (n 77 above) 1316.

¹⁰⁶ *RichtersveldSCA* (n 88 above) 130.

¹⁰⁷ *RichtersveldSCA* (n 88 above) 112-113.

leasing land from the Crown or holding land from the Crown. Therefore, it must be accepted that the British colonial government regarded the land on which the railway was to be built as either private property or Crown land.¹⁰⁸

7.3.2.5 Port Nolloth Crown Lands Act

From the preamble of the Port Nolloth Crown Lands Act¹⁰⁹ ('Port Nolloth Act') it appears that, prior to the official laying out and surveying of the township of Port Nolloth, non-indigenous persons had occupied land at Port Nolloth with only temporary permission from the British colonial government. Although the non-indigenous persons had erected buildings on the occupied land, the temporary permission did not guarantee them any right to obtain a grant of the occupied land or any right to compensation for the improvements made to the land.¹¹⁰ The purpose of the Port Nolloth Act was to enable these non-indigenous occupiers of the land to obtain title in such land. To this end, section 2 of the Port Nolloth Act provided as follows:¹¹¹

Notwithstanding anything to the contrary contained in any Act it shall be lawful, from and after the passing of this Act for the Governor to grant title in favour of such claimants, to such pieces or lots of Crown land at Port Nolloth as the said Commission may recommend.

From the Port Nolloth Act it is clear that the British colonial government had no doubt that the land that was occupied by the non-indigenous persons was Crown land. This made it possible for the Governor to grant the land to the occupiers in terms of the Port Nolloth Act.

¹⁰⁸ In Chapter 11 I discuss the rights in land of the indigenous communities that developed at missionary institutions in the study area. From that discussion it is clear that the British colonial government did protect the rights of these communities in the Crown land that they occupied. It is therefore interesting to note that it is only the Extension Acts that contain the category of persons holding land under the Crown. This category was included because the extended railway line passed through the land held by the Steinkopf Missionary Institution on a ticket of occupation. JS Marais *The Cape Coloured people 1652-1937* (1968) 81. Such tickets of occupation conferred certain rights in land on the missionary institutions and their inhabitants and are discussed in section 12.3.3.5 of Chapter 12.

¹⁰⁹ 33 of 1904. EM Jackson *Statutes of the Cape of Good Hope 1652-1905 Vol. III, 1894-1905* (1906) 4759-4760.

¹¹⁰ Jackson (n 109 above) 4759.

¹¹¹ As above.

7.3.2.6 Conclusions made from the case study

It is accepted that the defendants in *RichtersveldLCC* did not present any evidence regarding the conduct of the British colonial government with regard to land that fell within the area claimed by the Richtersveld community. If the LCC's attention had been drawn to the specific legislation of the Cape Colony Parliament discussed in the case study, it would have had far more convincing grounds to contend that land claimed by the said community had been Crown land. The SCA would also then have had considerable difficulty to deny that the conduct of the British colonial government clearly indicated that it regarded the land as belonging to the British sovereign.¹¹²

In section 2.4.1 of Chapter 2 I discuss the histories of occupation of land that need to be studied to find an equitable solution to the dispossession of land from the indigenous communities in the study area. The British colonial government was not able to recognise the manner in which the indigenous communities of the Richtersveld occupied the land in and around the future site of Port Nolloth in 1847. Consequently, the said government acted as if the land in the region was unoccupied and therefore waste Crown land.

7.4 Conclusion

In Chapters 3 to 5 of this thesis I focussed on the Company's rights in the land of the Cape Colony in terms of international law rules and the domestic law of the Cape Colony. The conclusions that I reached in these chapters covered new ground and made it necessary to look at the period after 1806 in a different light.

In this chapter I showed that the British colonial government officials' conduct with regard to waste land was based on incorrect assumptions about the Company's rights in the waste land of the Cape Colony. They erroneously assumed that the Company was the owner of all the waste land in the Colony and proceeded on the basis that the British sovereign, as the successor of the Company, became the

¹¹² I do not contend that in the circumstances of *RichtersveldLCC* and *RichtersveldSCA*, the SCA came to the wrong conclusion in overturning the decision of the LCC. However, I do contend that if an indigenous community cannot present evidence that shows that the British colonial government did not appropriate their land as if it was Crown land, another court may come to a decision that is in line with my conclusion based on the case study.

owner of all such land. In this way the English common law doctrine of tenures was introduced into the domestic law of the Cape Colony.

Although this may be regarded as an insignificant event, the *Richtersveld* cases¹¹³ prove that the ownership of the waste land of the Cape Colony during the colonial period is of vital importance to the indigenous communities who lost their rights in land before 19 June 1913. My conclusion in this chapter is that, due to the introduction of the doctrine of tenures in the Cape Colony, the British sovereign became the private law owner of all land that was not held in terms of ownership transactions. This meant that the British colonial government only recognised the rights in such land that it had granted to non-indigenous persons and indigenous communities. It did not recognise that the indigenous communities had any inherent customary law rights in land as found by the SCA.

¹¹³ I use the phrase *Richtersveld* cases as a collective name for all the cases involving the land claim of the Richtersveld community against Alexkor Ltd and the State. In addition to the cases in the LCC and SCA, the Constitutional Court confirmed the decision of the SCA.

Part 3

Dual system of rights in land in terms of the domestic law of the Cape Colony

8 Occupation of land used as grazing

8.1 Introduction

This thesis is concerned with the history of occupation of land in the study area. In Chapter 2 a broad overview is given of the different ways in which indigenous communities and non-indigenous persons occupied the land in the study area. In this chapter the manner in which non-indigenous persons occupied the South-Western Cape is discussed in greater detail, in particular their occupation of land for use as grazing for their livestock.

The reason for the focus on grazing is that the rights in land of indigenous communities in terms of their customary law systems can be compared with the rights of non-indigenous persons in the land they occupied as grazing.¹ The acquisition by the Company of land to use as grazing during the period that the settlement expanded² from the Cape to the Hottentots Holland Mountains and into the Berg River Valley is discussed.³ During the initial phases of this process the Company only had to contend with the pastoral indigenous communities who also used the grazing at the Cape and the surrounding area for their livestock. When the Company decided in 1657 to release the first non-indigenous settlers to engage in agriculture in the Liesbeek Valley, it was soon faced by their demands for grazing for their working cattle.

¹ This contention is based on the fact that the indigenous communities in the study area were all pastoral indigenous communities. Non-indigenous persons obtained the rights in the land that they occupied as grazing in terms of the domestic law of the Cape Colony. (These rights are discussed in Chapter 10.) From Chapters 4 and 9 it emerges that the domestic law of the Cape Colony with regard to rights in land is unique. The rights of the indigenous communities and non-indigenous settlers in land used as grazing can therefore be compared without having recourse to the Eurocentric Roman-Dutch and English common law systems.

² This is the period from the establishment of the settlement in April 1652 to the time that the Company established non-indigenous settlers in the Tulbagh Valley (*Land van Waveren*) in October 1700. The expansion into the Tulbagh Valley was the first permanent settlement in the interior of the Cape Colony.

³ In this chapter I refer to this region as the South-Western Cape.

The colonial government now had to control the land that it had acquired as grazing to ensure that the Company and the non-indigenous settlers had sufficient grazing for their livestock. The land used as grazing that was subject to the control of the Company is referred to as pasture in this thesis. Control by the colonial government included measures to prevent the non-indigenous settlers from using land outside the recognised boundaries of the settlement as grazing for their livestock.

Land used as pasture is not normally regarded as a type of land that must be treated differently from other types of land. As I contend that the waste land in the Cape Colony did not belong to the Company, it is necessary to establish to whom the land belonged.⁴ I do this by classifying the land as grazing, which in turn enables me to determine what rights could be obtained by non-indigenous persons in such land. As land was freely available at the Cape during the early stages of the settlement of non-indigenous persons, I contend that land used as grazing initially did not have a commercial value and must be regarded as a thing out of commerce. Therefore, I discuss the applicable Roman law principles to conclude that land used as pasture at the Cape must be regarded as a public thing.

8.2 Grazing for the Company's livestock

The acquisition of land in the Table Valley to use as grazing for the growing herds and flocks of the Company was a gradual process. I describe the different stages of this process in this section.

8.2.1 Acquiring land to be used as grazing

In the very beginning of the non-indigenous settlement at the Cape, the newcomers had no livestock and concentrated on planting vegetables to provide refreshment to the Company's ships as soon as possible. Once the colonial government was able to establish contact with the indigenous communities who had livestock, it was able to start building up its own herds and flocks. Simultaneously, the process of appropriating grazing for the livestock was begun.

⁴ My contentions with regard to the Company's private law ownership of the land at the Cape are set out in Chapter 5.

8.2.1.1 Communal use of grazing at the Cape

Jan van Riebeeck and the Company servants accompanying him were not acquainted with the customary law systems of the pastoral indigenous communities living at the Cape and the rights that were acquired in terms of such customary law systems. Van Riebeeck did not find any cultivated land in the Table Valley and its immediate surroundings, nor did he encounter indigenous communities with their livestock.⁵ Some of Van Riebeeck's remarks regarding the manner in which the land could be used for agriculture if he had enough labourers, create the impression that in April 1652⁶ he did not have reason to suspect that the land concerned belonged to the indigenous communities living at the Cape. The livestock of the indigenous communities was grazing in other parts of the interior and apparently fertile agricultural land did not show any signs of having been cultivated. By June 1652 the indigenous communities had not yet started their yearly migration to the Cape and the colonial government had not had the opportunity to start trading for livestock.⁷

The first opportunity to obtain livestock for the provisioning of the Company's fleets arose when the indigenous communities arrived in the vicinity of the Fort in October 1652.⁸ When the colonial government started to trade with the indigenous communities, Van Riebeeck realised that they were reluctant to part with their livestock. This, and the high prices they demanded, made the establishment by the Company of its own herd of cattle and flock of sheep essential.⁹ Therefore, the colonial government started to build up herds and flocks for the Company. On 15 December 1652 Van Riebeeck was able to note that, apart from the livestock that was to be slaughtered for the workmen at the Fort, a herd of 88 cattle and a flock of 269 sheep had been established.¹⁰

⁵ DB Bosman & HB Thom *Daghregister gehouden by den oppercoopman Jan Anthonisz van Riebeeck Deel I 1651-1655* (1952) 43. See section 2.3.1 of Chapter 2 with regard to the indigenous communities that lived at the Cape in April 1652.

⁶ HCV Leibbrandt *Precis of the archives of the Cape of Good Hope December, 1651-December, 1653: Riebeeck's journal &c* (1897) 20, Bosman (n 5 above) 30, 32-33, 429.

⁷ Leibbrandt (n 6 above) 25, Bosman (n 5 above) 43.

⁸ HB Thom *Journal of Jan van Riebeeck Volume I 1651-1655* (1952) 71.

⁹ Thom (n 8 above) 113 and footnote, 121, D Sleigh *Die buiteposte: VOC-buiteposte onder Kaapse bestuur 1652-1795* (2007) 29.

¹⁰ Thom (n 8 above) 113.

The grazing available for the Company's livestock was first mentioned in Van Riebeeck's journal on 14 January 1653. He remarked that within sight of the Fort there was very fine grazing for large numbers of livestock and still enough land for making gardens. The remarks regarding the quality of the grazing were based on the fact that it was sufficient for the large number of livestock of the indigenous communities that had been grazing there in the preceding months.¹¹ From the remarks made in Van Riebeeck's journal it does not appear that the colonial government, at that stage, entertained the idea or had the intention that some of this grazing had to be reserved for the exclusive use of the Company's livestock.¹² At this stage, the size of the Company's flocks and herds did not require the colonial government to have exclusive use of the available grazing at the Cape.

8.2.1.2 Table Valley claimed as exclusive grazing for the Company's livestock

The formal allocation of grazing is mentioned for the first time in Van Riebeeck's journal on 1 August 1655. He noted that the indigenous community living under the protection of the Company near the Fort was directed as to where their livestock could graze, namely 'behind the Lion Mountain,' and also stated that the 'Table Valley' should be left as grazing for the Company's cattle.¹³ This was during a period when the trade in livestock between the Company and the indigenous communities increased, which led to a substantial increase in the number of livestock held by the Company.¹⁴ Another instance of apportionment of the land used as grazing between the indigenous communities and the Company was recorded on 19 November 1655. The same indigenous community that had previously requested to have their livestock grazing under the protection of the Company near the Fort, was told that they were only allowed to use the grazing that was not needed for the Company's livestock.¹⁵ It appears that with the increase in the numbers of livestock held by the Company during 1655, its policy with regard to grazing had changed from sharing it

¹¹ Thom (n 8 above) 129.

¹² From May 1653 Van Riebeeck also placed some sheep on Robben Island to see whether the island could be used as grazing. Thom (n 8 above) 156. However, the rights in land that may have been acquired by the Company by using the island as grazing are not considered, as the indigenous people did not have access to the island during this period.

¹³ Thom (n 8 above) 334.

¹⁴ Thom (n 8 above) 319, 322, 325.

¹⁵ Thom (n 8 above) 367.

to trying to allocate separate areas of grazing for the Company's livestock and that of the indigenous communities.¹⁶

The Company did not always succeed in preventing the indigenous communities from using the grazing at the Cape as they wished. This was mainly due to the fact that the herds of the indigenous communities were so large that the animals grazed wherever they wanted to. However, when indigenous communities were requested to move their livestock further from the Fort apparently they were willing to do so.¹⁷

During May 1656, on returning from their summer grazing area, the indigenous community that requested grazing under the protection of the Company in 1655, again requested the use of the grazing in the Table Valley. The colonial government was reluctant to accede to the request, as at this stage it clearly considered that the grazing in the Table Valley could not sustain the Company's and the indigenous community's livestock.¹⁸ By May 1656 matters had developed to a point where the colonial government felt itself to be established strongly enough at the Cape to inform some of the indigenous leaders that the Company had taken possession of Table Valley and that the indigenous communities could no longer contend that the land there belonged to them.¹⁹

Although there was no formal resolution providing that the indigenous communities who wished to use the land in Table Valley as grazing had to pay for the privilege, the practice was adopted that such communities had to provide a number of head of cattle to the Company on a monthly basis. If the indigenous communities complied with this requirement they were entitled to be protected by the Company and to use the grazing in the vicinity of the Lion Mountain.²⁰ In October 1656 it became clear to Van Riebeeck that, because of the extremely strong southeasterly winds blowing in the Table Valley, it would be better to use it exclusively as grazing for livestock and not to try to cultivate any grain in the valley. He remarked

¹⁶ Sleigh (n 9 above) 40.

¹⁷ Thom (n 8 above) 373.

¹⁸ HB Thom *Journal of Jan van Riebeeck Volume II 1656-1658* (1954) 32.

¹⁹ Thom (n 18 above) 33; Sleigh (n 9 above) 40.

²⁰ Thom (n 18 above) 38, 42-43.

that by stopping the planting of crops in the Table Valley the great need for extra grazing could be addressed.²¹ From the above it can be deduced that by the time the first non-indigenous settlers were given land in the Liesbeek valley in February 1657, the Company had exclusive control of the grazing in the Table Valley for its own livestock.

8.2.2 Conflict over grazing at the Cape

The colonial government's gradual appropriation of valuable grazing in the Table Valley posed a serious risk to the livestock-owning indigenous communities at the Cape. In response to the Company's encroachment on their grazing, the indigenous communities first tried passive and then hostile action in order to try to ensure their survival.

8.2.2.1 Attempts by the indigenous communities to regain the grazing in Table Valley

The most important developments with regard to grazing at the Cape from 1657 to the departure of Van Riebeeck in 1662 resulted from the deteriorating relationship between the colonial government and the indigenous communities of the Cape. When the indigenous communities became aware that land was being given to non-indigenous settlers in the Liesbeek valley, they confronted Van Riebeeck on the basis that this development encroached on their living area and grazing. Van Riebeeck ventured the opinion that there was enough grazing for the livestock of the indigenous communities and the non-indigenous settlers.²² Van Riebeeck's suggestion was that they should remain in the area where they were situated, which was quite a long way removed from the Fort.²³

As the indigenous communities of the Cape were vulnerable to attack by stronger indigenous communities, they insisted that they wanted to come to the Fort to be protected by the Company. In these circumstances the question of the scarcity of grazing for the Company's livestock and that of the indigenous communities once again came to the fore. The colonial government was only willing to make grazing

²¹ Thom (n 18 above) 69.

²² Thom (n 18 above) 89, Sleigh (n 9 above) 40-41.

²³ Thom (n 18 above) 135.

available to the indigenous communities if they were willing to trade with the Company. Eventually they came to an agreement that the indigenous communities could use the area beyond Kloofnek (where modern day Camps Bay is situated) as grazing. It was made clear to them that the Table Valley was to be used exclusively as grazing for the Company's livestock.²⁴

A clash between the non-indigenous settlers and the indigenous communities occurred on 2 January 1658 when the cattle of the indigenous communities trespassed onto the cultivated fields of the non-indigenous settlers.²⁵ Van Riebeeck was called upon to intercede and he requested that the indigenous communities should use the grazing near Hout Bay. According to the journal entry for 2 January 1658, the indigenous communities' leaders were willing to accede to Van Riebeeck's request.²⁶ Following on this discussion, Van Riebeeck, a few days later, met with one of the leaders of the indigenous communities concerned and indicated that the Company would allow the indigenous communities to use the grazing at Hout Bay and in the mountain valleys of the peninsula, if the grazing in the Liesbeek valley and between Table Bay and False Bay was left to the Company and the non-indigenous settlers.²⁷

After a further period of increased tension between the Company and the indigenous communities, during which time some of the leaders of the indigenous communities were taken hostage, the indigenous communities indicated that they wanted to normalise their relationship with the Company. The meeting held on 5 July 1658 led to the release of the hostages and to a formal peace treaty that provided, amongst other things, that the indigenous communities would not use the grazing on the western side of the Salt and Liesbeek rivers, as it was barely sufficient for the livestock of the Company and the non-indigenous settlers. It was also agreed that if the indigenous communities should be attacked by other indigenous communities

²⁴ Thom (n 18 above) 136.

²⁵ HCV Leibbrandt *Precis of the archives of the Cape of Good Hope January, 1656 - December, 1658: Riebeeck's journal &c* (1897) 99.

²⁶ Thom (n 18 above) 211.

²⁷ Thom (n 18 above) 214.

coming from the interior, they would be allowed to bring their livestock to the area behind the Lion Mountain.²⁸

8.2.2.2 The 1659 war and the ousting of the indigenous communities from the grazing at the Cape

The disputes between the Company and the indigenous communities of the Cape eventually resulted in a war breaking out in May 1659, in which the Company defeated the indigenous communities.²⁹ During the peace negotiations in April and May 1660 it was made clear to the indigenous communities that there was not sufficient grazing at the Cape for their livestock and the livestock of the Company and the non-indigenous settlers. The indigenous leaders pointed out to Van Riebeeck that since the Company only arrived at the Cape in 1652, the Company and the non-indigenous settlers did not have a legitimate claim to the grazing at the Cape.³⁰ Confronted with this argument, Van Riebeeck indicated that as the Cape had been conquered by the Company, the indigenous communities would no longer have access to the grazing in the Table Valley and in the area west of the boundary established along the line of the Liesbeek River.³¹ The indigenous communities who were previously allowed to use the grazing beyond Kloofnek and the Lion Mountain (in cases where they were threatened by other indigenous communities), were therefore permanently deprived of that privilege. Even when, during November 1661, the indigenous communities living near the Cape were forced to retreat by the seasonal migration of stronger indigenous communities, the former were not allowed to use the grazing that the colonial government regarded as belonging to the Company and the non-indigenous settlers.³²

²⁸ Thom (n 18 above) 300-301.

²⁹ See section 3.2.1 of Chapter 3 with regard to the consequences of this war from an international law viewpoint. It must be noted that some military historians cast doubt on whether the Company achieved a military victory in the war. However, as it was the indigenous communities that sued for peace and lost their access to the area west of the Liesbeek and Salt Rivers, the war is regarded as a victory for the Company. See S Marks 'Khoisan resistance to the Dutch in the seventeenth and eighteenth centuries' (1972) 13 *The Journal of African History* 64.

³⁰ HCV Leibbrandt *Precis of the archives of the Cape of Good Hope January, 1659 - May, 1662: Riebeeck's journal &c* (1897) 118.

³¹ Leibbrandt (n 30 above) 118, 127. In view of the remarks in section 3.2.1, Van Riebeeck's comments were not in line with the accepted international law rules of the seventeenth century.

³² Leibbrandt (n 30 above) 307, 309.

After the war between the indigenous communities and the Company, the colonial government only had to ensure that there was enough grazing available at the Cape for its and the non-indigenous settlers' livestock. This is evidenced by the journal kept subsequent to Van Riebeeck's departure, in which only one instance is mentioned of possible harm being done by the cattle of an indigenous community to the grazing used for the Company's livestock. On 4 November 1670 it was noted that the cattle of an indigenous community were being pastured beyond the Wynberg and that it might be necessary to request the indigenous community to move further inland.³³ On 22 November 1673 the indigenous communities were also requested to remove their cattle to grazing that fell outside the jurisdiction of the Company.³⁴

8.3 Livestock farming by the Company and the non-indigenous settlers at the Cape

The indigenous communities that were excluded from using the grazing in the Table Valley still came to the Cape and pastured their livestock in the Tygerberg area and in and around the areas of Stellenbosch and Hottentots Holland. However, they had to be content to use the grazing and water resources that were not required by the colonial government and the non-indigenous settlers. After the 1659 war, the colonial government was more concerned with ensuring that its livestock had the benefit of the best available grazing than with the fact that the indigenous communities still used the grazing in the vicinity of the Cape.³⁵

8.3.1 Provisions of the land cultivation transactions dealing with grazing

One of the purposes of establishing the non-indigenous settlers as farmers in the Liesbeek valley was to relieve the Company of the burden of providing all the agricultural produce for the Company's fleets.³⁶ Guelke remarks that the fact that the first non-indigenous settlers were given only 11,3 hectares of land is an indication that the Company required them to practise the intensive agricultural methods that

³³ HCV Leibbrandt *Precis of the archives of the Cape of Good Hope: Journal, 1662-1670* (1901) 337.

³⁴ Leibbrandt (n 33 above) 169.

³⁵ The resolution of 1679 in which the colonial government authorised H Hüsing to occupy land east of the Eerste River contains the condition that the indigenous communities must not be prevented from also using the land as grazing. *Resolutions of the Council of Policy of Cape of Good Hope* C. 14, pp. 78–79.

³⁶ L Guelke 'Blanke boere en grensbewoners 1652-1780' in Giliomee, H & Elphick, R (eds) *'n Samelewing in wording: Suid Afrika 1652-1840* (1990) 71.

were followed in the Netherlands.³⁷ The land cultivation transactions of 21 February 1657 allowed for the keeping of cattle and other livestock, but the purpose of the transactions was cultivation.³⁸

The provisions of the land cultivation transactions relating to livestock are of interest for the purposes of this chapter. Working cattle initially had to be bought at a set price from the Company. The non-indigenous settlers could later also buy cattle from the Company for breeding purposes. The same provisions applied with regard to sheep and pigs. The most important provision for the purposes of this chapter was that, as far as cattle and sheep were concerned, the non-indigenous settlers had to render ten per cent of the progeny of their livestock to the Company in return for the use of pasture.³⁹ From the provisions of the land cultivation transactions relating to the keeping of livestock it appears that it was the colonial government's attitude that the grazing at the Cape belonged to the Company and that the Company could control it. By demanding compensation for the use of grazing at the Cape, the colonial government imposed the first measure that transformed land used as grazing to land used as pasture.

It appears that the non-indigenous settlers took full advantage of the abovementioned provisions of the land cultivation transactions. They did not plant crops on their farms as feed for their livestock, but used the freely available natural grazing instead.

8.3.2 Measures adopted to accommodate the livestock of the Company and the non-indigenous settlers

In the instructions given on 27 May 1660 to the mounted guard stationed at the outpost Ruijterwacht⁴⁰ it was made clear that the non-indigenous settlers were not allowed to have their livestock graze to the east of this outpost.⁴¹ During the latter part of 1660 the Company enjoyed a very successful period of trade in livestock with

³⁷ Guelke (n 36 above) 71.

³⁸ Thom (n 18 above) 90.

³⁹ Thom (n 18 above) 92.

⁴⁰ The outpost Ruijterwacht was east of the Liesbeeck River, a little way outside the recognised boundary of the Cape. See the map in Sleigh (n 9 above) 128 and comments in Sleigh (n 9 above) 140.

⁴¹ Leibbrandt (n 30 above) 138.

the indigenous communities. As a result there was no longer adequate grazing for the livestock of the Company and the non-indigenous settlers.⁴² The decision that the Company's livestock had to graze outside of the recognised⁴³ boundaries of the Cape under guard of mounted and foot soldiers, was noted in the journal entry for 20 December 1660.⁴⁴ On 21 February 1661 the non-indigenous settlers were also granted permission to use the grazing, apparently situated three to four hours away from the Fort, outside the recognised boundaries of the Cape.⁴⁵ In his instructions to his successor, Van Riebeeck reiterated that there was not enough grazing within the recognised boundaries of the Cape for the livestock of the Company and the non-indigenous settlers. He also added that the land used for agricultural purposes west of the Liesbeek River should not be increased, so that the land could be used as pasture for the livestock of the Company and the non-indigenous settlers.⁴⁶

It appears that in the period from 1662 to 1670 there was enough grazing available at the Cape and in the immediate surroundings for the livestock of the Company and the non-indigenous settlers, without causing friction between the groups. However, by September 1671 the scarcity of grazing in the Table Valley caused the colonial government to issue a notice to the non-indigenous settlers that a certain part of the valley was for the exclusive use of the Company's livestock.⁴⁷ As time passed, grazing outside the recognised boundaries of the Colony also came to be regarded as exclusively for the use of the Company's livestock. Even in cases where the non-indigenous settlers were given permission to use pasture in the False Bay area, the Company made sure that they did not encroach on pasture that the Company regarded as being reserved for the exclusive use of its livestock.⁴⁸ The Company adopted the same attitude towards the indigenous communities occupying grazing that the Company wanted to utilise as a hayfield where fodder could be gathered for its livestock. In 1676 the leader of an indigenous community was

⁴² Leibbrandt (n 30 above) 189-199.

⁴³ Although I use the word 'recognised' in connection with boundaries and the territory of the Cape, this means no more than 'generally accepted' because the outer limits of the territory were not clearly defined and the description of the boundaries was vague and subject to change.

⁴⁴ Leibbrandt (n 33 above) 199.

⁴⁵ Leibbrandt (n 33 above) 225.

⁴⁶ HCV Leibbrandt *Precis of the archives of the Cape of Good Hope: Letters despatched from the Cape 1652-1662 Volume III* (1900) 248.

⁴⁷ HCV Leibbrandt *Precis of the archives of the Cape of Good Hope: Journal, 1671-1674 & 1676* (1902) 25.

⁴⁸ Leibbrandt (n 47 above) 211-212.

requested to move his encampment, which was situated on the Company's hayfield between the Company outposts at Hottentots Holland and De Cuijlen, to another location.⁴⁹

8.4 Expansion beyond the Cape

The expansion of the settlement at the Cape towards the Hottentots Holland Mountains made it possible for the non-indigenous settlers to consider livestock farming as an alternative to agriculture. However, the colonial government required the non-indigenous settlers in the first place to produce grain and vegetables for the benefit of the Company. The diverging interests of the Company and the non-indigenous settlers are discussed in this section.

8.4.1 The establishment of outposts outside the recognised boundaries of the Cape

The first outposts established outside the recognised boundaries of the Cape were at Saldanha Bay and the area known as Hottentots Holland. The outpost at Saldanha Bay was primarily used to maintain the territorial rights of the Company to Saldanha Bay and also served as a livestock trading post with the indigenous communities.⁵⁰ The outpost at Hottentots Holland was established for agricultural purposes, to try to boost the agricultural production aimed at making the settlement self-sufficient in the production of grain.⁵¹ The Company also kept livestock at the Hottentots Holland outpost: the records show that large numbers of livestock were transferred to the outpost in January 1673.⁵² At this stage the land around the outposts served as grazing for the Company's livestock only, as no land was initially granted to non-indigenous settlers in the Saldanha Bay and Hottentots Holland areas.

Theal remarked that, up until the time of the arrival of Simon van der Stel in 1679, no land beyond the recognised boundaries of the Cape was given to the non-indigenous settlers.⁵³ The non-indigenous settlers were however authorised to use land as grazing outside of the recognised boundaries of the Cape. The authority

⁴⁹ Leibbrandt (n 47 above) 283.

⁵⁰ Sleight (n 9 above) 418-419, 421.

⁵¹ Sleight (n 9 above) 146.

⁵² Sleight (n 9 above) 149, Leibbrandt (n 47 above) 106-107.

⁵³ GM Theal *Chronicles of the Cape commanders* (1892) 212.

given to Henning Hüsing and his companion on 25 February 1678 to utilise the land at the Steenberg exclusively as pasture for a flock of sheep was the first of its kind noted in the *Resolutions of the Council of Policy of Cape of Good Hope*.⁵⁴ As non-indigenous settlers they were granted discharge from the Company, but with the specific purpose to farm with a flock of sheep. They were therefore not given land for agricultural purposes.⁵⁵ The discharge was subject to the condition that the non-indigenous settlers concerned had to provide ten per cent of the progeny produced by their sheep in a year to the Company, in return for the use of the pasture.⁵⁶ Van der Merwe equated the resolution which authorised Henning Hüsing and his companion to use the pasture at the Steenberg, to a grazing licence granted to them.⁵⁷ They are the first non-indigenous farmers that I am aware of in South Africa to farm exclusively with livestock.

The sequel to the granting of this type of privilege was that other non-indigenous settlers soon came to request that they should also be allowed to sell the meat of their sheep to the colonial government. They argued that they had built up large flocks of sheep which were of little use to them, because they were not able to sell the meat to the colonial government. In view of these complaints, the colonial government on 27 October 1681 resolved that the right to slaughter and sell the meat of sheep would from January 1682 be put up for auction.⁵⁸ According to Van der Merwe the non-indigenous settlers had by this time built up large stocks of livestock which, he argues, is an indication that livestock farming was already an important industry in the seventeenth century.⁵⁹ He also contends that there were non-indigenous settlers who were engaged exclusively in livestock farming and who did not have any land obtained in terms of the land cultivation transactions.⁶⁰ He

⁵⁴ This arrangement presents an opportunity to further explain the distinction made in this chapter between grazing and pasture. The fact that the colonial government identified an area that the non-indigenous settlers could use as grazing means that it was in effect regulating the use of the land concerned. The land must therefore be regarded as pasture for the purposes of this chapter and not as grazing.

⁵⁵ *Resolutions of the Council of Policy of Cape of Good Hope* C. 12, pp. 59–66.

⁵⁶ *Resolutions of the Council of Policy* (n 65 above), GM Theal *Abstract of the debates and resolutions of the council of policy at the Cape, from 1651 to 1687* (1881) 167.

⁵⁷ PJ van der Merwe *Die trekboer in die geskiedenis van die Kaapkolonie 1657-1842* (1938) 25.

⁵⁸ Theal (n 53 above) 196-197, *Resolutions of the Council of Policy* C. 15, pp. 57–60.

⁵⁹ Van der Merwe (n 57 above) 21.

⁶⁰ Van der Merwe (n 57 above) 24. In view of Van der Merwe's remarks regarding Simon van der Stel's measures to encourage agriculture, which are discussed in section 8.4.2, it must be accepted that these non-indigenous settlers' livestock farming was illegal.

does not give an indication whether the non-indigenous settlers utilised the pasture at the Cape and in the Stellenbosch and Drakenstein district for their substantial herds and flocks, or whether they used grazing outside the recognised boundaries of the Cape.

8.4.2 Competition between agriculture and livestock farming during Simon van der Stel's government

Van der Merwe expressed the opinion that even though Simon van der Stel realised that livestock farming by non-indigenous settlers was an important industry, agriculture was regarded as far more important for the interests of the Company.⁶¹ The colonial government tried to ensure the primacy of agriculture above livestock farming by publishing a *plakaat* prohibiting the non-indigenous settlers from abandoning or neglecting the land granted to them for agricultural purposes. He also instituted measures to safeguard the pasture of the livestock of the Company kept at the Company outposts under the jurisdiction of the landdrost of the district of Stellenbosch and Drakenstein. The landdrost was ordered to make sure that the commanders at the Company outposts did not allow the non-indigenous livestock farmers to use the pasture near these outposts for their livestock.⁶²

On 19 October 1691 the colonial government adopted a resolution that all non-indigenous settlers holding livestock had to own land in either the district of Cape Town or the district of Stellenbosch and Drakenstein⁶³ and had to be resident on such land.⁶⁴ In order to enforce this resolution the colonial government also resolved that all persons who owned land in the districts concerned had to present their title deed to the government within a period of eight months from the publication

⁶¹ Van der Merwe (n 57 above) 26.

⁶² MK Jeffreys *Kaapse argiefstukke: Kaapse plakkaatboek Deel I (1652-1707)* (1944) 231. This is another indication of the circumstances in which grazing became pasture. By safeguarding the grazing of the Company's livestock at the outposts the colonial government was controlling the land used as grazing, making it pasture for the purposes of this chapter.

⁶³ Drakenstein is a region between the Roodezand Pass and the present Paarl. PE Raper; LA Möller & LT du Plessis *Dictionary of Southern African place names* (2014) 99. The district of Stellenbosch was extended into this region in October 1687. GM Theal *History of South Africa under the administration of the Dutch East India Company [1652-1795] Vol I* (1897) 322. The first land allocated to the non-indigenous settlers in this region was along the banks of the Berg River. See section 2.4.2 of Chapter 2 with regard to the settlement patterns of non-indigenous settlers in the districts of the Cape and Stellenbosch and Drakenstein.

⁶⁴ *Resolutions of the Council of Policy of Cape of Good Hope* C. 21, pp. 47–54.

of the resolution.⁶⁵ Failure to comply with this condition could lead to forfeiture of the non-indigenous settlers' livestock.⁶⁶ In the same resolution, the colonial government endeavoured to limit the area that the non-indigenous settlers were allowed to use as grazing to the territory within the recognised boundaries of the Cape and Stellenbosch and Drakenstein districts. Non-indigenous settlers had to ensure that each evening their livestock returned to their homesteads from where they were grazing.⁶⁷

Van der Merwe speculated that the measures instituted by Simon van der Stel to ensure that agriculture was practised diligently on the land given to non-indigenous settlers, were not successful.⁶⁸ He based this supposition on the fact that the non-indigenous settlers, compelled by the climatic conditions and varying fertility of the land, sent their herds of cattle and flocks of sheep to distant grazing beyond the recognised boundaries of the Cape and Stellenbosch and Drakenstein districts, notwithstanding the conditions of the 1691 resolution.⁶⁹

8.5 Ownership of the land used as pasture in the Cape Colony

In section 3.2.1 of Chapter 3 I remark that international law rules relating to sovereignty do not confer any private law ownership of territory on a colonial government. I also contend that, as the Company acquired the Cape by occupation and not by conquest, it did not obtain any private law or other rights to land from a predecessor in title.

Chapter 5 contains essential background material that is necessary to understand this section. In that chapter I contend that the Company could not have been the private law owner of the land it gave to the non-indigenous settlers or of the waste land in the Cape Colony.⁷⁰ However, the Company did obtain private law ownership of the demarcated land that it occupied.⁷¹ The Company also had the power, as sovereign, to enter into contracts with the non-indigenous settlers in terms

⁶⁵ As above.

⁶⁶ Jeffreys (n 62 above) 262.

⁶⁷ Jeffreys (n 62 above) 263.

⁶⁸ Van der Merwe (n 57 above) 30-32.

⁶⁹ Van der Merwe (n 57 above) 32.

⁷⁰ See the discussion of the charter of the Company in section 5.2.1 of Chapter 5.

⁷¹ See section 5.4.3 of Chapter 5.

of which land was given to them. In terms of these contracts the non-indigenous settlers had to cultivate the land given to them.⁷²

Land used as grazing in the Cape Colony is of central importance in this thesis, as it is the type of land where the rights of the Company, non-indigenous settlers and pastoral indigenous communities overlapped.⁷³ However, in view of the contention in Chapter 5 that the Company was not the private law owner of waste land at the Cape, it is also important to determine the nature of the ownership of the land used as pasture in the Cape Colony.

8.5.1 Classification of the land used as pasture

In section 5.4.1 of Chapter 5 I discuss the application of Roman law principles in the case where no applicable Roman-Dutch law principles could be found to deal with a situation at the Cape. As there were no Roman-Dutch law principles relating exclusively to land used as grazing, applicable Roman law principles are used to classify such land at the Cape.

8.5.1.1. Ownership of land used as pasture in the Netherlands

In the seventeenth century, in the eastern parts of the Netherlands, waste land in the vicinity of villages was owned by 'mark' associations set up by the villagers who had shares in the mark. It is not necessary for the purposes of this thesis to discuss the mark system in the eastern Netherlands in detail. It suffices to know that the farmers created a society that owned and regulated the waste land or commons that was used as pasture for their livestock.⁷⁴ In the western part of the Netherlands such land

⁷² See section 5.5 of Chapter 5.

⁷³ The concept of overlapping rights in land is discussed in section 2.5 of Chapter 2.

⁷⁴ JL van Zanden 'Chaloner Memorial Lecture: The paradox of the Marks. The exploitation of commons in the eastern Netherlands, 1250-1850' (1999) 47 *The Agricultural History Review* 128-129. The common land used by the members of the mark can be classified as *res universitatis*. CG van der Merwe *Sakereg* (1989) 28, CM Rose 'Romans, roads, and romantic creators: Traditions of public property in the information age' (2003) 66 *Law and Contemporary Problems* 105. Van Weeren remarks that the name 'marks' for the land owned by mark associations derives from the boundary markers that were placed to identify the land concerned. R van Weeren & T De Moor 'Controlling the commoners: Methods to prevent, detect, and punish free-riding on Dutch commons in the early modern period' (2014) 62 *Agricultural History Review* 259. It is therefore clear that common land of the mark associations was a demarcated thing that could be owned in terms of Roman-Dutch law.

belonged to the sovereign, who was either the Count of Holland or the Bishop of Utrecht. These sovereigns were owners of the land in terms of the feudal system.⁷⁵

The Company was an association that received its powers from a charter granted by the States-General.⁷⁶ It could therefore not be a feudal landlord who had the powers over waste land that the Count of Holland or the Bishop of Utrecht had.⁷⁷

The position in the Netherlands was that land used as pasture had an owner. In the Cape Colony the land used as pasture was neither owned by the Company nor by the non-indigenous settlers. The Roman-Dutch law principles applicable to land used as pasture in the Netherlands could therefore not be applied to land used as pasture in the Cape Colony. In this section the Roman law principles with regard to things that do not form part of the normal legal traffic between private individuals (also known as *res extra commercium*) are discussed to determine whether they can be made applicable to land used as pasture at the Cape.⁷⁸

8.5.1.2 Pasture as a thing that does not form part of the normal legal traffic between private individuals

The two types of things that do not form part of the normal legal traffic between private individuals that are relevant for this thesis are common things (*res omnium*

⁷⁵ Van Zanden (n 74 above) 128.

⁷⁶ The Company's charter is discussed in section 5.2.1 of Chapter 5.

⁷⁷ The reasons why the Company could not be regarded as a feudal landlord are discussed in sections 5.3.2.3 and 5.3.2.4 of Chapter 5.

⁷⁸ The characteristics of a thing are that it must be—

- corporeal;
- impersonal, in other words not part of a human;
- independent, that is to say it must be identifiable as a thing on its own;
- susceptible to human control; and
- of use and value.

Van der Merwe (n 74 above) 23. Pasture could not form part of the normal legal traffic between private individuals as it did not qualify as a thing in terms of Roman and Roman Dutch law principles. Sonnekus makes it clear that in order for land to qualify as a thing it must be demarcated with beacons to be the object of private ownership. JC Sonnekus 'Grondeise en die klassifikasie van grond as *res nullius* of as staatsgrond' (2001) *Tydskrif vir die Suid-Afrikaanse Reg* 84. Van der Merwe also remarks that a thing that does not form part of the normal legal traffic between private individuals is available for use by the public or an organ of state. Van der Merwe (above) 29.

communes) and public things (*res publicae*).⁷⁹ The question discussed in the subsections hereunder is whether land used as pasture at the Cape must be regarded as a common thing or a public thing.

8.5.1.2.1 *Classification of land used as pasture at the Cape as a common thing*

In Roman law, air, free flowing water, the sea and the sea shore are regarded as objects that belong in common to everybody and are not susceptible to private ownership.⁸⁰ I am of the opinion that the difference between the two relevant types of things that do not form part of the normal legal traffic between private individuals must be found in the reason why a thing was regarded as not being susceptible to private ownership. As the sea shore is also land and therefore the nearest in nature to land used as pasture, I consider how the classification of the sea shore has changed over time from when it was regarded as a common thing in terms of Roman law.

Fenn contends that the first pronouncement on the legal status of the sea is contained in the Digest of Justinian.⁸¹ He states that Justinian's Institutes and Digest contain a body of law that reflects the position of Roman jurisprudence on the law of the sea.⁸² Included in this body of law is also the law relating to the sea shore. These Roman authorities state that as far as ownership and use are concerned, the same principles apply to the sea shore as to the sea. This is because the sea shore derives its character from the sea and not from the land.⁸³ However, subsequent commentators on the texts referred to by Fenn, like De Groot, realised that the legal principles relating to the sea shore must differ from those relating to the sea in as much as a human being is able to physically occupy a part of the sea shore.⁸⁴

⁷⁹ Van der Merwe (n 74 above) 29-30. The other types are the human person and *res divini iuris* which refers to things like temples, sacrificial offerings, city walls and gates and tombs and graveyards, which clearly fall outside the scope of this thesis.

⁸⁰ Van der Merwe (n 74 above) 30, E van der Schyff 'The constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002: A comparative legal study' unpublished Doctoral dissertation, North-West University, Potchefstroom, 2006 87.

⁸¹ PT Fenn 'Justinian and the freedom of the sea' (1925) 19 *The American Journal of International Law* 716.

⁸² Fenn (n 81 above) 722.

⁸³ Fenn (n 81 above) 723.

⁸⁴ R Perruso 'The development of the doctrine of *res communes* in medieval and early modern Europe' (2002) 70 *Tijdschrift voor Rechtsgeschiedenis* 92.

As far as the sea shore is concerned, De Groot qualified the principle that the sea is not susceptible to private ownership by saying that buildings in which private ownership exists can be erected on the sea shore and that a sovereign nation may also acquire ownership of the sea shore.⁸⁵ Perruso remarks that De Groot's view of the status of the sea shore was that it was a sort of hybrid of public and common property.⁸⁶ On the other hand, Van der Schyff is of the opinion that the texts concerned do not provide for ownership of land occupied on the sea shore, but merely for a temporary right of exclusive use of such land.⁸⁷

From the discussion above it appears that the answer to the question why a thing was regarded as not being susceptible to private ownership may be that it could not be occupied or taken into possession by a human being.⁸⁸ In contradistinction, possession could be taken of parts of the sea shore. In other words, as soon as something is capable of being physically and exclusively occupied, like the sea shore, doubt exists whether the Roman law classification of the sea shore as a common thing can be accepted.⁸⁹

In *Surveyor-General (Cape) v Estate De Villiers*⁹⁰ (*Fish Hoek*), the Appellate Division discussed, amongst other things, the ownership of the sea shore where the town of Fish Hoek is situated today. The Court was of the opinion that in terms of the Roman-Dutch law rules relating to *regalia*, the sea shore was the property of the Crown.⁹¹ Notwithstanding the court's finding that the sea shore belonged to the

⁸⁵ Perruso (n 84 above) 92, Fenn (n 81 above) 723.

⁸⁶ As above.

⁸⁷ Van der Schyff (n 80 above) 89.

⁸⁸ Perruso (n 84 above) 92, Rose (n 81 above) 93.

⁸⁹ Van der Merwe (n 74 above) 30.

⁹⁰ 1923 AD 588.

⁹¹ *Fish Hoek* (n 90 above) 594. Hahlo describes the *regalia* as a source of revenue that flowed from the prerogative rights of the ruler who, in the case of the lowlands, was the Count of Holland. He remarks that one of the prerogative rights of the ruler was to receive the income that may be generated from the 'unowned soil' within the ruler's domain. HR Hahlo 'The great South-West African diamond case: A discourse' (1959) 76 *South African Law Journal* 163-164. Notwithstanding the finding of the court with regard to the applicability of *regalia* to ownership of the sea shore, the approach of Sonnekus to the applicability of *regalia* to unallocated waste land at the Cape must also be considered. He is adamant that there were no traces of the feudal land system remaining in the Roman-Dutch law that was received in the Cape Colony and that the Company could not be the owner of such land due to the *regalia* of the Count of Holland. Sonnekus (n 78 above) 98. JC Sonnekus 'Abandonnering van eiendomsreg op grond van aanspreeklikheid vir grondbelasting' (2004) *Tydskrif vir die Suid-Afrikaanse Reg* 753 The status of the Company as land owner is discussed in Chapter 5.

sovereign, Kotzé JA deemed it necessary to discuss the legal nature of the sea shore.⁹² This discussion is important as it gives a clear indication of the legal position in South Africa with regard to things that could not be owned. It also indicates that the sea shore was for the common use of the public before the ownership of the sea and sea shore was regulated by statute.

Kotzé remarked that the Roman law authorities were not in agreement about what things should be regarded as being common to all men and what should be regarded as a thing belonging to and controlled by the state for the benefit of the general public. He therefore surmises that there was not a clear line of distinction between these two types of things during Roman times.⁹³ Commentators on Roman law came to the conclusion that, ultimately, the Roman law authorities were of the opinion that things common to all of the general public fell in the category of things controlled by the state for the benefit of the public in a wide sense.⁹⁴ This interpretation had two consequences, namely—

- (a) in the case of, for instance, a thing like the sea shore, everybody had free access thereto, but an individual could use a part thereof for his or her own purposes, like drying his fishing nets, without asking permission from the state to do so; and
- (b) if a person wished to erect a permanent structure on the seashore he had to request permission from the state to do so.⁹⁵

The exposition of the Roman-Dutch law principles relating to the sea shore in *Fish Hoek* places it beyond doubt that the sea shore was not regarded as a common thing in South Africa. Land used as pasture is more capable of being occupied and controlled than the sea shore. I am therefore of the opinion that land used as pasture cannot be regarded as a common thing.

The conclusion that I reach in this section may be of such an obvious nature that it does not warrant the extensive discussion of the principles relating to common things in Roman and Roman-Dutch law. However, from my discussion in the

⁹² *Fish Hoek* (n 90 above) 619.

⁹³ *Fish Hoek* (n 90 above) 619-620.

⁹⁴ *Fish Hoek* (n 90 above) 620.

⁹⁵ As above.

following section of the principles relating to public things, it will become clear that land used as pasture was also not regarded as a public thing in terms of Roman and Roman-Dutch law. Therefore, I deem it necessary to eliminate the possibility that such land may, in terms of Roman law principles, be regarded as a common thing.

8.5.1.2.2 *Classification of land used as pasture at the Cape as a public thing*

In Roman and Roman-Dutch law, harbours, public rivers, public roads and public buildings were the main examples of things controlled by the state for the benefit of the public.⁹⁶ These public things were not susceptible to private ownership in Roman law and belonged to the Roman people.⁹⁷ Van der Merwe remarks that although public things belonged to the state, the state was not the owner thereof in a private law sense.⁹⁸

At the Cape the state was a commercial company that managed the settlement in a way that would ensure it the greatest financial benefit possible. The colonial government was careful to secure the best pasture for the Company's livestock. It is therefore doubtful that the colonial government controlled the pasture for the benefit of the public. However, the point is that grazing in the Cape and Stellenbosch and Drakenstein districts was a scarce resource that had to be controlled. Control by the government of land that must be used by the whole community is the main characteristic of public things.⁹⁹

The purpose of the settlement at the Cape was to provide adequate refreshment for the Company's trading fleets. The colonial government was dependent on the non-indigenous settlers to provide the refreshment and therefore made sure that the non-indigenous settlers always had enough pasture for their working cattle.¹⁰⁰ The control of the land at Groene Cloof provides a good example of the balancing act that the colonial government had to perform to provide enough

⁹⁶ Van der Merwe (n 74 above) 31.

⁹⁷ Van der Schyff (n 80 above) 88; M Habdas 'Who needs a park or a city square? The notion of public real estate as *res publicae*' (2011) *Tydskrif vir die Suid Afrikaanse Reg* 628.

⁹⁸ Van der Merwe (n 74 above) 31.

⁹⁹ Rose (n 74 above) 99.

¹⁰⁰ Sleigh (n 9 above) 439. GM Theal *Records of the Cape Colony from March 1811 to October 1812* (1901) 102-103. The Company wanted the non-indigenous settlers to concentrate on agriculture, but this enterprise went hand in hand with maintaining a herd of healthy working cattle.

pasture for the livestock of the Company and the non-indigenous settlers.¹⁰¹ The pasture at Groene Cloof was of a very good quality and was therefore earmarked for the use of those non-indigenous settlers who had the monopoly of providing the Company's ships with fresh meat. The colonial government also needed pasture for the working cattle that played an important part in its transport system. When these animals became worn out Groene Cloof offered the perfect pasture for the animals to recuperate. An additional complication was caused by other non-indigenous settlers who also wished to use the pasture at Groene Cloof for their sheep. However, these sheep were diseased and were a potential source of infection for the other livestock that used the same pasture. In these circumstances the colonial government had to play a decisive role in regulating the use of the available pasture.¹⁰²

Although land used as pasture by the whole community and the government was not recognised as a public thing in terms of Roman and Roman-Dutch law, there is a case to be made for recognising such land as a public thing. Writing about the modern United States, Rose contends that the public trust doctrine of the Anglo-American common law system accepts as public things 'resources that very closely resemble the major examples of *res publicae* in Roman law'.¹⁰³ She remarks that these things are mostly lanes on land or water that are used as means of transport or communication. Whereas in Roman times these roads and waterways were public things used mainly for military purposes, they had become the backbone of commerce in the United States.¹⁰⁴ I am of the opinion that when the circumstances that prevailed in the Cape Colony of the seventeenth and eighteenth century are taken into account, land used as pasture can be regarded as analogous to the types of things identified as public things in Roman law. The rearing and maintenance of livestock was one of the most important reasons for the establishment of the settlement at the Cape. As the settlement at the Cape expanded and the demand for meat and agricultural products increased, pasture became a scarce resource that had to be controlled by the colonial government. Land used as pasture must therefore be classified as a public thing that was owned by the colonial government, but was used in common by non-indigenous settlers and the colonial government.

¹⁰¹ Sleigh (n 9 above) 498-501.

¹⁰² Sleigh (n 9 above) 500-501.

¹⁰³ Rose (n 74 above) 97.

¹⁰⁴ As above.

The Company therefore did not have private law ownership of land used as pasture at the Cape.¹⁰⁵

8.6 Conclusion

In view of the definition that I use for pasture in this thesis, it is obvious that it is only in areas where the non-indigenous settlers and the colonial government were obliged to use the available pasture communally that pasture can be regarded as a public thing. Communal use of land necessitated a body with policing power exercising control over it. Also, it is only in areas where farms were used for agricultural purposes and did not include large areas of grazing, that it was necessary to use pasture communally. In section 2.4.2.2 of Chapter 2 I conclude that for the reasons mentioned in that section, large-scale agricultural production was limited to the South-Western Cape during the period that the Company ruled the Cape Colony. Therefore, most land used as pasture was found in the South-Western Cape. The cases where land was used as pasture in the interior of the Cape Colony are discussed in section 3.3.4.3 of Chapter 3.

The discussion of how land was occupied and controlled in the interior of the Cape Colony in Chapter 9 reveals that the land used as grazing for livestock in the interior cannot be regarded as pasture as discussed in this chapter.

¹⁰⁵ PJ Badenhorst et al *Silberberg and Schoeman's The law of property* (2003) 34, 36.

9 Control measures related to land

9.1 Introduction

The purpose of this chapter is to discuss the control measures¹ applied to land in the Cape Colony² by the colonial government. The challenges presented by the demands for fresh produce by Company fleets and the expansion of the Cape Colony led to the adoption of control measures that addressed each particular situation relating to land that the colonial government encountered.

In the first 15 years of the eighteenth century the Cape went through a period of expansion into the interior³ that necessitated greater control over land by the colonial government. The first part of this chapter deals with the history of this expansion, in order to provide essential background information for the discussion of the control measures applied to land.

As far as land used for agricultural purposes is concerned, the control measures were exercised in the South-Western Cape and in the interior of the Cape Colony. The colonial government had to devise a way in which it could derive income from the land it made available to non-indigenous settlers for agricultural purposes. To this end the loan of agricultural land for payment control measure was developed.⁴

¹ The phrase 'control measure' is used to refer to *ad hoc* resolutions made by the colonial government from time to time to deal with land utilised by non-indigenous settlers in the Cape Colony. I am of the opinion that the colonial government did not consciously develop a 'system' to control agricultural land and land used as grazing in the eighteenth century.

² For the meaning of the phrase 'Cape Colony' in this thesis, see note 24 of Chapter 1. In view of this definition, the area where the control measures were applied changed in accordance with the development of the Cape Colony from 1652 to 1795.

³ The word 'interior' has the same meaning as the phrase 'interior of the Cape Colony' discussed in note 18 of Chapter 1.

⁴ Although it is made clear throughout this thesis, and especially in Chapter 5, that the Company was the not private law owner of the land in the Cape Colony and therefore did not have the right to 'loan' land to the non-indigenous settlers, I use the word 'loan' in connection with the control measures. The colonial government used the word '*leening*' to describe the giving out of waste land for agricultural purposes against payment. *Resolutions of the Council of Policy of Cape of Good Hope* C. 10, pp. 89-94. It is possible that the colonial government regarded the transaction of giving of land for agricultural purposes to the non-indigenous settlers as the same as the loan of land in Batavia as described in section 4.3.1.1 of Chapter 4.

In 1703 the colonial government instituted a form of control over land used as grazing by starting to issue grazing licences or permits to use land as grazing.⁵ These licences were apparently issued to authorise non-indigenous farmers to use grazing, subject to certain conditions and at locations inside and outside the recognised boundaries of the Cape Colony.⁶ No resolution was taken or *plakaat* published by the colonial government to provide for the issuing of such authorisations to utilise land.⁷ The haphazard way of dealing with land matters, which I discuss in this chapter, cannot be regarded as the systematic development of a land tenure system. Following on the work of Robertson and Milton, I posit this against the accepted view, based on the research and findings of Truter during 1811 and 1812, that three forms of land tenure developed during the eighteenth century.⁸

Robertson betrays some reservation about the approach adopted by Truter in his investigation regarding the loan place system, when he remarks that it has led to an over-simplification of the problems related to this form of tenure.⁹ I wish to go further. I am of the opinion that the approach adopted by Truter should no longer be followed. As Milton remarks,¹⁰ the control measures in fact constituted a unique system that had little in common with the principal titles of possession¹¹ described by Truter in his reports.

The most important control measures adopted by the colonial government were the resolutions adopted on 17 April and 3 July 1714. It was these control measures that introduced the system that was later referred to as the loan place tenure system. To make it clear that the 1714 resolutions did not introduce a tenure system as contended by Truter, I refer to the system established by the said

⁵ CG Botha 'Early Cape land tenure' (1919) 36 *South African Law Journal* 151, PJ van der Merwe *Die trekboer in die geskiedenis van die Kaapkolonie 1657-1842* (1938) 67. GM Theal *Records of the Cape Colony from May 1809 to March 1811* (1900) 429. In the seventeenth century grazing in the South-Western Cape became a public thing (*res publicae*), which was controlled by the colonial government and is referred to as pasture in this thesis. See sections 8.3 and 8.5 of Chapter 8.

⁶ Theal (n 5 above) 429.

⁷ Van der Merwe (n 5 above) 68.

⁸ See the sources listed in note 33 of Chapter 7.

⁹ HM Robertson 'Some doubts concerning early land tenure at the Cape' (1935) 3 *South African Journal of Economics* 158.

¹⁰ JRL Milton 'Ownership' in R Zimmermann & D Visser (eds) *Southern Cross: Civil law and common law in South Africa* (1996) 664.

¹¹ See section 6.4.2.2. of Chapter 6 for the meaning of 'principal titles of possession'.

resolutions as the 'loan of land system'. After the important resolutions of 1714 there were further developments with regard to the control measures applied to loaned land in the interior of the Cape Colony. The Van Imhoff control measure instituted for loaned agricultural land during this period had the effect that the non-indigenous settlers could become the owners of the land developed for agricultural purposes on the land loaned for use as grazing.

The analysis of the control measures in this chapter is aimed at providing an alternative interpretation of the land law system of the Cape Colony under the Company.¹² This analysis goes against the interpretation given to this land law system during the second British occupation of the Cape Colony in 1806.¹³ To assist in understanding the land law system based on control measures that developed in the Cape Colony prior to 1795, I include the following Table:

Period	Name of control measure: Agricultural land	Name of control measure: Grazing	Sections and sub-sections
+/- 1657 to 1680	Loan of agricultural land for payment		9.3.1.2 9.3.1.2.1 9.3.1.2.2 9.3.1.2.3
1703 to 1714		Informal: Authorisations to utilise grazing	9.3.2.2.1

¹² The control measures discussed in this chapter are not the only features of the unique domestic land law system that developed in the Cape Colony. In Chapters 5 and 8 I address some of the other features, such as the land cultivation transactions that were applied in the Cape Colony, albeit almost exclusively in the South-Western Cape. The classification of pasture as a public thing as discussed in Chapter 8 is another unique feature of the domestic land law system of the Cape Colony. In Chapter 10 the rights in land that were conferred on the non-indigenous settlers in terms of all these features are discussed.

¹³ When reading this chapter it must be borne in mind that in view of the arguments advanced in Chapter 5, I proceed from the assumption that the Company was not the owner of the land it gave to the non-indigenous settlers, nor was it the owner of the waste land for which it adopted control measures.

17 April 1714 to 1813	Grazing used for agricultural purposes subject to payment ('17 April 1714 control measure')		9.3.1.3 9.3.1.3.1 9.3.1.3.2 9.3.1.3.3
3 July 1714 to 1813		Loan of land used as grazing subject to payment of recognition ('3 July 1714 control measure')	9.3.2.2.2
1743 to about 1795	Control measure instituted in terms of Van Imhoff's instructions ('Van Imhoff control measure')		9.4.2 9.4.2.1 9.4.2.2

9.2 Expansion of the Cape Colony

The Hottentots Holland Mountains remained a formidable barrier to the expansion of the Cape Colony along the coast to the east. The initial expansion of the colony was therefore to the north. The expansion of the Cape Colony to the Berg River and beyond and the later expansion across the Hottentots Holland Mountains are discussed in this section.

9.2.1 Expansion to the north up to the Olifants River

The tendency of the non-indigenous livestock farmer to wander into areas outside the recognised boundaries of the Cape settlement is well documented¹⁴ and described picturesquely by Spilhaus:

Difficulties arising from deliberate or casual evasion of the transfer regulations increased as men trekked farther and farther inland. The district of Stellenbosch came to embrace a very large area, widening its boundaries in the effort to keep pace

¹⁴ GM Theal *Chronicles of the Cape commanders* (1892) 348, Van der Merwe (n 5 above) 135, CFJ Muller *Vyfhonderd jaar Suid Afrikaanse geskiedenis* (1980) 62, L Guelke 'Blanke boere en grensbewoners 1652-1780' in H Giliomee & R Elphick (eds) *'n Samelewing in wording: Suid Afrika 1652-1840* (1990) 86.

with the men who, like a rippling, but rising tide, steadily seeped away to a new high-water mark.¹⁵

WA van der Stel went on a tour of inspection to the interior of the Cape Colony on 23 November 1699.¹⁶ Before that tour he had already, on 28 February 1699, given land to non-indigenous settlers at Wagenmakers Valleij¹⁷ (where the present Wellington developed).¹⁸ This was the most northerly area along the course of the Berg River where farms were given to non-indigenous settlers. However, on his tour of inspection he found that non-indigenous settlers were already living north of Wagenmakers Valleij, in the area now known as Hermon.¹⁹ Proceeding further northwards through the Roodezand Pass to the valley beyond, Van der Stel decided that the new immigrants arriving at the Cape would be settled in this valley which he named Land van Waveren.²⁰

It appears that on his way to the Land van Waveren, Van der Stel encountered non-indigenous settlers who were utilising the grazing at Riebeek-Kasteel for their livestock.²¹ This area lies to the north-west of the present Hermon at the eastern end of the region known today as the Swartland. Therefore, by the end of 1699, the position was that the Cape Colony had officially expanded northwards along the Berg River to Wagenmakers Valleij, while the non-indigenous settlers were already settling without official authority further to the north near Hermon and were using the land at Riebeek-Kasteel as grazing for their livestock.

The expedition to settle the new non-indigenous settlers in the Land van Waveren reached its destination in October 1700.²² Although Van der Merwe states

¹⁵ MW Spilhaus *The first South Africans and the laws that governed them to which is appended the diary of Adam Tas* (1949) 111.

¹⁶ GM Theal *History of South Africa under the administration of the Dutch East India Company [1652-1795] Vol I* (1897) 380.

¹⁷ K Schoeman *Armosyn van die Kaap: Die wêreld van 'n slavin, 1652-1733* (2001) 321, HC Bredekamp 'Khoisan versus Hugenote, 1688-1713' (1989) 16 *Kronos* 23.

¹⁸ PE Raper et al *Dictionary of Southern African place names* (2014) 540.

¹⁹ Theal (n 16 above) 380.

²⁰ Theal (n 16 above) 380-381. This region corresponds to the present Tulbagh district. Raper (n 18 above) 268.

²¹ Bredekamp (n 17 above) 23.

²² A Böeseken & M Cairns *The secluded valley Tulbagh: 't Land van Waveren 1700-1804* (1989) 22.

that land was given in ownership to those settlers,²³ Böeseke sketches a different scenario regarding the manner in which the non-indigenous settlers initially occupied the land in the Land van Waveren. She states that until 1712 no farms were given in ownership to the non-indigenous settlers there.²⁴ Looking back at previous official extensions of the boundaries of the Cape Colony and the settlements at Stellenbosch, Drakenstein, Paarl and Wagenmakers Valleij, it appears that the settlement in the Land van Waveren took place in a different manner. In the earlier cases the opening up of the new region went hand in hand with the giving of land to the new non-indigenous settlers.²⁵ According to Böeseke the land occupied by the first non-indigenous settlers in the Land van Waveren was at first only used as grazing for livestock. In 1707 a non-indigenous settler was authorised to cultivate the land that, according to Böeseke, was leased to him.²⁶ Up to 1712 the non-indigenous settlers occupied the land in the Land van Waveren without establishing ownership in the land.

After the official boundaries of the Cape Colony were expanded by WA van der Stel in 1700 to include the Land van Waveren, the expansion of the colony underwent a fundamental change. Guelke remarks that where the colonial government had been the initiator of expansion, as described in the sources listed in note 14 above, the non-indigenous settlers now became the initiators of expansion.²⁷ This meant that land was added to the territory of the Cape Colony as non-indigenous livestock farmers moved to the regions that they regarded as having the

²³ Van der Merwe (n 5 above) 56. It must be borne in mind that the terminology used by writers in reference to the giving of land to non-indigenous settlers by the Company conforms to the accepted approach that the Company granted land in freehold to the settlers. However, I contend that during the Company's reign, these grants were land cultivation transactions as discussed in Chapter 5, loaned agricultural land converted in terms of the 1680 resolution (see section 9.3.1.2.3) or land given in terms of the Van Imhoff control measure (see section 9.4.2), which cannot be equated with land granted in freehold. References to grants before 1795 must therefore be regarded as land given to the non-indigenous settlers in terms of these transactions.

²⁴ Böeseke (n 22 above) 24.

²⁵ For Stellenbosch see Theal (n 16 above) 248, Guelke (n 14 above) 74. For Drakenstein see Theal (n 16 above) 322. In the case of Paarl, land was given to non-indigenous settlers before the official boundaries were extended to Paarl on 19 October 1691 - see Schoeman (n 17 above) 331, AG Oberholster & P van Breda *Paarlvallei 1687-1987* (1987) 14-15, *Resolutions of the Council of Policy of Cape of Good Hope* C. 21, pp. 47-54. For the Wagenmakers Valleij see note 17 above.

²⁶ Böeseke (n 22 above) 24.

²⁷ L Guelke 'The tragedy of privatisation: Some environmental consequences of the Dutch invasion of Khoikhoi South Africa' (2003) 85 *South African Geographical Journal* 94.

best grazing and water resources.²⁸ In the western part of the colony this expansion continued north up to the Olifants River. Once the Olifants River was reached, the aridity of the region to its north inhibited further expansion in that direction. Instead, in the decade up to 1740, the non-indigenous settlers started to move to the east into the Bokkeveld.²⁹

9.2.2 Expansion to the east up to the Sundays River

The remarks of Guelke discussed in the previous paragraph are equally applicable to the expansion into the Overberg: expansion was initiated by non-indigenous settlers and not by the colonial government.³⁰ The non-indigenous farmers living in the Cape and Stellenbosch and Drakenstein districts sent their livestock across the Hottentots Holland Mountains to utilise the grazing in the Overberg.³¹ The first official recognition given by the colonial government to this movement of non-indigenous farmers over the Hottentots Holland Mountains was in 1708 when Ferdinand Appel was given an authorisation to utilise the land as grazing.³² In 1710 Ferdinand Appel was also given land at the hot springs where the present Caledon is situated.³³

The expansion of the Cape Colony into the Overberg and further east followed the pattern described in section 9.2.1: non-indigenous settlers moved further eastwards looking for more grazing and the colonial government followed in their wake by giving out loan places, giving out land in terms of ownership transactions and establishing Company outposts.³⁴ This expansion initially took place between the Atlantic Ocean and Indian Ocean in the south and the almost continuous chain of mountains that forms the escarpment to the north.³⁵ As the

²⁸ Guelke (n 27 above) 94.

²⁹ N Penn *The forgotten frontier: Colonist and Khoisan on the Cape's northern frontier in the 18th century* (2005) 56, M Legassick 'Die Noordgrens tot 1840: Die opkoms en ondergang van die Griekwa-volk' in H Giliomee & R Elphick (eds) *'n Samelewing in wording: Suid Afrika 1652-1840* (1990) 377.

³⁰ See note 27 above.

³¹ EH Burrows *Overberg odyssey: People, roads and early days* (1994) 8.

³² Burrows (n 31 above) 8, JE Wilson 'Caledon and the Overberg: Placid centre of geographic microcosm?' (1988) 24 *Contree* 21-22.

³³ D Sleigh *Die buiteposte: VOC-buiteposte onder Kaapse bestuur 1652-1795* (2007) 542, Theal (n 16 above) 422.

³⁴ Theal (n 16 above) 4, Sleigh (n 33 above) 542, 551, 553, CG Botha 'The dispersion of the stock farmer in the Cape Colony in the eighteenth century' (1923) 20 *South African Journal of Science* 579.

³⁵ Wilson (n 32 above) 21, Van der Merwe (n 5 above) 138.

migration progressed eastwards, some of the non-indigenous settlers moved into the Little Karoo between the Langeberg mountain range and the Swartberg mountain range.³⁶

It is not necessary for the purposes of this thesis to discuss the migration process in detail. It is sufficient to state that after the district of Swellendam in the Overberg was separated from the district of Stellenbosch and Drakenstein in 1745, the colonial government did not actively try to stem the eastward migration of the non-indigenous settlers until 1770.³⁷ From time to time the colonial government determined an eastern boundary for the Cape Colony, but this did not inhibit the eastward migration of the non-indigenous settlers.³⁸ It was only in 1770 that the colonial government instituted more decisive measures by declaring, by resolution of the colonial government³⁹ and by *plakaat*,⁴⁰ the Gamtoos River as eastern boundary of the Cape Colony. The colonial government resolved that no non-indigenous settlers would be authorised to utilise land east of the Gamtoos River and those non-indigenous settlers who were already using the land as grazing east of that river would be compelled to return within the boundaries of the Cape Colony.⁴¹

Muller remarks that the non-indigenous settlers were not deterred by the colonial government's resolution and *plakaat* that determined the Gamtoos River as the eastern boundary of the Cape Colony.⁴² In fact, the non-indigenous settlers crossed the Gamtoos River and established themselves in the region between that river and the Boesmans River, which became the official eastern boundary of the Cape Colony on 11 July 1775.⁴³ As the Sundays River lies to the west of the Boesmans River, it is accepted that the eastward migration of the non-indigenous settlers, insofar as it is of interest for this thesis, reached the Sundays River during the 1770's.

³⁶ Van der Merwe (n 5 above) 138.

³⁷ Van der Merwe (n 5 above) 146-147.

³⁸ Muller (n 14 above) 62-63.

³⁹ *Resolutions of the Council of Policy of Cape of Good Hope* C. 148, pp. 43-83.

⁴⁰ SD Naudé *Kaapse argiefstukke: Kaapse plakkaatboek Deel III (1754-1786)* (1949) 76-77.

⁴¹ Van der Merwe (n 5 above) 148-149, Muller (n 14 above) 63.

⁴² Muller (n 14 above) 63, GM Theal *History of South Africa under the administration of the Dutch East India Company [1652-1795] Vol II* (1897) 140.

⁴³ Theal (n 42 above) 140-141.

9.3 Control measures applied to agricultural land and to land used as grazing

It is not possible to state categorically that the colonial government consciously decided that different control measures would be applied when regulating agricultural land and land used as grazing in the Cape Colony. However, in this section I discuss the two kinds of control measures separately to illustrate that, especially during the seventeenth century, agricultural land was subject to more control measures⁴⁴ than land used as pasture or grazing.

9.3.1 Agricultural land

The first control measure instituted by the colonial government was aimed at agricultural land, because the colonial government needed certain Company servants and the non-indigenous settlers to assist with the provision of agricultural products to visiting fleets. However, during the seventeenth century there was also certain land that did not need to be controlled.

9.3.1.1 Agricultural land that was not subject to control measures

In circumstances where the colonial government exercised direct control over land, for example in its own gardens, or where it exercised sufficient control over the persons using land, like Company servants and their wives, no control measures were applied. In cases where the colonial government leased land to the non-indigenous settlers, the settlers were also in some cases allowed to appropriate uncultivated land next to or near the leased land. This waste land that was cultivated by the non-indigenous settlers was not subject to control measures.

9.3.1.1.1 *Company gardens and outposts*

The main reason why the Company established a settlement at the Cape was to supply its ships sailing between Europe and its possessions in the East with fresh water, vegetables and meat.⁴⁵ Acting in accordance with the instructions of the Directors of the Company, Van Riebeeck immediately prepared land for the sowing

⁴⁴ See section 5.5.1 of Chapter 5 and section 8.4.2 of Chapter 8 for the reasons why the colonial government deemed it necessary to exercise greater control over land used for agricultural purposes than land used as grazing.

⁴⁵ HCV Leibbrandt *Precis of the archives of the Cape of Good Hope December, 1651 December, 1653: Riebeeck's Journal, &c.* (1897) 10.

of seeds.⁴⁶ On 20 July 1652 he could already comment on the vegetables that were starting to come up in the garden.⁴⁷ On 14 October 1652 the colonial government published a prohibition against persons entering the Company's garden without good reason and causing damage to the Company's vegetables.⁴⁸ This prohibition was repeated on several occasions.⁴⁹ The prohibitions published by the colonial government show that the Company regarded the land that it used for agricultural purposes as its property. As time progressed the Company's gardens assumed fixed boundaries and were fenced.⁵⁰ This land became the private law property of the Company by occupation.⁵¹ For the same reason, agricultural land at the various Company outposts is also regarded as the private law property of the Company and was not subject to control measures.

9.3.1.1.2 *Land given to Company servants for no consideration*

A letter to the Directors of the Company dated 28 April 1655 and a resolution of the colonial government dated 1 October 1655 refer to gardens that were established by Company servants outside of the Company's garden.⁵² These Company servants were authorised to sell the produce from these gardens to the crews of visiting ships.⁵³ Some writers⁵⁴ who have dealt with the origins of the loan place system refer to the fact that the land was given to Company servants

⁴⁶ Leibbrandt (n 45 above) 21.

⁴⁷ Leibbrandt (n 45 above) 26.

⁴⁸ MK Jeffreys *Kaapse argiefstukke: Kaapse plakkaatboek Deel I (1652-1701)* (1948) 7.

⁴⁹ Jeffreys (n 48 above) 9, 14, 20, 24.

⁵⁰ Whereas the first prohibitions did not specifically mention hedges or fences, the resolution of 17 July 1657 specifically warns the people who kept livestock to prevent their animals from damaging the fences around the Company's garden. Jeffreys (n 48 above) 30; HB Thom *Journal of Jan van Riebeeck Volume II 1656-1658* (1954) 132; MC Karsten *The old Company's garden at the Cape and its superintendents: Involving an historical account of early Cape botany* (1951) 39-40. In addition to the Company's garden near the Fort, the gardens that were established in the vicinity of the present Rondebosch were also fenced or surrounded by ditches. Karsten (above) 48.

⁵¹ See section 5.4.3 of Chapter 5 in this regard.

⁵² HCV Leibbrandt *Precis of the archives of the Cape of Good Hope: Letters despatched from the Cape 1652-1662 Volume II* (1900) 96, DB Bosman & HB Thom *Daghregister gehouden by den oppercoopman Jan Anthonisz van Riebeeck Deel I 1651-1655* (1952) 348.

⁵³ Bosman (n 52 above) 348.

⁵⁴ GG Visagie *Regspleging en reg aan die Kaap van 1652 tot 1806* (1969) 81; Truter in GM Theal *Records of the Cape Colony from March 1811 to October 1812* (1901) 93. JL Hattingh also refers to the granting of gardens in Table Valley 'in loan' which clearly refers to the decisions taken by the colonial government on 1 October 1655 (see JL Hattingh 'Grondbesit in die Tafelvallei Deel 1: Die eksperiment: vryswartes as grondeienaars, 1652-1710' (1985) 10 *Kronos* 40 footnote 22, JL Hattingh 'Om die Kaap te vergelyk' (1988) 14 *Kronos* 11-12, Botha (n 5 above) 151.

provisionally on loan⁵⁵ and contend that this is the precedent from which the loan place system eventually developed.⁵⁶ The abovementioned documents do not indicate whether the Company servants had to make any payment for the use of the land on which the gardens were established.⁵⁷ Robertson contends that the absence of any reference in these documents to payment made for such land supports the conclusion that the loan of land was free.⁵⁸ There is no specific indication that the Company had the right to take back the land developed as gardens by the Company servants after a period of time. However, I am of the opinion that by specifically stating that the land was provisionally loaned, the colonial government indicated that it had the right to reclaim the land.

On 1 May 1656 the colonial government had to consider an order from the Directors of the Company to reduce the high cost that the Company incurred by providing food for the married officials of the Company and their families. The colonial government decided that the married officials would receive money with which they had to provide for their own food. In addition, they would receive land on which they could grow produce to sustain themselves and their families. The land was to be given to them free of charge for three years, after which the colonial government would decide whether the land should be taxed.⁵⁹

There are three types of Roman-Dutch law contracts under which the transactions discussed above may possibly be classified. These contracts are gift or

⁵⁵ Bosman (n 52 above) 348.

⁵⁶ Theal (n 54 above) 93, Botha (n 5 above) 151, Hattingh (1985) (n 54 above) 40, Robertson (n 9 above) 158.

⁵⁷ Robertson (n 9 above) 158-160, HCV Leibbrandt *Precis of the archives of the Cape of Good Hope: Letters despatched from the Cape 1652-1662 Volume II* (1900) 96, 237, Bosman (n 52 above) 348.

⁵⁸ Robertson (n 9 above) 158-159.

⁵⁹ *Resolutions of the Council of Policy of Cape of Good Hope* C. 1, pp. 166-171; Theal (n 16 above) 55-56. There is very little information available with regard to the land that was given out in terms of these resolutions of the colonial government. Karsten remarks that the sailors arriving on the Company's ships bought fruit and vegetables grown by the Company officials on the plots given to them with things like rice and spirits that were stolen from the ships. In order to stop this practice, the Company officials were apparently prohibited from keeping their own gardens. Karsten (n 50 above) 5; EC Gódee Molsbergen *De stichter van Hollands Zuid Afrika* (1912) 123 footnote 1. It is not known whether any official received any land in terms of the 1656 resolution. However, it is doubtful whether this resolution was implemented. It is probable that the Directors would have had to approve such an important decision by the colonial government. When the commissioner R van Goens visited the Cape during March and April 1657 he determined that the Company officials would not be allowed to have their own gardens, as it would lead to unfair competition with the non-indigenous settlers. Robertson (n 9 above) 160; AJ Böeseken *Jan van Riebeeck en sy gesin* (1974) 123, 130-131.

donation (*schencking*), loan for use (*commodatum*), and loan revocable at the will of the giver of the loan (*precarium*).⁶⁰

De Groot defines the contract of gift or donation as a contract where a person who is under no obligation to another person, gives to that person a gift without expecting anything in return and also receives no advantage for himself from the gift.⁶¹ One of the requirements of the contract of donation is that once a thing has been given it cannot be revoked.⁶² The colonial government deemed itself free to revoke the privilege that was given to these officials and in fact did revoke it.⁶³ Therefore, the land given to Company officials for the purpose of making their own gardens was not donated to them.

Movable or immovable things can be the object of the contract of loan for use. The thing that is given to the borrower must be used by him for an agreed purpose and he must return the same thing to the lender after a period agreed upon between the lender and borrower. The thing is loaned for use by the borrower gratuitously. The thing that is loaned cannot become the property of the borrower, which means that the lender of the thing need not be owner thereof. The lender of the thing is obliged to leave the thing in the borrower's possession until the expiration of the period that they agreed upon.⁶⁴

Bell defines *precarium* as a type ('species') of loan for use contract. According to him the thing loaned in terms of the agreement can be demanded back at any time by the giver of the loan in the case of the contract of *precarium*.⁶⁵ Sohm describes *precarium* as an agreement of which the terms do not have binding force.

⁶⁰ I do not contend that the colonial government, when it decided to make land available to Company officials, considered the principles of contract in terms of Roman-Dutch law before implementing its decision. It appears highly unlikely that there was any consideration by the colonial government of the legality of what it was doing. I could find no English translation for the contract of *precarium* in any authoritative legal dictionary or other resource. I therefore use the inelegant phrase 'loan at the will of the giver of the loan' as it best expresses the essence of the contract in this sentence. In the rest of the section I use the Latin name *precarium*.

⁶¹ RW Lee *The jurisprudence of Holland by Hugo Grotius Vol I* (1926) 307.

⁶² Lee (n 61 above) 309.

⁶³ Robertson (n 9 above) 160.

⁶⁴ Lee (n 61 above) 343, 345; P Gane *The selective Voet being the Commentary on the Pandects by Johannes Voet Volume three* (1956) 42-43.

⁶⁵ WHS Bell *South African legal dictionary* (1910) 437-438.

He remarks that even if a loan was subject to the payment of rent in terms of the contract, the giver of the loan could not enforce the payment of such rent.⁶⁶ According to Buckland, *precarium* usually related to land and was for general use and enjoyment of the land by the person receiving the loan.⁶⁷ Nathan discusses the Roman-Dutch law principles relating to *precarium* and remarks that the contract of loan for use and *precarium* differ in only one respect. While the loan for use is subject to conditions, the *precarium* is unconditional. Consequently, in terms of the contract of *precarium*, the person borrowing the land could only use the land at the pleasure of the giver of the loan who could retract the loan at any time.⁶⁸

The contract of loan concluded on 9 October 1657 between the wife of Sergeant Jan van Herwerden and the Company is an example of a contract in terms of which land was given to a servant of the Company for no consideration. Land situated near the Fort that was of no use to the Company was given in loan to the wife of the sergeant to grow vegetables to be used as feed for pigs. Although the colonial government granted her the right to breed with pigs for her own account, the land was not given to her in loan for that purpose, but for the purpose of growing vegetables on it. The loan for use was conditional. Amongst other conditions, it was provided that the land would be loaned for an unspecified period subject thereto that if she should depart from the Cape or if the Company needed the land, they may reclaim it.⁶⁹ It appears that the contract cannot be classified as either a loan for use contract or as *precarium*, as it provided that the sergeant's wife had to use the land to grow vegetables, but also included a condition that the Company may retract the loan at its pleasure.

The example of Sergeant Herwerden's wife makes it clear that the loans of land to the Company's servants or their wives were tailored to the circumstances of each case and that the colonial government was not overly concerned with applying legal principles to such loans. I am therefore of the opinion that the loan of land

⁶⁶ JC Ledlie *The institutes of Roman law by Rudolph Sohm* (1892) 255 footnote 3.

⁶⁷ WW Buckland *A text-book of Roman law from Augustus to Justinian* (1921) 522.

⁶⁸ M Nathan *The common law of South Africa: A treatise based on Voet's commentaries on the Pandects, with references to the leading Roman-Dutch authorities, South African decisions, and statutory enactments in South Africa Vol II* (1904) 993.

⁶⁹ DB Bosman & HB Thom *Dagregister gehouden by den oppercoopman Jan Anthonisz van Riebeeck Deel II 1656-1658* (1955) 171; Thom (n 50 above) 156-157.

transactions entered into between the colonial government and Company servants cannot categorically be regarded as the equivalent of any of the Roman-Dutch law contracts discussed in the preceding paragraphs.⁷⁰

In conclusion, it appears to me that the loan of land by the colonial government to Company officials cannot be regarded as a control measure related to land, such as the measures discussed below. From the example cited above, it is clear that the Company had sufficient control over its servants and their wives and did not need to institute additional control measures with regard to the use of land by them.

9.3.1.1.3 *Land given to non-indigenous settlers for no consideration*

The colonial government realised that the cultivated land on which agricultural experiments had been conducted was more valuable than uncultivated land. Therefore, in a case where a non-indigenous settler had been using such land without paying any rent it was decided to change the situation. Consequently, on 1 January 1659 the previously cultivated land was leased to the highest bidder. The conditions on which the land was leased included a clause that the lessee may develop uncultivated land near the previously cultivated land for free. The extent of the land that could be developed was not specified, but the lessee could use the newly developed land for three years, after which he or another settler would have to lease the land.⁷¹ I am of the opinion that this clause in the lease agreement in fact constituted a contract of loan for use between the colonial government and the non-indigenous settler.

The lease agreement between the colonial government and the non-indigenous settlers who hired the buildings and land at the Company's outpost at Hottentots Holland contained a similar clause. The non-indigenous settlers were authorised to develop uncultivated land near the leased property for the period of three years for which the lease was concluded. Although it is not expressly stated

⁷⁰ It is not possible to be categorical in this regard as there may have been loans of land for use that did comply with the requirements of this type of contract, or there may have been loans that were *precarium*.

⁷¹ HB Thom *Journal of Jan van Riebeeck Volume III 1659-1662* (1958) 1; Robertson (n 9 above) 164. See also section 10.3.1.1 of Chapter 10.

that the new land cultivated would be free of charge, there was no provision that the produce rent charged by the colonial government would be increased over the three-year lease period.⁷² The provision in this agreement with regard to new land developed for agricultural purposes was also a contract of loan for use.

The colonial government did not impose any control measure on the land loaned to non-indigenous settlers for use, as it was satisfied that it would be able to lease out the newly developed land when the original lease expired.

9.3.1.2 The first control measure: Loan of agricultural land for payment

After 1657 the colonial government gave land to non-indigenous settlers, but not in terms of a land cultivation transaction, and referred to such a transaction as loan of land. The non-indigenous settlers were obliged to make a form of payment for it in return for the loan. De Groot remarks that one of the requirements for the contract of loan for use is that the loan must be gratuitous. According to De Groot, a loan for consideration is a contract for hire.⁷³

The colonial government was well aware of the difference between leasing land and giving land in loan to the non-indigenous settlers. Robertson remarks that in cases where the land was uncultivated and inconveniently situated it was given out for free to non-indigenous settlers, but where it had already been cultivated by the colonial government they made sure that it was leased to the highest bidder.⁷⁴ In the case of a lease, the colonial government received a fixed amount for the lease of the land. In the case of loaned land, the non-indigenous settlers were only obliged to make a payment when they had cultivated the land and produced crops on it. The nature of the control measure in respect of loan of agricultural land for payment is discussed in this section.

⁷² Sleigh (n 33 above) 158.

⁷³ Lee (n 61 above) 343.

⁷⁴ Robertson (n 9 above) 165-166. From the discussion of lease of land at the Cape in section 10.3.1 of Chapter 10, it is clear that in the case of lease of land the extent of the land leased had to be determined by survey or description or had to be properly described, whereas loaned land was often not described or the description was vague.

9.3.1.2.1 *Methods of payment in terms of the control measure: First method - Payment of a percentage of the produce of land*

On 23 March 1677 the colonial government resolved to give out land on loan in the Hout Bay Valley.⁷⁵ Two non-indigenous settlers received in loan for a period of 12 years as much arable land as they could cultivate.⁷⁶ In return for this loan they had to pay ten per cent of their grain crop to the Company.⁷⁷ This ten per cent payment was based on principles that can be traced back to a payment method used during the feudal period in the Netherlands.

In 1330 the Holy Roman Emperor bestowed the powers and rights that he had in the lowlands (Holland, Zeeland and Friesland) on the Count of Holland. This meant that the revenue that was due to the Emperor instead went to the Count. The revenue was made up of the income generated on the Count's estates and from the *regalia* that was bestowed on him.⁷⁸

The practice of demanding a percentage of the crops yielded on the land given by a ruler to his subjects originated in Europe in the Middle Ages.⁷⁹ According to Van der Schelling, the counts in the lowlands, later known as Holland and West

⁷⁵ *Resolutions of the Council of Policy of Cape of Good Hope* C. 10, pp. 89-94.

⁷⁶ The resolution states that the quantity of land that the non-indigenous settlers could occupy would depend on the size of the labour force that they could muster. In other words, if the two non-indigenous settlers were the only labour force for the first year, they would have been able to occupy the land that they could cultivate to produce a crop and harvest it in a growing season. The condition is couched in such a manner that if the non-indigenous settlers could obtain more labour the following growing season, they were authorised to occupy the quantity of the land that the larger workforce could cultivate. It appears that the colonial government was of the opinion that the settlers would be prevented from occupying an inordinate quantity of land, because of the scarcity of and fluctuation in the labour supply at the Cape.

⁷⁷ Sleigh (n 33 above) 269, Botha (n 5 above) 151.

⁷⁸ PH Engels *De geschiedenis der belastingen in Nederland, van de vroegste tijden tot op heeden* (1848) 8-9. With regard to the nature of *regalia* see note 91 of Chapter 8. The approach I adopt with regard to *regalia* is that the Company could not have any rights in land similar to the rights of the Count of Holland based on feudal law. See section 5.3.2.4 of Chapter 5 with regard to the status of the Company as land holder in the Cape Colony. However, the fact that the Company could not obtain rights in land because it could not be regarded as a feudal landlord, does not mean that it could not impose payments that were similar to payments made to the Count of Holland. In other words, the Company was under the mistaken impression that as sovereign it owned all the unowned land at the Cape. Consequently, it was of the opinion that it could impose a payment on the use of such land by the non-indigenous settlers. Robertson argues that the payment made by non-indigenous settlers for loaned land is not rent as is contended by Truter. I agree with him in this regard, except that his motivation appears to be wrong. He argues that the Company was not a feudal landlord that could earn rent, but was a feudal 'overlord' that had rights in the land that entitled it to demand payment of a percentage of the produce of the land. Robertson (n 9 above) 168-169.

⁷⁹ As this percentage was usually one tenth of the crops yielded the payment was referred to as a tithe.

Frisia, gave out land on which no-one had settled (*onbeheerde landen*), on the condition that they would receive a yearly payment in recognition.⁸⁰ This practice commenced before the year 1100.⁸¹ He remarked that it was not known whether this payment constituted a tenth of the crops produced on such land. From 1100 it became an established practice for a count to give out such land to his subjects in order to obtain their loyalty and bind them to him. In return for the security that the count would provide to his subjects, they would render their services and a tenth or eleventh of the crops produced on the land on a yearly basis to the count.⁸²

In view of the status and powers of the States-General, that granted the Company its charter and its powers, the Company could not have been a feudal landlord.⁸³ However, the Company was the sovereign ruler of the Cape Colony and could impose a tax on its subjects for the use and occupation of land at the Cape.⁸⁴ I am of the opinion that the practice of demanding payment of a percentage of the produce of land was a form of taxation that was based on the tax that was imposed on landholders in the Netherlands in terms of feudal law.

9.3.1.2.2 *Methods of payment in terms of the control measure: Second method - Other forms of payment*

In line with its policy to try to benefit as soon as possible from the land loaned to non-indigenous settlers,⁸⁵ the colonial government accepted forms of payment other than payment of a percentage of the produce of the land. In one case the colonial

⁸⁰ The sovereign used his prerogative to generate revenue from the unowned land in his domain by granting it to others.

⁸¹ P van der Schelling *Hollands tiend-regt, of verhandeling van het regt tot de tienden, toekomende and de graafelykheid, en de heerelykheden van Holland, en Westvriesland* (1727) 206.

⁸² Van der Schelling (n 81 above) 207.

⁸³ Politically, the establishment of the Dutch Republic or the United Provinces was a complete break with feudalism and feudal lords. Fisher gives a summary of the Dutch constitution and remarks that in the seven united provinces 'feudalism was dead'. The States-General, which was the weak central authority of the Republic, had no feudal rights in land and could therefore not confer any such rights on the Company. HAL Fisher *A history of Europe* (1936) 595-596. See also the discussion in Chapter 5 in general and specifically section 5.3.2.4 of Chapter 5.

⁸⁴ See for example the conditions in the land cultivation transactions in terms of which land was given to the first non-indigenous settlers, where it is stated in Van Riebeeck's journal that the settlers will render ten per cent of the progeny of their livestock to the Company for the privilege of using '*Compagnie's landt*' as pasture. Bosman (n 69 above) 102.

⁸⁵ Robertson (n 9 above) 166. In terms of the land cultivation transactions, the colonial government undertook not to impose any taxes on the land for a certain period. Consequently, whereas the colonial government could benefit from a loan as soon as the non-indigenous settler produced a crop on the loaned land, it had to wait for the expiry of the period contemplated in the land cultivation transactions before it could tax such land.

government accepted a number of slaughter animals as payment, while in another case payment in the form of hay was accepted. These cases are discussed in more detail below.

On 5 August 1679 the colonial government loaned some land east of the Eerste River to Henning Hüsing and his companion as additional pasture for their sheep and for agricultural purposes.⁸⁶ The colonial government gave this loan on the condition that Hüsing and his companion would supply 80 suitable slaughter sheep per year to the colonial government. Sleigh refers to this payment as *rekognisiegeld*.⁸⁷ I am of the opinion that the colonial government regarded the 80 slaughter sheep that had to be supplied to them as payment for both the land used as pasture and the land used for agricultural purposes.⁸⁸

On the same date the colonial government loaned land for agricultural use on the eastern side of the Tygerberg to two non-indigenous settlers.⁸⁹ As the Company had used the land previously as a place to gather hay for its livestock, it was loaned on the condition that the non-indigenous settlers must continue to provide the same amount of hay to the Company.⁹⁰ Robertson contends that this obligation placed on the non-indigenous settlers must not be regarded as rent paid for the land. He argues that, as the non-indigenous settlers were only obliged to deliver the same amount of hay that the Company had received previously from the same land, the Company did not make any profit. According to him the Company was therefore not compensated for the loan of the land.⁹¹ This argument is based on faulty reasoning, as the Company no longer had to carry the costs of mowing the hay that was required for its livestock. From the journal kept by the colonial government for the

⁸⁶ *Resolutions of the Council of Policy of Cape of Good Hope* C. 14, pp. 78–79. See section 8.4.1 of Chapter 8 with regard to the land loaned to Hüsing and his companion as pasture the previous year.

⁸⁷ Sleigh (n 33 above) 172. This remark of Sleigh's appears to equate the payment to the *recognitie* that was paid after 1714 for land used as grazing. See my remarks in section 9.3.3.2.2.

⁸⁸ The difference between the payment in this case and the payment imposed under the 17 April 1714 control measure was that livestock was used to pay for the use of agricultural land. Under the control measure, a percentage of the crops produced on the agricultural land was paid. As it is not clear whether the payment was for the agricultural land or the use of the pasture, Sleigh is not necessarily correct in his contention that the payment was for the loan of the land used as pasture.

⁸⁹ *Resolutions of the Council of Policy of Cape of Good Hope* C. 14, pp. 78–79.

⁹⁰ As above.

⁹¹ Robertson (n 9 above) 160-161.

years 1671 to 1674 and 1676, it appears that the Company must have incurred substantial costs in labour and transport in order to mow hay at its outpost at Hottentots Holland and transport it to the Cape. This appears from the numerous entries in the journal, starting on 23 December 1672, referring to the gathering of hay at the Hottentots Holland outpost and the transport thereof and also an entry on 21 September 1676 with regard to the gathering of hay at the place east of the Tygerberg that was loaned to the two non-indigenous settlers in 1679.⁹² The Company had, by suspending its activities at the Hottentots Holland outpost in 1678, reduced its expenditure on labour.⁹³ Giving the land at the Tygerberg in loan to the non-indigenous settlers on condition that they supply the colonial government with the necessary hay, must have reduced these costs even more. It may be assumed that the colonial government did not demand a payment of a percentage of the crops that the non-indigenous settlers produced on the loan land, because of this cost saving. I agree with Robertson, albeit for different reasons, that the supply of hay to the colonial government did not constitute payment of rent. I am of the opinion that, instead of burdening the non-indigenous settlers further with the payment of a percentage of their crops, the colonial government accepted the delivery of the hay as payment for the loan of the land.

I am of the opinion that the delivery of the slaughter sheep and the hay to the colonial government can be equated to the payment of the ten per cent of the produce yielded by the land in Hout Bay. The three transactions between the colonial government and the non-indigenous settlers were therefore all loans of agricultural land subject to payment.

9.3.1.2.3 *Suspension of loan of agricultural land for payment*

By the end of the 1670's the loan of agricultural land for payment had developed into a control measure that had major disadvantages for the non-indigenous settlers who held agricultural land in loan. Not only did the settlers have to pay a percentage of the crops produced on the land or make another type of payment to the colonial

⁹² HCV Leibbrandt *Precis of the archives of the Cape of Good Hope: Journal, 1671-1674 & 1676* (1902) 100, 167, 169, 170, 177, 180, 184, 189, 217, 224, 251, 283.

⁹³ Sleight remarks that the renting out of the Hottentots Holland outpost to non-indigenous settlers meant that 24 paid employees of the Company could be recalled to the Cape. Sleight (n 33 above) 156.

government, they also had no assurance that they would stay in possession of the land.⁹⁴ The colonial government did not make any commitment to reward the non-indigenous settlers for the improvements made to the loaned land if the Company terminated the loan.⁹⁵ Consequently, the non-indigenous settlers did not put any great effort into developing the land loaned to them.⁹⁶ To rectify this problem the colonial government, on 23 March 1680 ('1680 resolution'), resolved that land held in loan by non-indigenous settlers could, on request, be given to them in terms of conversion transactions.⁹⁷ They also resolved that from 1680 land given to non-indigenous settlers for agricultural purposes would not be given out on loan, but in terms of land cultivation transactions. In other words, the colonial government suspended its use of the loan of agricultural land for payment control measure.⁹⁸

⁹⁴ *Resolutions of the Council of Policy of Cape of Good Hope* C. 18, pp. 2-5. On 25 April 1686 the colonial government decided that the Company needed the land at the Tygerberg for their own purposes. The non-indigenous settlers were given six months to vacate the land. Although the settlers were compensated by giving them other land there is no indication that such land was improved land. If it was unimproved land, the non-indigenous settlers concerned would have suffered a significant loss.

⁹⁵ Although I could not find a loan of land transaction in which a condition regarding the revocation of the loan is mentioned, Robertson ventures the opinion that the loan was subject to the will of the colonial government. Robertson (n 9 above) 171. See also the resolution referred to in note 96. This resolution mentions that the "Coloniers" at Stellenbosch were leaving their agricultural land uncultivated. These non-indigenous settlers were warned that if the land was not cultivated within six months from the date of the resolution, the land would be taken away from them and given to others. It is possible that settlers who were still holding their land on loan (in other words they had not converted their land in terms of the resolution of 23 March 1680) were also included in this warning.

⁹⁶ *Resolutions of the Council of Policy of Cape of Good Hope* C. 14, pp. 121-154, Robertson (n 9 above) 167.

⁹⁷ *Resolutions of the Council of Policy of Cape of Good Hope* C. 14, pp. 121-154. From this resolution it is clear that these transactions were similar to land cultivation transactions. It is stated that the loaned land will be converted subject to the following condition:

...met die restrictie nochtans, wanneer 't selve onbebout laten leggen en niet na behoren comen te cultiveeren en van dese onse meeninge behoorlijck gewaarschout sijnde, dat haer alsdan 't selve lant weder al werden afgenomen en aen ijmant anders gegeven die den ackerbouw meerder comt te beeiijveren, sonder dat den eerste eygenaar eenige 't minste recht daar op sal moogen reserveeren ofte iets te pretenderen hebben.

This condition is another indication that it was not the intention of the colonial government to confer conventional ownership of the land on the non-indigenous settlers with conversion transactions, but to ensure that they cultivated the land that they occupied.

⁹⁸ This conclusion is applicable to the rural land outside the Cape. As the non-indigenous settlers were not compelled to convert their loaned land, the control measure remained applicable to loan land that was not converted. However, it would appear that it would not have made much sense not to convert land in terms of the 1680 resolution. The non-indigenous settlers who held land in terms of land cultivation transactions also had to pay a percentage of their crops to the colonial government as tax, but their rights in land were far more secure. Robertson (n 9 above) 167.

9.3.1.3 Grazing used for agricultural purposes subject to payment: First loan of land system control measure

The grazing used for agricultural purposes subject to payment control measure adopted in terms of the resolution of the colonial government on 17 April 1714 ('17 April 1714 control measure') had most of the characteristics of the loan of agricultural land for payment control measure. However, where the loan of agricultural land for payment control measure was applicable to land made available to non-indigenous settlers, specifically for agricultural purposes, the 17 April 1714 control measure was applicable to land that was initially given to non-indigenous settlers in terms of authorisations to utilise land as grazing.

9.3.1.3.1 *Introduction of the 17 April 1714 control measure*

The application by Hendrik Mentie van den Bergh for an authorisation to utilise land as grazing presented the colonial government with the opportunity to introduce the 17 April 1714 control measure. Prior to the application that was considered on that date, according to an entry in the *Oude Wildschutte Boeken*, he had been using land as grazing at Roodezand and north of the Berg River.⁹⁹ The application of 17 April 1714 differed from his other applications in that he, in addition to his request for the extension of his authority to use the land north of the Berg River as grazing, also requested permission to sow six muid¹⁰⁰ of wheat on this land. The colonial government did not comment on his application to continue to use the land north of the Berg River as grazing. It must therefore be accepted that his application in this regard was successful. However, instead of granting Van den Bergh's request to sow wheat on condition that he make a payment of a percentage of the crops produced, the colonial government made a general resolution that was applicable to him and to all other comparable applicants. It was resolved that in future the non-indigenous livestock farmers who used part of the land given to them as grazing to grow crops, had to make a payment consisting of a percentage of that

⁹⁹ *Resolutions of the Council of Policy of Cape of Good Hope* C. 31, pp. 113–116 note [10].

¹⁰⁰ The *Oxford English Dictionary* defines 'muid' as 'A dry measure of capacity approximately equal to three bushels (109 litres), used chiefly for grain;', and also defines the Dutch word 'mud' as 'An old Dutch and (in later use) South African dry measure of capacity, varying in amount but usually equivalent to about three bushels (approx. 109 litres)'. 'muid, n.2' *OED Online*. March 2016. Oxford University Press. <http://0-www.oed.com.innopac.up.ac.za/view/Entry/253321?rskey=4ATzxv&result=2> (accessed 14 March 2016), 'mud, n.2' *OED Online*. March 2016. Oxford University Press. <http://0-www.oed.com.innopac.up.ac.za/view/Entry/123227> (accessed 14 March 2016).

crop to the colonial government.¹⁰¹ It was specifically stated that when future applications to utilise land were received, the intention to use such land to produce crops in excess of what was necessary for the subsistence of the settler had to be noted. This was the first time since the suspension of the loan of agricultural land for payment control measure in 1680 that the non-indigenous settler who loaned land had to pay if he produced crops on the loaned land.

I am of the opinion that the resolution of 17 April 1714 was instituted, because the colonial government realised that some of the non-indigenous livestock farmers were utilising the land given to them as grazing, to rather produce grain to generate an income for themselves. In this regard it must also be noted that the colonial government had received a letter from the Directors of the Company dated 12 August 1713, in which they were urged to find new ways of increasing the revenue of the Cape Colony.¹⁰² That would be the reason why Governor De Chavonnes drew the colonial government's attention to the fact that the Company had in the past not benefitted from the crops raised on land that was earmarked for and ought to have been used for grazing.¹⁰³

9.3.1.3.2 *The 17 April 1714 control measure as source of revenue in the interior of the Cape Colony*

In the seventeenth century, under the loan of land for payment control measure, land was almost exclusively loaned for agricultural purposes only.¹⁰⁴ After 1703, due to the manner in which the Cape Colony expanded¹⁰⁵ and the scarcity of pasture in the Cape and Stellenbosch and Drakenstein districts, the non-indigenous settlers were authorised to use land as grazing in the interior of the Cape Colony.¹⁰⁶ These authorisations were given free of charge. However, by 1714 the colonial government realised that the non-indigenous livestock farmers were producing grain crops on

¹⁰¹ *Resolutions of the Council of Policy of Cape of Good Hope* C. 31, pp. 113–116.

¹⁰² *Resolutions of the Council of Policy of Cape of Good Hope* C. 32, pp. 47–84.

¹⁰³ *Resolutions of the Council of Policy of Cape of Good Hope* C. 31, pp. 113–116.

¹⁰⁴ The only exception is the case of Hüsing and his companion which is discussed in section 8.4.1 of Chapter 8 and section 9.3.1.2.2.

¹⁰⁵ See sections 9.2.1 and 9.2.2.

¹⁰⁶ Van der Merwe (n 5 above) 58-60.

these lands in excess of their household requirements.¹⁰⁷ The change brought about by the 17 April 1714 control measure was that the non-indigenous farmer now had the choice whether he wanted to produce a surplus of grain on the land initially given to him as grazing. If he decided to do so, he in effect used land made available as grazing for agricultural purposes and had to pay a percentage of the crops produced on it to the colonial government.

9.3.1.3.3 *Permanent settlement on land due to the adoption of the 17 April 1714 control measure*

At the start of the eighteenth century it was mostly those non-indigenous settlers who held land in terms of land cultivation transactions or conversions in terms of the 1680 resolution at the Cape and in the Stellenbosch and Drakenstein district, who were authorised to use land as grazing. Being the owners of land where they built their homes and established vineyards or grain fields, they only needed land in the interior of the Cape Colony to use as additional grazing for their livestock.¹⁰⁸ From around 1706 non-indigenous settlers who did not own agricultural land also obtained authorisations to utilise land as grazing.¹⁰⁹

Van der Merwe remarks that the non-indigenous settlers who were not owners of agricultural land started to grow wheat for bread on the land that they were authorised to utilise as grazing. He is also of the opinion that the use of such land to grow wheat for bread was in time accepted as a matter of course. Due to the practice of growing crops on land used as grazing, these non-indigenous settlers began to erect more permanent structures on such land.¹¹⁰ Malan remarks that the resolution of 17 April 1714 was a general concession to grow crops on land that non-indigenous settlers were authorised to use as grazing. According to her this brought

¹⁰⁷ On 26 February 1710 the colonial government considered a representation made by the non-indigenous settlers that they should be allowed to subtract the wheat that they needed for bread and seed from the yield of their wheat crop, before the ten per cent that was due to the colonial government was calculated. The colonial government acceded to the request of the non-indigenous settlers. *Resolutions of the Council of Policy of Cape of Good Hope C. 27*, pp. 96–100. It is therefore clear that the colonial government made a distinction between crops produced for subsistence and those produced to generate income.

¹⁰⁸ Van der Merwe (n 5 above) 67-68.

¹⁰⁹ Van der Merwe (n 5 above) 71.

¹¹⁰ Van der Merwe (n 5 above) 72, L Guelke & R Shell 'Landscape of conquest: Frontier water alienation and Khoikhoi strategies of survival, 1652-1780' (1992) 18 *Journal of Southern African Studies* 814, Theal (1903) (n 9 above) 331.

about a change in perceptions about the suitability of this type of land as a permanent family home.¹¹¹ The 17 April 1714 control measure therefore played a role in making the semi-nomadic non-indigenous livestock farmer more sedentary.

9.3.2 Land used as grazing

In contradistinction to pasture that was a scarce resource at the Cape and later in the more settled areas of the districts of the Cape and Stellenbosch and Drakenstein, there was an abundance of grazing in the interior of the Cape Colony from which the Company derived no benefit. To change this situation, the colonial government instituted control measures.

9.3.2.1 Control of land used as grazing in the seventeenth century

The discussion in Chapter 8 of the control that the colonial government exercised over land used as pasture in the South-Western Cape during the seventeenth century makes it clear that its main concern was to ensure that there would always be sufficient pasture for its own livestock.¹¹² The colonial government was reluctant to relinquish control of any part of the available pasture to anybody else. The provisions of the land cultivation transactions of 1657 did not give the non-indigenous settlers rights in the land they used as pasture, but only the right to use the pasture. It follows that the percentage of the progeny of their livestock that was delivered to the colonial government was the payment for the use of the pasture.¹¹³

As time progressed the colonial government realised, in line with its responsibility as owner of public things, that the pasture had to be controlled for the benefit of the community as a whole.¹¹⁴

¹¹¹ A Malan 'From outlaws to in-laws: Families and farms in the Piketberg District, c.1700-c.1910' (2013) 27 *Vernacular Architecture Society of South Africa* 10.

¹¹² See sections 3.2.1.2 and 3.3 of Chapter 3.

¹¹³ When land was first given to non-indigenous settlers in the Stellenbosch and Drakenstein district, the condition regarding payment for the use of the Company's pasture was omitted. Theal (n 16 above) 248.

¹¹⁴ See the example of the land used as pasture at Groene Cloof in section 8.5.1.2.2 of Chapter 8.

9.3.2.2 Control measures for land used as grazing

From the facts that are available on the issuing of authorisations to utilise land as grazing, it must be deduced that the authorisations were an administrative measure exercised by the colonial government official who had control of the register called the *Oude Wildschutte Boeken*. Van der Merwe emphasises the informality of the authorisations to utilise land as grazing in his description of the system to which he refers as the issuing of grazing licences.¹¹⁵ The loan of land used as grazing subject to the payment of recognition control measure instituted by the resolution of 3 July 1714 ('3 July 1714 control measure'), was the first resolution made to regulate the use of land as grazing.

9.3.2.2.1 *Informal control measure: Authorisations to utilise grazing*

It appears that during the second British occupation of the Cape Colony, the Office of the Receiver-General of Revenue was the custodian of the register that came to be known as the *Oude Wildschutte Boeken*. This register was already in existence at the beginning of the eighteenth century. Its initial purpose was to note the applications lodged by non-indigenous settlers to hunt game. In 1810 an official of the Office of the Receiver-General remarked that he had, in order to try to establish the origins of the loan place system, scrutinised this register.¹¹⁶ He found that in addition to licences for hunting, authorisations to utilise land as grazing for livestock were also noted in the register from 1703. These authorisations were made for varied periods of time and in some cases the applicants were authorised to grow crops on the land, while in other cases they were not authorised to grow crops on such land. One of the conditions that appeared in all the authorisations was that the non-indigenous settlers had to respect each other's right to use the grazing and should not encroach on the grazing of another. It is not clear from the entries in the register whether the applicants had to pay anything for the authorisations or whether the extent of land that could be used as grazing was specified.¹¹⁷ Van der Merwe refers to these authorisations recorded in the *Oude Wildschutte Boeken* as the grazing licences system (*stelsel van weilisensies*).¹¹⁸ He contends that with time the

¹¹⁵ Van der Merwe (n 5 above) 68.

¹¹⁶ Theal (n 5 above) 428. The report of the Office of the Receiver-General of Revenue is discussed in section 6.4.1 of Chapter 6.

¹¹⁷ Theal (n 5 above) 429.

¹¹⁸ Van der Merwe (n 5 above) 67.

system developed to a point where the non-indigenous settlers became the permanent occupiers of the land given to them under the authorisation. He is of the opinion that this development was spontaneous.¹¹⁹

9.3.2.2.2 3 July 1714 control measure: Second loan of land system control measure

Governor De Chavonnes drew the colonial government's attention to the fact that giving the non-indigenous settlers authorisations to use grazing in the interior of the Cape Colony had no financial benefit for the Company.¹²⁰ He requested that the colonial government should consider suitable ways in which the Company could derive some financial benefit from these authorisations. Therefore, the colonial government decided on 3 July 1714 that the Company should receive something in return from the non-indigenous settlers who had been using land as grazing free of charge since 1703. The colonial government resolved that when the non-indigenous livestock farmers came to request authorisations to utilise land as grazing in the interior, they would be given such land on loan. The colonial government decided to impose a fee to be paid as recognition for the privilege to loan the land in the interior as grazing.¹²¹ From the manner in which the resolution was drafted it is clear that it was the colonial government's intention that if the non-indigenous settler should grow grain crops on the land concerned, he would in addition be required to pay a percentage of the grain crops produced.¹²² The resolution did not conflate the two types of payment for the two types of land as Botha contended in 1919.¹²³

9.3.3 Land reforms implemented in terms of the loan of land system

The effect of the 1714 resolutions was to create a totally different system for the non-indigenous settlers who chose to pursue a career as stock farmers rather than agriculturists. The features of this new system are discussed in this section.

¹¹⁹ Van der Merwe (n 5 above) 68.

¹²⁰ KM Jeffreys et al *Kaapse argiefstukke: Kaapse plakkaatboek Deel II (1707-1753)* (1948) 31.

¹²¹ As above.

¹²² The Dutch word used is '*daar boven*', which implies that the payment of the recognition fee must not be regarded as payment for land used for agricultural purposes.

¹²³ Botha (n 5 above) 152.

9.3.3.1 Decision that land used as grazing in the interior must be loaned to non-indigenous settlers

The Governor was concerned that the Company should generate income from land that had not previously generated any income. In order to impose payment for the use of such land, the colonial government had to establish a basis on which to do it. It therefore decided that instead of simply authorising the use of land, it would in future loan the land to the non-indigenous settlers.¹²⁴ Duly refers to the loan of land system as the product of innovation rather than a system based on Roman-Dutch legal principles.¹²⁵ Milton remarks that the loan of land was 'a unique indigenous type of tenure of obscure legal provenance developed from the peculiar customs and practices of the colony'.¹²⁶

9.3.3.2 Payment of recognition (*recognitie*)

The payment of recognition for the loan of land used as grazing was a new form of payment in the Cape Colony. The question is whether the payment of recognition was rent paid to the Company or whether there was another basis for the payment.

9.3.3.2.1 *Contention that recognition is rent paid for the lease of the colonial government's land*

Truter was of the opinion that the resolutions of 1714 transformed the loan of land system into a lease of land.¹²⁷ His opinion was based on his preliminary remark in his letter of 28 June 1811 to the Deputy Colonial Secretary that the land loaned to the non-indigenous settlers was owned by the British government.¹²⁸ Botha confirmed this view by remarking that loan tenure was nothing more than 'a permission to an occupier to graze his cattle in a certain locality upon payment of rent, a tithe, and an annual renewal of his lease'.¹²⁹ Other writers also accepted

¹²⁴ *Resolutions of the Council of Policy of Cape of Good Hope* C. 32, pp. 87–91.

¹²⁵ LC Duly *British land policy at the Cape, 1795-1844: A study of administrative procedures in the Empire* (1968) 15.

¹²⁶ Milton (n 10 above) 664.

¹²⁷ Theal (n 54 above) 95.

¹²⁸ Theal (n 54 above) 94.

¹²⁹ Botha (n 5 above) 152.

Truter's assumption that payment of recognition must be equated with payment of rent and that the land concerned was owned by the colonial government.¹³⁰

9.3.3.2.2 *Recognition as a payment for the use of land in the interior as grazing*

In view of the unique nature of the 3 July 1714 control measure, I am of the opinion that the loan of land used as grazing should not be equated with the lease of land. The circumstances that made it impossible for the Company to be the private law owner of waste land in the Cape Colony are discussed in Chapter 5. In view of these circumstances, there is no legal ground on which the colonial government could have contended that it owned the land in the interior of the Cape Colony. Consequently, the payment of recognition should not be equated with payment of rent.

With regard to the payment of recognition in terms of the resolution of 3 July 1714, Robertson remarks that the payment was regarded as recognition of *heerenrecht*.¹³¹ He does not offer any explanation of how this *heerenrecht* came into existence. Therefore, it is necessary to determine whether there was a comparable payment in the Netherlands that settlers had to make to the ruler when settling on waste land.

To this end, I consider the practice that was adopted with regard to the reclamation of the peat lands in the domains of the Count of Holland and the Prince-Bishop of Utrecht. These rulers had acquired the legal rights to the peat lands which were in essence waste land.¹³² They were interested in increasing the populations of their domains and therefore entered into contracts with groups of free peasants to

¹³⁰ G Denoon 'Diagrams and remainders (I)' (1947) 64 *South African Law Journal* 180; HJ Erasmus 'Title to land and loss of land in the Griqua captaincy of Philippolis, 1826-1861' (2010) 16 *Fundamina* 32.

¹³¹ Robertson (n 9 above) 170. The resolution does not refer to the payment as a '*heerenrecht*' and Robertson does not cite any authority for this statement.

¹³² JL van Zanden, 'Chaloner Memorial Lecture: The paradox of the Marks. The exploitation of commons in the eastern Netherlands, 1250-1850' (1999) 47 *The Agricultural History Review* 128, H van der Linden 'History of the reclamation of the western fenlands and of the organizations to keep them dry' in H de Bakker & MW van den Berg (eds) *Proceedings of the symposium on peat lands below sea level: Peat lands lying below sea level in the western part of the Netherlands, their geology, reclamation, soils, management and land use* (1982) 58.

reclaim the waste peat lands.¹³³ The peasants who drained the peat lands became the settlers on the reclaimed land where they built their homesteads and practised mixed farming activities. These farming activities consisted of agriculture and livestock farming.¹³⁴ Soens remarks that the reclaimed land was held by the settlers in exchange for a low customary rent and that this payment was interpreted as recognition of the authority of the count.¹³⁵ Van der Linden points out that the settlers who came to drain the peat lands were colonists and had to make a payment¹³⁶ as recognition of the power of the ruler.¹³⁷ According to Van Bavel, these settlers paid a small fixed fee for possession of the reclaimed land and, in practice, effectively became the owners of the land.¹³⁸

There are enough similarities between the position of the first settlers on the waste peat lands in the Netherlands and the non-indigenous livestock farmers in the Cape Colony to contend that the payment of recognition made by the livestock farmers can be equated with the payment made by the settlers on the peat lands. In both cases the rulers of the land wished to increase their incomes through tithes and payment of recognition on land.¹³⁹ They consequently decided that land that had previously been of no value to them should be utilised by settlers and that they should receive the recognition payment in return.¹⁴⁰ It is also clear that the Count of Holland received a tithe of the crops that were grown on the reclaimed land.¹⁴¹

¹³³ T Soens 'The social distribution of land and flood risk along the North Sea Coast: Flanders, Holland and Romney Marsh compared (c.1200-1750)' in BJP van Bavel & E Thoen (eds) *Rural societies and environments at risk: Ecology, property rights and social organisation in fragile areas (Middle Ages-Twentieth century)* (2013) 145-146, BJP van Bavel 'The organization and rise of land and lease markets in northwestern Europe and Italy, c. 1000-1800' (2008) 23 *Continuity and Change* 21.

¹³⁴ Soens (n 133 above) 146.

¹³⁵ As above.

¹³⁶ The word used by Van der Linden for this payment is '*census*'. Van der Linden's description of this payment corresponds with the description that De Groot gives of a '*cyns-recht*' which is translated as 'census-right' by Lee. Lee (n 61 above) 276-277. De Groot characterises the right to receive the census as a right to receive a yearly income from land that he no longer owns. Lee (n 61 above) 277.

¹³⁷ Van der Linden (n 132 above) 59.

¹³⁸ Van Bavel (n 133 above) 21. The contractual relationship between the settlers and the feudal lords of the land is discussed in section 5.5.3.2 of Chapter 5.

¹³⁹ Van Bavel (n 133 above) 21.

¹⁴⁰ The reasons why the land was previously of no value to the rulers were not the same in the Netherlands and in the Cape Colony. In the Netherlands the land concerned had to be reclaimed from the marshes that had no value as agricultural land or pasture. In the Cape Colony the colonial government initially allowed the non-indigenous settlers to utilise the land without demanding any

Hattingh remarks that one of the important principles the WIC applied when it gave out land to settlers, was that they had to pay an amount of money as a payment in recognition of that Company's position of lord and grantor of land.¹⁴² The practice of demanding payment of recognition to the lord of the land was therefore still used by one of the two great Dutch trading companies of the era. It is not unreasonable to assume that the Governor and the colonial government of the Cape Colony were aware of fixed payments made by occupiers of land in the colonial possessions of the WIC for the privilege of using such land for farming.

I am therefore of the opinion that the payment of 12 rixdollars a year provided for in the resolution of 3 July 1714 must be regarded as a payment for the privilege of using the waste land in the interior as grazing. The reason why the colonial government believed it could ask for the payment of recognition is the same as the reason for collecting a tithe of the crops produced on loaned agricultural land.¹⁴³ The Company was of the opinion that, as sovereign, it was the owner of the land that it loaned to the non-indigenous settlers. Therefore, it believed that it was legally entitled to impose a payment that was similar to the types of payment that were made to the Count of Holland when the feudal system was still operational.¹⁴⁴ The important fact is that, notwithstanding the erroneous grounds on which the payment of recognition was based, the payment was not rent for land leased from the Company.

9.4 Control measures instituted after 1714

The control measures that were instituted after 1714 were minor amendments to the 3 July 1714 control measure as well as a new control measure that related mainly to agricultural land, but also impacted on land used as grazing.

payment from them. The colonial government therefore did not have to encourage utilisation of the land, but only had to start collecting the payment from the crops and the recognition.

¹⁴¹ Van der Linden (n 132 above) 53.

¹⁴² Hattingh (1988) (n 54 above) 16.

¹⁴³ See section 9.3.1.2.1.

¹⁴⁴ See note 80.

9.4.1 Amendments to the 3 July 1714 control measure

After 1714 no new control measures were introduced that were directly applicable to land used as grazing. I discuss the relatively minor amendments that were made to the 3 July 1714 control measure in this section.

9.4.1.1 Annual renewal of loan of land used as grazing

The colonial government soon realised that if it wanted to ensure regular payment of the six or twelve rixdollars recognition, it would have to implement stringent measures in this regard. It also wanted to ensure that the stamp duty that had to be paid on the written authorisation to occupy land loaned as grazing would regularly accrue to the Company.¹⁴⁵ It was resolved on 18 June 1715 that the non-indigenous settlers who loaned land used as grazing for six or twelve months, would have to renew the loan within one month after the expiry of the period. Failure to comply with the notice published in this regard could result in a fine of up to 30 rixdollars.¹⁴⁶

9.4.1.2 Increase of the amount of recognition

On 28 February 1732 the colonial government resolved to increase the annual payment of recognition on loan land used as grazing from 12 rixdollars to 24 rixdollars.¹⁴⁷ The colonial government was of the opinion that the 12 rixdollars paid by the non-indigenous settlers was not proportionate to the benefit they received from using the land as grazing or for raising crops and planting vineyards.¹⁴⁸ In the notice published by the colonial government in connection with the increase of the payment of recognition, it was made clear that the Company wanted the non-indigenous settlers to assume a larger part of the heavy burden borne by the Company.¹⁴⁹ As the percentage payable of the crops produced was fixed, the income derived from loaned agricultural land would only increase if the settlers produced more. Short of forcing the settlers to produce more, the only way in which the Company could lighten its burden was to increase the amount of the recognition payment. Consequently, it must be accepted that the reference made in the

¹⁴⁵ With regard to the stamp duties see Jeffreys (n 120 above) 27-31.

¹⁴⁶ Jeffreys (n 120 above) 60-61.

¹⁴⁷ *Resolutions of the Council of Policy of Cape of Good Hope* C. 89, pp. 57-61.

¹⁴⁸ As above.

¹⁴⁹ Jeffreys (n 120 above) 152.

resolution to land used for agricultural purposes was only to indicate how much benefit the non-indigenous settlers obtained from the land loaned to them.¹⁵⁰

9.4.2 Control measure instituted in terms of Van Imhoff's instructions: Third loan of land system control measure

In 1743 the newly appointed governor-general of the Dutch East Indies, Baron Van Imhoff, visited the Cape on his way to Batavia.¹⁵¹ During this visit he considered, amongst other things, the situation relating to the occupation of land in the interior by non-indigenous livestock farmers. Van Imhoff regarded the tendency of these farmers to keep moving further into the interior to obtain better grazing with disfavour.¹⁵² He accordingly suggested the institution of a new control measure ('Van Imhoff control measure') which was aimed at ensuring that the livestock farmers would remain at the place where they had originally settled.¹⁵³

The provisions of this new control measure were contained in a report submitted to the Governor of the Cape Colony by Van Imhoff on 25 February 1743.¹⁵⁴ Van Imhoff empowered the Governor, on request, to convert loan farms into farms not exceeding 60 morgen in size.¹⁵⁵ In terms of these conversion transactions, the rights in land of the non-indigenous settlers would be more secure than under the loan place system. The non-indigenous settlers would continue to pay the recognition of 24 rixdollars that was imposed on 28 February 1732.¹⁵⁶ If the 60 morgen of land that was to be converted was assessed by reliable persons to be well developed and therefore of greater value than 24 rixdollars, the colonial government could impose an additional payment on conversion. Van Imhoff remarked that the additional payment should only be demanded if the non-indigenous settler was able

¹⁵⁰ In other words, the wording of the notice must not be interpreted to mean that the 24 rixdollars was payment for the agricultural land as well as the land used as pasture. The increased recognition was only payable on the land used as grazing.

¹⁵¹ Theal (n 42 above) 36.

¹⁵² Theal (n 42 above) 50-51.

¹⁵³ As above.

¹⁵⁴ *The reports of Chavonnes and his council, and of Van Imhoff, on the Cape. With incidental correspondence* (1918) 53, 76.

¹⁵⁵ *The reports* (n 154 above) 64, 139.

¹⁵⁶ Although the translation of Van Imhoff's instructions refers to 'rent', the Dutch report refers to an *impositie*. *The reports* (n 154 above) 64, 139.

to afford it.¹⁵⁷ The additional payment was therefore an *ad hoc* measure and not related to the payment of recognition.

9.4.2.1 Implementation of the Van Imhoff control measure

The manner in which the colonial government interpreted and implemented the instructions of Van Imhoff can be deduced from documentation relating to the conversion in 1746 of loaned land in terms of the Van Imhoff control measure. The resolution that the colonial government made on 16 February 1746 shows that the widow of Pieter Jurgen van der Heijden requested that two places that had been loaned as grazing for livestock be converted in terms of the instructions of Van Imhoff.¹⁵⁸ The request was granted on condition that, in addition to the usual payment of 24 rixdollars, she would pay 100 rixdollars for each farm. In the resolution it is stated that the payment is made in acknowledgement to the Company for giving the land to the applicant.¹⁵⁹

The official documentation that effected the conversion of one of the farms approved in the resolution was signed by the Governor on 14 March 1746.¹⁶⁰ The document refers to the land as a 'veepost,' which means that the loaned land was used as grazing. However, the document specifically provided that the owner was authorised to continue to conduct all the existing agricultural activities on the land specified in the document.¹⁶¹ The condition regarding the payment of the 24 rixdollars is reiterated as well as the condition in the resolution that she had to pay 100 rixdollars for the land. The owner was also obliged to deliver a percentage of the grain crop to the Company; failure to do so could result in forfeiture of the land. Similarly, failure to conduct the agricultural activities stipulated in the document could

¹⁵⁷ *The reports* (n 154 above) 64, 139.

¹⁵⁸ *Resolutions of the Council of Policy of Cape of Good Hope* C. 124, pp. 78-84.

¹⁵⁹ As above. The resolution provides that the payment is made '*tot een erkenisse voor d' E: Compe voor het verkrijgen dier Landereijen*'. When this statement is read in conjunction with Van Imhoff's instructions that the non-indigenous settler requesting conversion only had to make an additional payment if he was able to do so, it is clear that the land was not sold to the applicant.

¹⁶⁰ *Report of the Surveyor-General on the tenure of land, on the land laws and their results, and on the topography of the Colony Cape of Good Hope* 1876 14

¹⁶¹ *Report of the Surveyor-General* (n 160 above) 14. It must be noted that the English translation of the document on page 15 of the *Report of the Surveyor-General* does not contain a translation of the Dutch phrase *als vooren*. Consequently, the English translation does not reflect that the land to be converted was already improved and not only used as grazing.

also lead to forfeiture of the land.¹⁶² The last mentioned condition makes it clear that it was not the intention of the Company to confer ownership, in the conventional Roman-Dutch law sense, on the applicant.¹⁶³

The boundaries of the land that was converted are not described in the document. The size of the land in morgen and four points of the compass are the only physical description of the land forming part of the loan place concerned that was being converted. The only reasonable explanation of this description of the converted land is that the land formed a measured square around a specific point on the loan place, with each indicated point on the compass being a corner of the square. Although there is no indication in the document where the central point was situated, it is logical to accept that an important feature of the land, like the homestead, cultivated land or principal open water source, would have been the central point.¹⁶⁴

The Van Imhoff control measure did not deal directly with the use of the land as grazing. The *Report of the Surveyor-General* states that the conversion had the effect that loaned land used as grazing, that was estimated to be 3000 morgen in extent, was reduced to a farm of 60 morgen.¹⁶⁵ The Van Imhoff control measure in effect separated the residential and agricultural land and the grazing that a non-indigenous settler had been using under the first two control measures of the loan of land system. Notwithstanding this separation, the non-indigenous settler still had to pay the recognition of 24 rixdollars. Therefore, he accepted that he still had the right to utilise the remainder of the land now falling outside his 60 morgen farm as grazing and continued to use it as he had done under the 3 July 1714 control measure. The

¹⁶² *Report of the Surveyor-General* (n 160 above) 14.

¹⁶³ See the remarks in section 10.2.1 of Chapter 10 for the type of ownership that was conferred in terms of the land cultivation transactions, and conversions in terms of the Van Imhoff control measure. Furthermore, in view of the remarks in section 5.3.2.4 of Chapter 5, the Company was not able to confer ownership of the land on the non-indigenous settlers.

¹⁶⁴ The homesteads were usually the central points that were used to determine the extent of the grazing that may be occupied by the non-indigenous settlers on loan places. Theal (n 5 above) 430; Van der Merwe (n 5 above) 83. It is therefore accepted that this was often also the case with the land that was converted in terms of the Van Imhoff control measure. It is also accepted that the document reproduced in the *Report of the Surveyor-General* is representative of the documents used to convert land in terms of the Van Imhoff control measure.

¹⁶⁵ *Report of the Surveyor-General* (n 160 above) 6.

Report states that the non-indigenous livestock farmers contended that the 60 morgen freehold farm was not sufficient as grazing for the number of cattle that they needed to conduct their agricultural activities. This was due to the fact that the land in the interior of the Cape Colony was not suitable for growing sufficient feed for livestock.¹⁶⁶

9.4.2.2 Effect of the Van Imhoff control measure

I am of the opinion that the manner in which the Van Imhoff control measure was implemented clearly shows that it was aimed at transforming the land used for agricultural purposes in terms of the 17 April 1714 control measure into a farm separate from the land used as grazing by the non-indigenous settler concerned. The reason for the additional payment that the non-indigenous farmer had to make on the demarcated 60 morgen farm was that it was more valuable than the land for which he had to pay the 24 rixdollars recognition. As I remarked in section 9.3.3.2.2, the payment of recognition was for the loan of the land used as grazing. This situation was not changed by the resolution of 28 February 1732, which increased the amount of recognition that had to be paid. The only way in which the farmer could enhance the value of the land, in the estimation of the Company, was by using the land for agricultural purposes. Consequently, it must be accepted that if an additional amount had to be paid on conversion, it was paid for the agricultural land contemplated in the 17 April 1714 control measure. As a result of the resolution of 16 February 1746, the non-indigenous livestock farmer who decided to convert his loaned land had to make a once-off payment to the Company for the 60 morgen of agricultural land previously loaned under the 17 April 1714 control measure, if necessary, and continue to pay the 24 rixdollars for the grazing previously loaned under the 3 July 1714 control measure.¹⁶⁷

The effect of the Van Imhoff control measure was that non-indigenous settlers who had loan places could now own agricultural land in the interior of the Cape Colony on the same basis as land owned in terms of the land cultivation transactions and the conversions done in terms of the 1680 resolution. However, Duly remarks that, by 1798, only 107 of the estimated 400 locations where land was loaned by

¹⁶⁶ As above.

¹⁶⁷ Theal (n 5 above) 431-432.

non-indigenous settlers had been converted in terms of the Van Imhoff control measure.¹⁶⁸ This means that most of the land occupied by non-indigenous settlers in the interior of the Cape Colony was loaned in terms of the first and second control measures related to the loan of land system.

9.5. Factors that strengthened the loan of land system

The non-indigenous settlers who loaned land from the Company dealt with it as if they were the owners thereof.¹⁶⁹ However, there were no legal grounds on which these settlers were authorised to subdivide, bequeath or sell the loan land.¹⁷⁰ Due to the failure of the colonial government to prohibit the transfer of loan land, the custom developed that the homestead (*opstal*) on the loaned land was bequeathed or sold. In the case of the sale of such a homestead it also became the customary practice that the purchase price was not calculated on the value of the actual homestead, but on the value of the loaned land.¹⁷¹ The conviction of the non-indigenous settlers that they were entitled to transfer not only the homesteads, but also the land they occupied under the 17 April 1714 and 3 July 1714 control measures, was strengthened by the imposition of transfer duty on loan land on 20 July 1790.¹⁷²

The imposition of the transfer duty on loan land was seen by the non-indigenous settlers as a tacit acknowledgement that they were authorised to sell their loan land, which included the land used as grazing. This meant that they regarded such land as their property. Van der Merwe endorses this view when he contends that selling the homestead without the agricultural land and the land used as grazing would be meaningless.¹⁷³ Similarly, WS van Ryneveld remarks that, because the colonial government was aware that the purchase price on which the transfer duty was raised did not represent the value of the homestead alone, the assumption that the government acquiesced therein was justified.¹⁷⁴ However, according to Charles D'Escury, the colonial government raised the two and a half per cent transfer duty

¹⁶⁸ Duly (n 125 above) 18.

¹⁶⁹ Duly (n 125 above) 17, Theal (n 5 above) 431, GM Theal *Records of the Cape Colony from February 1793 to December 1796* (1897) 255-256, Van der Merwe (n 5 above) 114.

¹⁷⁰ Milton (n 10 above) 663.

¹⁷¹ Theal (n 5 above) 431, Milton (n 10 above) 663.

¹⁷² *Resolutions of the Council of Policy of Cape of Good Hope* C. 188, pp 138-248, *Report of the Surveyor-General* (n 160 above) 4, Theal (1903) (n 9 above) 332.

¹⁷³ Van der Merwe (n 5 above) 115-117.

¹⁷⁴ Theal (n 54 above) 258.

only on the purchase price of the homestead and this price did not include the value of the agricultural land and land used as grazing.¹⁷⁵

The imposition of transfer duty on the sale of the homesteads on the loan places was motivated by economic reasons. This is clear from the submission prepared by the colonial government in 1786, in response to allegations made by the non-indigenous settlers in a submission to the Directors of the Company dated 17 February 1786.¹⁷⁶ The colonial government was aware of the fact that the non-indigenous settlers did not only take the value of the homestead into account when determining the price of a loan place and was determined to take advantage of this fact by imposing the transfer duty.¹⁷⁷ The colonial government did not take into account that the non-indigenous settlers would regard the imposition of transfer duty as an acknowledgement that they had acquired rights in the loaned land.¹⁷⁸

In 1790, when the transfer duty on loan land was implemented, loaned land had no fixed boundaries.¹⁷⁹ The size of the land that a non-indigenous livestock farmer loaned as grazing could therefore not be determined. If the boundaries of the loaned land could not be determined, it would be difficult to attach a value to the land used as grazing. On the other hand, any purchaser of loan land could attach a definite value to the homestead and the loaned agricultural land. However, because the non-indigenous settlers who bought the loan places were aware of the fact that the new owner always received the grazing used by the previous owner of the homestead, the estimated value of such grazing must have been taken into account in determining the value of the land.¹⁸⁰

¹⁷⁵ GM Theal *Records of the Cape Colony from August 1822 to May 1823* (1903) 332.

¹⁷⁶ HCV Leibbrandt *Precis of the archives of the Cape of Good Hope: Requesten (Memorials) 1715-1806 Vol I* (1905) 299-300. Denoon remarks that, although the obligation to pay the transfer duty was initially on the seller, this obligation had by 1790 shifted to the purchaser. Denoon (n 130 above) 187-189.

¹⁷⁷ Leibbrandt (n 176 above) 300.

¹⁷⁸ See the discussion of the legal effect of the perceptions that the non-indigenous settlers had about their rights in the loan land in section 10.6.3.2 of Chapter 10.

¹⁷⁹ Van der Merwe (n 5 above) 95.

¹⁸⁰ Leibbrandt (n 176 above) 300.

9.6 Conclusion

As I remarked in section 9.3.3.2.1 Truter was of the opinion that the resolutions of 1714 transformed the loan of land into a system where land was leased to non-indigenous settlers on payment of the recognition and a percentage of the crop where necessary. Concomitant with this interpretation of the resolutions, Truter argues that the non-indigenous settler now had the more secure rights of a tenant and not merely the rights of a 'possessor of a gratuitous concession'.¹⁸¹ However, I am of the opinion that there is nothing in the control measures of 1714 or subsequent thereto that indicates that the relationship between the Company and the non-indigenous settlers was that of a lessor and lessee.

During the seventeenth century the Cape had not really started to expand and the Company was able to keep tight control over the available land in the South-Western Cape. It was therefore able to demand payment for the use of pasture by the non-indigenous settlers. In Chapter 8 I came to the conclusion that the land used as pasture must be classified as a public thing that was owned by the Company, subject to the use thereof by the non-indigenous settlers for their livestock.¹⁸² In the eighteenth century the Cape Colony started to expand and the Company was no longer able to control the vast tracts of land in the interior. The process of expansion of the colony, as discussed in section 9.2, moved the effective control of the land into the hands of the non-indigenous settlers. A government that does not have control of the land cannot have pretensions to lease land to the persons who are already in control of it.

However, the Company did not relinquish its position as sovereign of the non-indigenous settlers and was therefore still able to prescribe the manner in which the non-indigenous settlers used the land in the interior. The control measures discussed in this chapter bear testament to this fact. The control measures that the Company devised for agricultural land were more effective than those applied to land used as grazing. By loaning the agricultural land to the non-indigenous settlers, they were induced into settling down in locations where there were favourable conditions for growing crops and building a permanent home. The Van Imhoff control measure,

¹⁸¹ Theal (n 54 above) 95.

¹⁸² See section 8.5.1.2.2 of Chapter 8.

although not very popular, created the opportunity for the non-indigenous settlers to obtain their already developed agricultural land as their property. When the Company in 1790 resolved to impose a transfer duty of two and half per cent on the sale and transfer of the homestead and agricultural land on loan places, it appeared to give legal sanction to the unauthorised selling of homesteads and agricultural land that had been taking place for a long time.¹⁸³

The main object of the 3 July 1714 control measure was to obtain some benefit from land over which the Company did not have control. The non-indigenous livestock farmer therefore did not obtain the greater security that a tenant of leased land would have had. The payment of his recognition did not give him the assurance that his loan would be renewed at the expiry of the loan period.¹⁸⁴ By paying his recognition, the non-indigenous livestock farmer only ensured that other non-indigenous livestock farmers would not encroach on his loaned land.¹⁸⁵ The position with regard to land used as grazing in 1795 was therefore that neither the Company nor the non-indigenous livestock farmer was the owner thereof. The Company also no longer controlled the land used as grazing for its own benefit as was the case in the seventeenth century, but, subject to the payment of the prescribed recognition, authorised the non-indigenous settlers to use the available grazing for their livestock.

It is a fact that the reports on the land tenure system of the Cape Colony prepared by Truter in 1811 and 1812¹⁸⁶ did not contain any of the interpretations that I have given to the relevant events of the period from 1700 to 1795. However, I am of the opinion that it did not suit Truter's political masters to be presented with a report that denied that the colonial government's predecessor had any ownership rights in the waste land of the Cape Colony.¹⁸⁷ He chose to present a picture in which it was beyond dispute that the colonial government was the owner of all the land in the colony.¹⁸⁸

¹⁸³ Van der Merwe (n 5 above) 116-117.

¹⁸⁴ Van der Merwe (n 5 above) 111.

¹⁸⁵ Van der Merwe (n 5 above) 131.

¹⁸⁶ These reports are discussed in section 6.4.2.2 and section 6.5.3.2 respectively of Chapter 6.

¹⁸⁷ See in this regard the sentiments of Deputy Colonial Secretary Bird in his request for a second opinion from Truter. Theal (n 5 above) 470.

¹⁸⁸ Theal (n 54 above) 94.

10 Rights in land of the non-indigenous settlers in terms of the domestic law of the Cape Colony

10.1 Introduction

One of the aims of this thesis is to investigate the domestic land law of the Cape Colony as it developed during the period from 1652 to 1795. The research conducted in this regard revealed that it is generally accepted that the Company was the private law owner of the land that it gave to the non-indigenous settlers. The analysis of the charter of the Company in Chapter 5 leads me to a different conclusion. The conclusion that the Company did not obtain private law rights in the land at the Cape, means that it was not able to confer ownership of the land on the non-indigenous settlers by granting land to them. However, in the case of the land cultivation transactions¹ and conversions in terms of—

- (a) the 1680 resolution;² and
- (b) the Van Imhoff control measure,³

the non-indigenous settlers became owners of the land that they occupied. The rights that the non-indigenous settlers obtained in the land occupied in terms of the abovementioned ownership transactions and in the land leased or loaned to them are discussed in this chapter.

The conclusion that the Company was not the private law owner of the land concerned has an important effect on the rights in agricultural land that could accrue to the non-indigenous settlers. The fact that the Company was not the owner of the waste land in the interior of the Cape Colony and that unregulated occupation of such land by the non-indigenous settlers occurred, also had a significant effect on their rights in the land used as grazing. These rights, where they existed, are in some cases of a unique nature and are discussed in this chapter.

The non-indigenous settlers did obtain ownership rights in the land that was given to them in terms of the ownership transactions. However, it is imperative that these rights of the non-indigenous settlers are not equated with the absolute right of

¹ See section 5.5 of Chapter 5.

² See section 9.3.1.2.3 of Chapter 9.

³ See section 9.4.2 of Chapter 9.

ownership that forms part of the South African common law of today.⁴ It is equally important to note that ownership of the land occupied by the non-indigenous settlers was not transferred to them by the Company.⁵

The colonial government had to ensure that the land given to the non-indigenous settlers was used for agricultural purposes and that it would not be unduly hindered in developing the necessary infrastructure, such as roads, for the growing settlement. Instead of making a law that provided for conditions to that effect, the colonial government deemed it appropriate to include the said conditions in the ownership transactions.⁶ The purpose of the discussion of the non-indigenous settlers' rights in land held in terms of the ownership transactions is to show that the modern principles of South African land law should not be used to define the rights in land that developed in the seventeenth and eighteenth centuries. The discussion of the rights of the non-indigenous settlers in leased land is primarily aimed at making a clear distinction between the lease transactions in connection with land used for agricultural purposes and the loan of land used as grazing.

Writers commenting on the loan place system of the Cape Colony are in agreement that the non-indigenous settlers occupying loan places bought and sold

⁴ See the definitions of ownership in note 13. However, it must be borne in mind that writers like Van der Walt and Dhliwayo are of the opinion that the notion of ownership as an absolute right is not a Roman-Dutch law principle, but originates from what they refer to as 'pandectist scholarship'. AJ van der Walt & P Dhliwayo 'The notion of absolute and exclusive ownership: A doctrinal analysis' (2017) 134 *South African Law Journal* 40-41. Although the concept of absolute ownership is still emphasised in contemporary academic handbooks, Van der Walt contends that South African courts have adopted another approach. By studying cases dealing with access to privately owned land, Van der Walt remarks that the following definition of the concept of ownership is more appropriate for South African circumstances:

It is often said that the backbone of the South African common-law property system is that a private landowner can exclude non-owners from his or her land. However, we argue that ownership is in fact a fundamentally, systemically restricted right, with the result that all entitlements of a particular owner, including the right to exclude, will not necessarily be upheld or enforced equally strongly (or even at all) in all cases.

Van der Walt (above) 36.

⁵ See section 5.3.4.2 of Chapter 5.

⁶ In the discussion of land cultivation transactions, I refer to the condition regarding public roads on the land given to non-indigenous settlers. It is accepted that the conversions in terms of the 1680 resolution were done on the same conditions as the land cultivation transactions, as the resolution refers to the giving of land in *volle eijgendom* as was the case with the land cultivation transactions. *Resolutions of the Council of Policy of Cape of Good Hope* C. 14, 121–154. The document relating to the conversion in terms of the Van Imhoff control measure, as discussed in section 9.4.2.1 of Chapter 9, also included a condition that allowance had to be made for public roads on the land. (See *Report of the Surveyor-General on the tenure of land, on the land laws and their results, and on the topography of the Colony Cape of Good Hope* 1876 15.)

loan places as if they were the owners of such land. They also note that the non-indigenous settlers regarded their rights in the loaned land to be of a permanent nature.⁷ These perceptions of the non-indigenous settlers have led to theories that they were in fact the holders of rights that can be equated with the rights of a lessee or the rights of an occupier of land in terms of the contracts of *emphyteusis* and *superficies*. The discussion of the rights in land of the non-indigenous settlers occupying loan places in this chapter shows that the abovementioned writers have attached too much importance to the said settlers' own perception of their rights.

10.2 The rights of the non-indigenous settlers in land held in terms of ownership transactions

The discussion in section 5.5 of Chapter 5 and sections 9.3.1.2.3 and 9.4.2 of Chapter 9 forms the background to the discussion of the rights of the non-indigenous settlers in the land that they occupied in terms of the ownership transactions.

10.2.1 Rights obtained by occupation of land

In section 5.4.3 of Chapter 5 I referred to the test that must be applied when determining whether land was acquired by occupation.⁸ One of the requirements of this test is that the occupier must have the intention to become owner of the thing concerned.⁹ My contention that the Company did not have any rights in the land that it could confer on the non-indigenous settlers means that the rights of the non-indigenous settlers depended on whether they occupied the land with the intention to become the owner thereof or not.

The conditions imposed in the ownership transactions obliged the non-indigenous settlers to show with what intention they occupied the allocated land.¹⁰ If

⁷ WS van Ryneveld in GM Theal *Records of the Cape Colony from March 1811 to October 1812* (1901) 258; PJ van der Merwe *Die trekboer in die geskiedenis van die Kaapkolonie 1657-1842* (1938) 114-115; JRL Milton 'Ownership' in R Zimmermann & D Visser (eds) *Southern Cross: Civil law and common law in South Africa* (1996) 663.

⁸ It must be borne in mind that in section 5.4.2 of Chapter 5 I conclude that the Roman law principles applicable to the acquisition of movable things may, in the circumstances prevailing in the Cape Colony, be made applicable to the acquisition of land by occupation.

⁹ The non-indigenous settlers clearly complied with the other requirements of the test: they took possession of a thing and the thing, as far as they were aware, did not belong to anyone else. Therefore, it is not necessary to discuss these requirements in this section.

¹⁰ The conditions in the land cultivation transactions are discussed in section 5.5.1 of Chapter 5. I contend that the conditions were imposed for the public good of the developing colony. Although this

the non-indigenous settlers failed to cultivate the land within the period provided for in the conditions, it must be accepted that they did not have the intention to acquire the land as owners. The condition in the land cultivation transactions prohibiting the alienation of the land within a period of 12 years indicates that the Company wanted to ensure that the non-indigenous settlers committed themselves to cultivating the land and growing crops.¹¹ It can be accepted that in the cases where the non-indigenous settlers cultivated the land with the necessary diligence, they had the intention to become the owners thereof.¹² Therefore, I contend that when a non-indigenous settler had cultivated the land in terms of the land cultivation transaction and by so doing indicated that he had the intention to occupy the land unit, he was able to transfer the real right of ownership to his heir or the buyer of the land.

In the twentieth and twenty-first centuries ownership has consistently been defined as being absolute, but subject to the limitation that it may not be exercised in

thesis does not deal with urban land in the Cape Colony, it is necessary to note that my argument around giving of land instead of granting land is also sustainable with regard to land given to non-indigenous settlers in the towns. In this regard Denoon remarks as follows:

It was originally in respect of building requirements that a distinction was drawn between the three main categories of land. In regard to an erf there was an obligation to build at least one building ... In the days of old when land was granted as a gift the grants were made for purposes that had to be fulfilled and care was taken that this was done.

G Denoon 'Conditions in deeds' (1948) 65 *South African Law Journal* 365. From these remarks it is clear that, as was the case with land cultivation transactions, the occupier had to do something with the land given to him. In other words, if the occupier undertook to build a house on the plot of land he was authorised to do so by the colonial government.

¹¹ It is not clear whether the condition regarding alienation was enforced by the colonial government. Already on 27 August 1657 some of the non-indigenous settlers submitted a request to the colonial government that the period of 12 years should be set aside and that they should be allowed to sell the land that they had cultivated. The colonial government referred the request to the Directors of the Company. *Resolutions of the Council of Policy of Cape of Good Hope* C. 1, pp. 251–252. I could not determine whether the Directors addressed the matter. Heyl remarks that the first transfer deed that he could locate in the archives was dated 12 October 1658. JWS Heyl *Grondregistrasie in Suid-Afrika* (1977) 9, 330. It would therefore appear that the colonial government did not enforce the 12-year period before alienation of land could take place.

¹² In an article dealing with obtaining ownership of abandoned farms during the later Roman Empire, Van den Bergh refers to the practice of occupation of abandoned farms that developed in the Roman provinces and remarks as follows in this regard:

Already during the Principate, a special form of *occupatio* of deserted land started developing in the provinces. People who occupied such land and cultivated it for a period of ten years, obtained a hereditary right, not unlike dominium, and *usus proprius*. This right could only be recalled if the occupier stopped cultivating the land for a period of two years.

R van den Bergh 'Ownership of *agri deserti* during the later Roman Empire' (2004) 67 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 64. I am of the opinion that there are remarkable similarities between this manner of obtaining ownership through occupation and the manner in which ownership was obtained in terms of the land cultivation transactions.

a manner that infringes the rights of others.¹³ In view of the limitations placed on the rights of the non-indigenous settlers in the land given to them, it is clear that their right of ownership in the land was not absolute or complete. The right that they obtained cannot therefore be regarded as ownership as defined in the textbooks of the twentieth and twenty-first centuries. However, once the period stipulated in the land cultivation transactions that prevented the non-indigenous settlers from alienating their land expired, one of the most important entitlements¹⁴ associated with the right of ownership was added to the entitlements that they already had. I am of the opinion that the right that the non-indigenous settlers obtained in terms of the ownership transactions was ownership, but not ownership as generally contemplated in the twentieth and twenty-first centuries. I contend that the following conclusions reached by Truter accurately describe the content of the rights of the non-indigenous settlers who occupied land in terms of the ownership transactions at the start of the first British occupation:

¹³ Maasdorp was the first writer to publish a textbook covering the whole field of private law in the Cape Colony. (See CCTurpin 'Tradition and modernism in South African law' (1957) 9 *Theoria: A Journal of Social and Political Theory* 71.) He provided the following definition for ownership:

In this limited sense ownership is the sum-total of all the real rights which a person can possibly have to and over a corporeal thing, subject only to the legal maxim: "*Sic utere tuo ut alienum non laedas*" (So use your own that you do no injury to that which is another's). These rights are comprised under three heads, namely, (1) the right of possession, ownership having indeed been defined by some as consisting in the rights to recover lost possession; (2) the right of usufruct, that is the right to use and enjoyment; and (3) the right of disposition.

AFS Maasdorp *The institutes of Cape Law being a compendium of the common law, decided cases, and statute law of the Colony of the Cape of Good Hope: Book II The law of things* (1907) 33. This definition of ownership has remained essentially the same to the present day as can be seen from the following definition in a relatively new textbook:

The common law definition of ownership focuses on the theoretical completeness of the right by describing it as the most complete right a legal subject can have in relation to an object. This means that only the owner has the most complete and absolute entitlements to his property ... no one has more rights in relation to a thing than the owner ...

H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 91. The courts have also confirmed that the common law definition of ownership emphasises that the owner has absolute rights in his property. In *Berlein v Seiti* 2012 JDR 0076 (KZD) the court remarked as follows in this regard in paragraph [12]:

In terms of our common law, ownership of land is the most extensive and absolute real right, protecting an owner against unwanted intrusions and affording an owner an absolute right of eviction against those whom (sic) occupy property and whom the owner no longer wants on the property.

However, see the contrary view of Van der Walt referred to in note 4.

¹⁴ In modern textbooks the powers of the owner of a thing are referred to as entitlements. CG van der Merwe *Sakereg* (1989) 173-174; PJ Badenhorst et al *Silberberg and Schoeman's The law of property* (2006) 92-93; Mostert (n 13 above) 92-93.

- (a) The grants of land by the sovereign to the non-indigenous settlers and the express conditions in the grant conferred specific rights in the land on the grantee.¹⁵
- (b) The right of ownership in land can be equated with the right of ownership in movables subject to any limitations imposed in the grant and the 'supreme rights of Government for the public good'.¹⁶

10.3 The rights of non-indigenous settlers in leased land

The history of the lease of land to non-indigenous settlers in the Cape and Stellenbosch and Drakenstein districts is divided into two periods for the purposes of this chapter. The first period ended with the introduction of the *erfpacht* system on 18 February 1732.¹⁷ The *erfpacht* system was in operation from 1732 to 1812. During the first period the colonial government leased land to the non-indigenous settlers when it was to the Company's financial advantage to do so. No official policy was in place regarding the lease of land to non-indigenous settlers. The *erfpacht* system was the first formal system that provided that the non-indigenous settlers could become tenants of the colonial government.

10.3.1 Legal principles applicable to leases between the colonial government and non-indigenous settlers before 1732

The colonial government did not publish a *plakaat* providing for the terms and conditions on which land could be rented by the non-indigenous settlers before 1732.

¹⁵ Theal (n 7 above) 101-102. In the context of this chapter it means that the ownership transactions contained conditions that limited the rights of ownership in the land occupied by the non-indigenous settlers. I use the words 'grant' and 'grantee' because they were used by Truter.

¹⁶ Theal (n 7 above) 106. It is not clear why Truter deemed it necessary to refer to rights in movables in order to describe the right of property in land. It may have been to indicate that an owner of land had all the usual entitlements of ownership of a movable thing, like the entitlement to use the thing, to dispose of the thing and to use the income from the thing. According to Badenhorst, a person who has entitlements such as these has 'comprehensive control' over the thing concerned. Badenhorst (n 14 above) 92-93. In other words, it is also possible that Truter wished to indicate that the owner of land had comprehensive control over such land. Nixon remarks that in Roman-Dutch law land is not distinguished from other property and is dealt with in the same way as movables. J Nixon 'On the position of lessors and lessees of immovable property' (1887) 4 *South African Law Journal* 3. A third possibility is that Truter may have subscribed to the theory discussed by Nixon.

¹⁷ Denoon remarks that the English word 'quitrent' is not an appropriate translation of the word *erfpacht* as contemplated in the resolution of 18 February 1732. G Denoon 'The "duties and regulations" clause' (1945) 62 *South African Law Journal* 8. I therefore use the Dutch word instead of 'quitrent'.

The Roman-Dutch legal principles that governed the lease of land during the period concerned were therefore applicable to these transactions.

De Groot describes hire (*huir*) as a contract whereby a person binds himself to put a thing, such as land or a house, at the disposal of another. In return, the person obtaining the thing undertakes to pay the lessor.¹⁸ The contract comes into existence when the subject matter of the lease is certain and the rent that is to be paid is agreed upon. The lessor of a thing may be the owner of that thing, but may also only have a right less than ownership in the thing or may even have no right in the leased thing. However, in the case where the lessor has no rights in a thing, he has to be able to deliver the thing to the lessee.¹⁹ An essential element of the lease contract is that it must be for a specified period. If the parties to the contract fail to stipulate a specified period it is assumed that it will be for one year.²⁰ The lessor has the right to evict the lessee if he is more than two years in arrears with paying the rent.²¹ The lessee may use the thing that he hires and may compel the lessor to keep it in good repair. If the lessor fails to repair the leased thing, the lessee may repair it and deduct the costs of the repairs from the rent due. In the case of damage caused to the leased thing by unforeseen circumstances, like war or an extraordinary failure of crops, the lessee may demand a decrease in the amount of the rent.²² In the case where a thing is leased for a specific period, the rights of the lessee pass to his heirs. Similarly, if during the duration of such a contract the lessor should pass away, his heirs are obliged to maintain the lease contract.²³

¹⁸ RW Lee *The jurisprudence of Holland by Hugo Grotius Vol I* (1926) 384, 385. De Groot not only refers to the hire of a thing like land, but also to the hiring out of services or animals. He also remarks that it is the practice in Holland that a contract of hire must be executed in writing before *schepenen* ('magistrates') or it must be a written contract signed by the owner of the land. As there is no indication that the contract for lease of land in the Cape Colony had to be in writing, it is accepted that this requirement did not form part of the domestic law of the Cape Colony.

¹⁹ In the case of the lease of land under the *erfpacht* system the Company was not the owner of the leased land, but was able to deliver the leased land to the occupier of the land held in terms of an ownership transaction. As sovereign, the Company had the power to enter into a contract of lease with the non-indigenous settlers concerned. See in this regard De Groot's characterisation of a contract as discussed in section 5.5.3.1 of Chapter 5.

²⁰ Lee (n 18 above) 387.

²¹ Lee (n 18 above) 387-389.

²² Lee (n 18 above) 389-391.

²³ Lee (n 18 above) 387, 391.

10.3.1.1 Examples of leases of land by the colonial government before 1732

Land was leased to non-indigenous settlers soon after the first land cultivation transactions were entered into in 1657. In Van Riebeeck's journal it is mentioned that land previously cultivated by the colonial government for experimental purposes was leased to the non-indigenous settler who put in the highest bid. The land, approximately 2 morgen in size, was leased to a non-indigenous settler at 90 gulden per year for three years.²⁴

The colonial government realised that in many cases it was not profitable for the Company to maintain the vegetable gardens, grain fields and vineyards that it had established at the various outposts of the Company.²⁵ From humble beginnings during the government of Van Riebeeck, the outpost at Rustenburg was developed to include a comfortable dwelling, a garden and a vineyard in the time of Commander Wagenaar. The colonial government deemed it necessary to enclose these facilities to protect them from grazing wild animals.²⁶ However, the Company garden in Table Valley produced all the vegetables necessary to supply the Company's ships, which meant that the vegetable garden at Rustenburg did not provide any benefit to the Company. Therefore, in 1673 it was resolved that Rustenburg would be leased to non-indigenous settlers.²⁷ Although the colonial government tried to lessen the burden on its finances by leasing out Rustenburg, it did not relinquish the whole outpost to indigenous settlers. Sleight remarks that after 1677 only the *vierkantige wingerd* (square vineyard) was rented out to one of the non-indigenous settlers.²⁸

Similarly, the outpost at Hottentots Holland was used for agriculture and for stock farming, but when the colonial government was instructed to reduce expenditure by leasing the outpost to non-indigenous settlers, only the farm buildings

²⁴ HB Thom *Journal of Jan van Riebeeck Volume III 1659-1662* (1958) 1; HM Robertson 'Some doubts concerning early land tenure at the Cape' (1935) 3 *South African Journal of Economics* 164. See also section 9.3.1.1.3 of Chapter 9.

²⁵ HCV Leibbrandt *Precis of the archives of the Cape of Good Hope: Journal, 1671-1674 & 1676* (1902) 132; D Sleight *Die buiteposte: VOC-buiteposte onder Kaapse bestuur 1652-1795* (2007) 229.

²⁶ Sleight (n 25 above) 228.

²⁷ Sleight (n 25 above) 229.

²⁸ It appears that the lease contracts for the land at Rustenburg were in writing, as Sleight remarks that in one case a new lease contract was drawn up. One of these contracts provided that the gardens and orchards at Rustenburg would be leased for a period of two years at 3000 gulden for the said period. Sleight (n 25 above) 229.

and the land used for agricultural purposes were leased.²⁹ Another example is the outpost *De Schuer*, where only the grain lands were leased to a non-indigenous settler in 1678.³⁰

In section 5.4.3 of Chapter 5 I discussed the legal grounds on which the Company obtained ownership of the land that it used for agricultural purposes at the outposts it established. All the land leased to non-indigenous settlers was agricultural land on which vineyards, vegetable gardens or grain lands had previously been established by the colonial government. This land was acquired by the Company by occupation. Therefore, the Company was the owner of the land which was leased to non-indigenous settlers in the period before 1732.³¹ From the available information about the lease transactions between the colonial government and the non-indigenous settlers discussed above, it is clear that the transactions conformed to the applicable Roman-Dutch legal principles. The non-indigenous settlers had the right to use and enjoy the leased land, but could not obtain it in ownership.³²

10.3.2 The *erfpacht* system

When the Directors of the Company sent the instruction to the colonial government to institute the *erfpacht* system, it had the following in mind:

²⁹ Sleigh (n 25 above) 151-158. The prospective lessees of the outpost requested that they be allowed to keep their own flock of sheep at the outpost, but this request was denied. The colonial government wanted to retain the pasture in the vicinity of the outpost for the exclusive use of their own flock of sheep, which was also leased to the lessees of the outpost. The land, livestock and farming equipment at the Hottentots Holland outpost were leased to the non-indigenous settlers for a trial period of three years and the rent was fixed as a yearly payment of a fixed amount of the crops produced on the land.

³⁰ Sleigh (n 25 above) 178.

³¹ I could find no case where a specific piece of land used as pasture for livestock by the colonial government was leased to the non-indigenous settlers during this period. (The land at Groene Cloof used as pasture by Henning Hüsing, the Company's meat supplier, was defined but was not leased to him.) *Resolutions of the Council of Policy of Cape of Good Hope* C. 24, pp. 14-21; Sleigh (n 25 above) 494-495. The outposts Hottentots Holland and *De Schuer*, where agricultural land was leased to non-indigenous settlers, had pasture in its vicinity that was used by the Company. I am of the opinion that part of the reason why the pasture was not leased to non-indigenous settlers was that the colonial government could not identify a defined area at these outposts that was used exclusively by its livestock. The leases described in this paragraph must be distinguished from the loan of agricultural land in the Hout Bay area in 1677, which is discussed in section 9.3.1.2.1 of Chapter 9. Prior to 1677 the colonial government had established outposts at Hout Bay for the keeping of livestock in the vicinity of the land loaned to the non-indigenous settlers. Sleigh (n 25 above) 268-269. However, there is no indication that it was the pasture used by the Company's livestock that was loaned to the non-indigenous settlers for agricultural purposes.

³² WE Cooper *The South African law of landlord and tenant* (1973) 25.

- (a) It wanted to benefit and promote agriculture at the Cape by making land available to non-indigenous settlers who already occupied land for agricultural purposes in terms of land cultivation or conversion transactions. By making this additional land available, the agriculturist would be able to let the land he owned lie fallow, while he cultivated the leased land.
- (b) The leased land was to be attached to the abovementioned land of the lessee.
- (c) The land was to be leased for a period of 15 years, after which the Company could terminate the contract. If the Company terminated the contract it was obliged to reimburse the settler for any improvements made on the land.
- (d) The lessees were to pay a yearly rent to the Company based on the potential fertility of the land.³³

The purpose of the *erfpacht* system was to advance agriculture in the Cape Colony. To this end a scheme was devised in terms of which contracts of lease between the Company and the non-indigenous owners of land were concluded. The only difference between these contracts and the land cultivation transactions discussed in Chapter 5 is that the Company did not intend that the said owners would become owners of the leased land. During the 15-year period of the lease contract, the non-indigenous owners could exercise rights akin to ownership over the leased land, provided that they paid the rent.

In 1747 the 15-year lease contracts concluded in 1732 between the colonial government and the non-indigenous settlers were renewed for a further period of 15 years. The lease contracts concluded after 1732 were also to be extended for a further period of 15 years when they expired.³⁴ This procedure was again adopted in 1762.³⁵ It appears that these renewals and extensions continued until 1811, when the British colonial government ceased to enter into such lease contracts with the non-indigenous settlers.³⁶

³³ *Resolutions of the Council of Policy of Cape of Good Hope* C. 89, pp. 36-49. *Report of the Surveyor-General on the tenure of land, on the land laws and their results, and on the topography of the Colony Cape of Good Hope 1876* 18; LC Duly *British land policy at the Cape, 1795-1844: A study of administrative procedures in the Empire* (1968) 14; CG Botha 'Early Cape land tenure' (1919) 36 *South African Law Journal* 156.

³⁴ Theal (n 7 above) 278.

³⁵ Theal (n 7 above) 278-279.

³⁶ CG Botha 'Early Cape land tenure (continued)' (1919) 36 *South African Law Journal* 231.

Botha describes the *erfpacht* system as a grant of land by the Company. He remarks that notwithstanding the grant of the land the Company remained the 'lawful lord of the soil'.³⁷ Botha failed to realise that the *erfpacht* system was a lease transaction and that the parties did not intend that ownership of the land should change. The terms of the lease contract prevented the settlers from occupying the leased land with the intention to become owners thereof. This is evidenced by the fact that several resolutions of the colonial government approved requests that land that had been occupied in terms of the *erfpacht* system be given to the occupier in ownership.³⁸

10.4 Rights of the non-indigenous settlers in the land occupied in terms of the loan of agricultural land for payment control measure

The loan of agricultural land for payment control measure³⁹ was mistakenly regarded as the precursor of the loan place system that was implemented in the interior of the Cape Colony for land used as grazing.⁴⁰ In the period before 1700, land was loaned to non-indigenous settlers for agricultural purposes only and not for use as grazing.

From the discussion in section 9.3.1.2.3 of Chapter 9 of the precarious position of non-indigenous settlers who occupied land in terms of the loan of agricultural land for payment control measure, it is clear that they had very limited rights in the land. It appears that the only rights the non-indigenous settlers had in the land loaned in terms of this control measure were to occupy and cultivate an identified, but unsurveyed parcel of land.

10.5 Rights of the non-indigenous settlers in the land occupied in the interior of the Cape Colony

In the interior of the Cape Colony very little land was occupied by the non-indigenous settlers in terms of the methods discussed in sections 10.2 to 10.4. Most of the land

³⁷ Botha (n 33 above) 152.

³⁸ See for example the following *Resolutions of the Council of Policy of Cape of Good Hope C. 126*, pp. 292–308, C. 128, pp. 254–258 and C. 132, pp. 243–263. My argument is that if the non-indigenous settlers believed that the *erfpacht* transactions were 'grants' of land they would not have submitted requests to be given the land in ownership to the colonial government.

³⁹ See section 9.3.1.2 of Chapter 9.

⁴⁰ Theal (n 7 above) 93; Botha (n 33 above) 151; Robertson (n 24 above) 160-161; GG Visagie *Regspleging en reg aan die Kaap van 1652 tot 1806* (1969) 81.

occupied in the interior of the Cape Colony after 1700 can be divided into three categories. In the first place there was public land, which was the land that was used exclusively for government purposes and was usually clearly identifiable.⁴¹ This land was public property owned by the colonial government. There was also pasture, forests and public roads that were public land used communally by the non-indigenous settlers and the colonial government. This type of public land and resources was not reserved for the exclusive use of the colonial government, but had to be managed for the mutual benefit of the government and the non-indigenous settlers. In other words, the colonial government had to conserve the scarce resources like pasture and wood and maintain public roads for the benefit of the general public and for the economic welfare of the Cape Colony.⁴² The third category of land is the land that was loaned to the non-indigenous settlers to use as grazing and for the purpose of growing sufficient grain for the settler's household.

Apart from the abovementioned categories of land, the land in the interior of the Cape Colony that was not suitable to use for agriculture or as grazing must be regarded as land belonging to no one. This type of land is also referred to as *terra nullius*.⁴³

10.5.1 Rights in land occupied as grazing in terms of authorisations to utilise before 1714

The rights in land of the non-indigenous settlers who loaned land as grazing developed in an informal manner during the first decade of the eighteenth century.⁴⁴ The rights that the non-indigenous settler obtained flowed from the only general condition that was included in the authorisations to utilise land as grazing between 1703 and 1714. The authorisations made it clear that non-indigenous settlers were not allowed to encroach on the land that was already being used by settlers who had

⁴¹ The Company gardens, the cultivated lands and buildings at government outposts and the land occupied by drostdy's are examples of this type of public land.

⁴² See the discussion of public land in sections 3.3.4.2 and 3.3.4.3 of Chapter 3.

⁴³ See Chapter 5 for the reasons why such land did not belong to the Company. See also JC Sonnekus 'Enkele opmerkings na aanleiding van die aanspraak op *bona vacantia* as sogenaamde regale reg' (1985) *Tydskrif vir die Suid Afrikaanse Reg* 131, 132; JC Sonnekus 'Grondeise en die klassifikasie van grond as *res nullius* of as staatsgrond' (2001) *Tydskrif vir die Suid-Afrikaanse Reg* 90-91; JC Sonnekus 'Abandonnering van eiendomsreg op grond en aanspreeklikheid vir grondbelasting' (2004) *Tydskrif vir die Suid Afrikaanse Reg* 752-753.

⁴⁴ Van der Merwe (n 7 above) 80-81; Milton (n 7 above) 662.

previously obtained authorisations. In the beginning of the eighteenth century a non-indigenous settler seldom had to rely on this right as there was abundant grazing available.⁴⁵ When encroachment did occur, the non-indigenous settlers approached the colonial government to resolve the dispute. One of the heemraden of a district was charged with investigating a complaint made and writing a report on the matter. The colonial government could then either withdraw the offending authorisation or confirm it or ensure that agreement was reached between the parties on how the grazing should be used.⁴⁶ This action was an exercise of the colonial government's power to ensure orderly distribution of grazing between the non-indigenous settlers. This power did not originate from the colonial government's ownership of the loaned land, as remarked by Van der Merwe,⁴⁷ but from its position as sovereign ruler that could authorise its subjects to use land as grazing. The non-indigenous settler who complained about the encroachment on his grazing by another settler who had been issued with an authorisation to utilise grazing in the same area, was not enforcing a right in land when he complained about the encroachment. He was only holding the colonial government to its undertaking not to issue an authorisation that would cause another non-indigenous settler to encroach on the grazing he used for his livestock.

10.5.2 Rights in land occupied in terms of the 1714 resolutions

The non-indigenous settlers who occupied land in terms of the 1714 resolutions did not obtain greater rights in land used for agricultural purposes than the rights obtained under the loan of agricultural land for payment control measure.⁴⁸ However, the protection against encroachment on grazing offered by the authorisations to utilise land was also applicable under the 3 July 1714 control measure. In this section the question addressed is whether the greater formality introduced by the control measure influenced the rights of the non-indigenous settlers in the land used as grazing.

10.5.2.1 Protection of the right to grazing under the 3 July 1714 control measure

The greater incidence of non-indigenous settlers settling down at a specific place created a greater need for enforcement of the condition that a settler's livestock was

⁴⁵ Van der Merwe (n 7 above) 79, 82.

⁴⁶ Van der Merwe (n 7 above) 83.

⁴⁷ Van der Merwe (n 7 above) 82.

⁴⁸ See section 10.4.

not allowed to encroach on another's grazing.⁴⁹ The basis of the enforcement of the condition was the identification of the grazing that the non-indigenous settlers' livestock could use. The colonial government chose neither to regulate this matter by resolution or regulation nor to publish an official policy that had to be followed. Van der Merwe consulted the records of the proceedings of the heemraden of the Stellenbosch district that were delegated to resolve disputes between non-indigenous settlers about grazing.⁵⁰ By having regard to his remarks on these records it is possible to deduce what criteria were used to resolve disputes between the non-indigenous settlers.

Before Van der Merwe's ground-breaking work on the movement of the non-indigenous settlers into the interior of the Cape Colony, it was accepted that the only criterion to determine the distance between the homesteads of loan places was that they had to be situated one hour's walk from each other.⁵¹ This was an important criterion, but Van der Merwe remarks that the heemraden also took into account factors like the quality of the grazing that was available and the availability of water for an existing loan place, to determine whether a new loan place should be allowed. The conclusion that Van der Merwe draws from his perusal of the dispute resolution methods is that the heemraden applied the principle that every non-indigenous settler with a loan place should have sufficient grazing to provide for the needs of his

⁴⁹ When the first authorizations to utilise land were issued the non-indigenous settlers did not initially settle down on the loaned land used as grazing. Van der Merwe (n 7 above) 69. It can therefore be accepted that the practice to settle down on loan places and build homesteads started around the time that the 1714 resolutions were made. Van der Merwe contends that it became the practice to allocate a specific area of grazing to the non-indigenous settlers in the vicinity of the homestead. He does not explain how this was done. Van der Merwe (n 7 above) 72-73. I am of the opinion that Van der Merwe is not correct in his contention that the colonial government assigned a specific area of grazing to the non-indigenous settlers. In *In Re D.G. Van Reenen. Van Reenen v Reitz and Breda* 1828-1849 2 Menz 316 (*Van Reenen*), decided in 1833, the English translation of the text of the 'title' of the loan place Kleinfontyn that was given in loan in 1787, is quoted at 317. In this text it appears that there is a description of the location of the place Kleinfontyn followed by the phrase 'provided he does not thereby hinder in grazing any prior occupant'. From this phrase it is clear that even in 1787 the extent of the non-indigenous settler's grazing was not determined by the description of the location, but by the condition that his livestock would not encroach on the grazing of another non-indigenous settler who was in the vicinity before him. If every loan place had a specifically designated area of grazing it would not have been necessary to include the abovementioned phrase in the 'title'.

⁵⁰ Van der Merwe (n 7 above) 83.

⁵¹ GM Theal *Records of the Cape Colony from May 1809 to March 1811* (1900) 430; Theal (n 7 above) 99; GM Theal *Records of the Cape Colony from August 1822 to May 1823* (1903) 330-331; Maasdorp (n 13 above) 146; Botha (n 33 above) 153.

livestock.⁵² This meant that the half-hour principle was generally applied, but was not immutable. When local circumstances required that other equitable principles should be applied to ensure that the complainant in a dispute retained his grazing for his livestock, this was done.⁵³

However, having sufficient grazing for livestock did not necessarily mean that all the grazing that the settlers were authorised to use formed part of the loan place. Van der Merwe refers to some cases where the heemraden were of the opinion that the circumstances demanded that the livestock of the non-indigenous settlers involved should use communal grazing that did not form part of their loan places.⁵⁴ The solution of using communal grazing to ensure that the non-indigenous settlers had sufficient grazing, illustrates that the right to use land as grazing did not mean that the non-indigenous settler had the exclusive right to use the grazing within half an hour's walk in each direction from his homestead.

Having a loan place meant that the non-indigenous settler was guaranteed the use of grazing in the vicinity of his homestead, which had a name and a fixed location entered into the appropriate register. The land that constituted the grazing of the loan place had no boundaries and the extent and location thereof were adjusted to suit the circumstances.⁵⁵ This is illustrated by the dispute between two non-indigenous settlers, Du Plessis and Pinard. Du Plessis complained about the giving of a loan place to Pinard in the vicinity of the loan place that he was occupying. The heemraden dealing with the dispute found that the half-hour principle could not be applied equitably in the circumstances. It was decided that rather than withdrawing the loan place given to Pinard it was possible to accommodate both settlers by determining a boundary between their loan places. This boundary was drawn three quarters of an hour's walk away from Du Plessis' homestead. This meant that the boundary was less than half an hour's walk from Pinard's homestead or central beacon. The heemraden were of the opinion that Pinard was able to find enough grazing for his livestock in a direction away from Du Plessis' loan place.⁵⁶

⁵² Van der Merwe (n 7 above) 84-85, 87.

⁵³ Van der Merwe (n 7 above) 88.

⁵⁴ Van der Merwe (n 7 above) 88-89.

⁵⁵ Van der Merwe (n 7 above) 94, 95.

⁵⁶ Van der Merwe (n 7 above) 85.

The discussion of the protection that the colonial government gave under the 3 July 1714 control measure makes it clear that non-indigenous settlers did not obtain any rights in the land they used as grazing. Their rights flowed from the authorisation that they received to use an essentially unlimited territory as grazing for their livestock.⁵⁷ In return for the payment of recognition they received the protection of the ruler against unfair deprivation of the grazing at or near their homestead. The only change brought about by the 1714 resolutions was that the method by which disputes between occupiers of loan places were addressed became more refined over time.

10.5.3 Use of land for grazing on a seasonal basis

The discussion of use of land in the interior will not be complete if the developments with regard to the seasonal occupation of land in the interior of the Cape Colony are not discussed. The phenomenon of seasonal migration occurred mainly in the north-western part of the Cape Colony, where the non-indigenous settlers who had loan places in the winter rainfall region had to migrate to the summer rainfall region during winter.⁵⁸ There were different levels of control of the use of grazing in the summer rainfall region.

From around 1728 to the middle of the eighteenth century the non-indigenous settlers started to obtain loan places in the mountainous areas of the Bokkeveld and the Roggeveld. Between the mountains of the Bokkeveld and the Roggeveld lies an arid region that the non-indigenous settlers called the Karoo. Due to a lack of water in the Karoo, permanent settlement in this area only took place at a much later stage.⁵⁹ If the non-indigenous settlers remained on their loan places during winter, the extreme cold and very wet circumstances in the Bokkeveld and Roggeveld caused them to suffer losses from the death of their sheep. It therefore became an accepted practice to migrate from the mountainous areas to the Karoo for the

⁵⁷ Van der Merwe (n 7 above) 108.

⁵⁸ PJ van der Merwe *Trek: Studies oor die mobiliteit van die pioniersbevolking aan die Kaap* (1945) 101.

⁵⁹ Van der Merwe (n 7 above) 121-124.

winter.⁶⁰ Van der Merwe remarks that the non-indigenous settlers who took part in the migration all had specific places in the Karoo that they used as grazing for their sheep. These specific places were referred to as outstations (*legplekke*).⁶¹ This system was developed by the non-indigenous settlers amongst themselves; the colonial government played no role in assigning or authorising these outstations that were utilised during winter in the Karoo. The colonial government only came to play a role in the matter when the non-indigenous settlers became involved in disputes about the available grazing in the Karoo. The solution to this problem was to request that the colonial government link the non-indigenous settlers' loan places to their specific outstations in the Karoo. These outstations were registered together with the loan place.⁶² The non-indigenous settlers therefore obtained similar protection for their outstations to the protection that they had for their grazing on their loan places.⁶³

10.5.4 Possession of land in the interior of the Cape Colony

Possession is a legal term with a specific meaning in Roman and Roman-Dutch law.⁶⁴ Van der Merwe remarks that one of the first steps in acquiring a thing by occupation is to take possession thereof.⁶⁵ According to him, possession in this sense is the gateway to the most complete real right, ownership. When a person has possession of a thing he displays one of the basic characteristics of an owner of that thing.⁶⁶ He has physical control of the thing. Physical control is only one of the elements of possession of a thing.⁶⁷ When a person exercising control over the thing has the intention to become the owner of the thing, he is legally in possession

⁶⁰ Van der Merwe (n 7 above) 125-126, 128-134; GM Theal *Belangrijke historische dokumenten over Zuid Afrika Deel III* (1911) 354.

⁶¹ 'Transfer and registration' (1887) 1 *Cape Law Journal* 317-318; Botha (n 33 above) 230; Van der Merwe (n 7 above) 144.

⁶² Van der Merwe (n 7 above) 144-145.

⁶³ Section 15 of the Perpetual Quitrent Proclamation did not allow the non-indigenous settlers to convert their outstations to land held under perpetual quitrent. Botha (n 33 above) 230; EM Jackson *Statutes of the Cape of Good Hope 1652-1905 Vol I, 1652-1879* (1906) 14. However, later in the nineteenth century the land at the outposts was leased to the non-indigenous settlers. Van der Merwe (n 7 above) 145.

⁶⁴ In connection with the specific meaning of possession, see Lee (n 18 above) 75; Maasdorp (n 11 above) 14; Van der Merwe (n 14 above) 90; Badenhorst (n 14 above) 273; CG van der Merwe 'Things' in WA Joubert (ed) *Law of South Africa Volume 27 - Second Edition Volume* paragraph 70.

⁶⁵ Van der Merwe (n 14 above) 93.

⁶⁶ As above.

⁶⁷ Badenhorst (n 14 above) 276.

thereof. When a person has physical control of a thing, but does not have the intention to become the owner of the thing, he is only the holder thereof.⁶⁸

Land which is not clearly identifiable as independent from the rest of the earth cannot be a thing for purposes of the law of things.⁶⁹ The land used as grazing by the non-indigenous settlers was not identifiable as a thing. Consequently, the land could not be in their possession in a legal sense. I am of the opinion that the non-indigenous settlers who occupied land as grazing in the interior of the Cape Colony were unable to possess such land in terms of the legal principles discussed.

The permanent homesteads that were built on the land that was loaned to the non-indigenous settlers present a different picture. In section 5.4.3 of Chapter 5 I described how the Company acquired original ownership by occupation in the buildings they built and the fenced gardens they planted. In section 10.2 it was pointed out that the non-indigenous settlers to whom land was given had to meet the same requirements to obtain ownership in the said land. If the Company could acquire ownership in land by erecting buildings on such land, the possibility exists that the non-indigenous settlers concerned could acquire ownership by occupation of the land on which they built their permanent homesteads.

However, the circumstances in the case of homesteads on loaned land differ from those in the abovementioned cases. Since the Company was the sovereign of the territory, it was able to acquire original ownership of the land it occupied without the assistance of anybody else. In the case of the ownership transactions, the initiative to demarcate specific parcels of land to be occupied by the non-indigenous settlers came from the colonial government. The colonial government did not show any intention to provide specific parcels of land on the loan farms that were susceptible of acquisition in ownership by occupation.

From a purely legal point of view, the policy of the colonial government prevented the non-indigenous settlers from occupying the land concerned with the

⁶⁸ AJ van der Walt 'Die ontwikkeling van houeerskap' unpublished Doctoral dissertation, Potchefstroomse Universiteit vir Christelike Hoër Onderwys, 1985 11; Badenhorst (n 14 above) 276.

⁶⁹ See section 5.4.3 of Chapter 5.

intention to become owner thereof. On the other hand, there are strong indications that the colonial government allowed the non-indigenous settlers to exercise rights akin to that of ownership with regard to their homesteads. Van der Merwe remarks that, because the colonial government allowed the building of homesteads and cultivation of the land on loan places, the non-indigenous settlers believed it also approved of such activities.⁷⁰ He also remarks that the colonial government almost never made use of its right to retract a loan place.⁷¹ The rights of the non-indigenous settlers in the permanent homesteads must be regarded as stronger than the rights that they had in the land used as grazing. I base this contention on the fact that a homestead was an identifiable thing whereas grazing was not. I therefore contend that the non-indigenous settlers had the right of possession in the land on which their homesteads were built.

10.6 Conventional theories regarding the rights in land used as grazing in the interior of the Cape Colony

The general acceptance of the theory that the Company was the owner of all waste land in the Cape Colony, led to the development of theories aimed at explaining the non-indigenous settlers' rights in land in the interior of the Cape Colony *vis-à-vis* the rights of the Company. These theories are discussed in the following sections.

10.6.1 Loan place system as lease of land by the Company

Truter was the first person who expressed the opinion that the resolutions of 1714 created a system in terms of which the Company leased the land in the interior of the Cape Colony to the non-indigenous settlers.⁷² Although he maintained that a system that changes its nature need not change its name, I am of the opinion that the colonial government never regarded the giving of the land in loan as a lease of the land.

In the resolutions of the colonial government that dealt with lease of land to the non-indigenous settlers, the Dutch words '*verhuyjren*', '*huirders*' and '*huyrder*' are

⁷⁰ Van der Merwe (n 7 above) 109.

⁷¹ Van der Merwe (n 7 above) 111.

⁷² Theal (n 7 above) 95.

used throughout.⁷³ In the cases where land was loaned, like the Tygerberg case, the Dutch word '*leening*' is used.⁷⁴ This practice clearly illustrates that the colonial government did not regard lease of land and loan of land as the same thing. To change the system of giving out land from one where land is loaned free of charge to non-indigenous settlers to one where land is leased to such settlers, is a major policy decision. It is highly unlikely that, if the colonial government intended to make such a decision, it would not have indicated this by stating clearly that land would in future be leased to the non-indigenous settlers. It is therefore much more likely that the 1714 resolutions formalised the informal system of authorisation to utilise grazing instead of transforming it into a lease system.

There are other more convincing arguments why the resolutions of 1714 did not change the existing system into a lease system. These arguments are based on Roman and Roman-Dutch law principles relating to the lease of land. The loan place system that was established in the interior of the Cape Colony did not conform to these principles. De Groot remarks that for a lease to come into existence the thing that is given in hire must be certain.⁷⁵ Cooper sheds light on the requirements that must be met to ensure that the thing is certain. He states that the property must be identified or identifiable. When the measurement of the land can be given, it is sufficiently identified to be susceptible to be leased.⁷⁶ For example, the leases that were granted in terms of the 1732 *erfpacht* system were in most cases identified by naming the land owned by the lessee and stating what the measurement of the leased land was.⁷⁷ When the land that is to be leased is described by giving the limits or boundaries thereof it is regarded as being identified land. When no description either by measurement or by describing the boundaries can be given of land, such land cannot be leased.⁷⁸ The land used as grazing that was loaned to the non-indigenous settlers could not be described nor could it be measured. The discussion of loan places in section 10.5.2.1 places it beyond doubt that it was not

⁷³ *Resolutions of the Council of Policy of Cape of Good Hope* C. 10, pp. 95–106 and C. 12, pp. 39–58. The entry for 1 January 1659 in Van Riebeeck's Journal also refers to '*verhuuring*'. DB Bosman & HB Thom *Dagregister gehouden by den oppercoopman Jan Anthonisz van Riebeeck Deel III 1659-1662* (1957) 1.

⁷⁴ *Resolutions of the Council of Policy of Cape of Good Hope* C. 14, pp. 78–79.

⁷⁵ Lee (n 18 above) 387.

⁷⁶ Cooper (n 32 above) 34.

⁷⁷ *Resolutions of the Council of Policy of Cape of Good Hope* C. 93, pp. 30–40.

⁷⁸ Cooper (n 32 above) 34–35.

possible to determine the boundaries of the land used as grazing. It follows logically that it was not possible to even estimate the size of the land used as grazing, and the colonial officials who registered the loan places did not mention the size of the loan places.⁷⁹ I am therefore of the opinion that Truter and other writers like Botha, Denoon and Erasmus⁸⁰ erred in their contention that loan places were transformed into leased land by the resolutions of 1714.

10.6.2 The applicability of the Roman law contract of *emphyteusis* to the loan places

South African jurists of the late nineteenth century onwards probably realised that the loan place system of the eighteenth century did not conform to the Roman-Dutch law principles relating to leases. In order to find an alternative explanation of the nature of the loan place system, Wessels suggests that the loan place system can be equated with the Roman law contract of *emphyteusis*.⁸¹ This contention is discussed in the following section.

10.6.2.1 Characteristics of *emphyteusis*

Sohm remarks that the contract of *emphyteusis* has its origins in the practice of town governments of letting out rural land for indefinite periods against payment of a yearly rent. This system was gradually extended to the land that was regarded as the Roman emperor's land and was then called *emphyteusis*. The specific purpose for which the emperor's land was let out was to cultivate waste land.⁸² According to Ledlie's note on Sohm's remarks, the characteristic that distinguished the letting of land by the towns from the letting of the emperor's land was that the first-mentioned land was already cultivated, while the emperor's land was specifically let to transform it from waste land to arable land.⁸³ According to Sohm the practice of letting out land

⁷⁹ It is clear from the copy of the register entry reproduced in *Van Reenen* (n 49 above) 317, that in 1787 the colonial government officials were still not including the size of the loan place in the register entry. It is interesting to note that the Court is not sure what the rights of non-indigenous settlers in the loan land were. It made the following remark at 316: '...the person then having the legal right to this loan place (*whatever that might be*)...'. (Emphasis added.)

⁸⁰ Botha (n 33 above) 152; G Denoon 'Diagrams and remainders (I)' (1947) 64 *South African Law Journal* 180; HJ Erasmus 'Title to land and loss of land in the Griqua captaincy of Philippolis, 1826-1861' (2010) 16 *Fundamina* 32.

⁸¹ JW Wessels *History of the Roman-Dutch law* (1908) 564.

⁸² JC Ledlie *The institutes of Roman law by Rudolph Sohm* (1892) 268.

⁸³ Ledlie (n 82 above) 268-269 footnote 1; WR Johnston 'Emphyteusis: A Roman "Perpetual" Tenure' (1940) 3 *The University of Toronto Law Journal* 323.

for an indefinite period had the effect that the Roman jurists disagreed on whether the contract was a sale of land or lease of land. This uncertainty had to be resolved by emperor Zeno, who declared that the contract of *emphyteusis* was neither sale nor lease of land, but a unique contract with its own characteristics.⁸⁴ In terms of this contract the person who received the land had virtually the same rights in land as the owner of the land.⁸⁵ He had the right to all the produce of the land, and in contradistinction to the rights of a person with a lease of shorter duration or a usufructuary, he had the right to make improvements to the land and to change the purpose for which the land was used. He had all the legal remedies that Roman law afforded to an owner of land to enjoy the land or to claim the land back when he was dispossessed thereof.⁸⁶ The intention of the person who received the land was therefore to hold it as if he was the owner thereof.⁸⁷ The duties of such a person were to—

- (a) pay the yearly rent;⁸⁸
- (b) ensure that the land did not deteriorate; and
- (c) inform the owner of the land if he intended to divest himself of the rights in the land.

The last mentioned duty had to be performed in order to enable the owner of the land to exercise his right of pre-emption.⁸⁹ Failure to perform these duties could lead to the termination of the contract by the owner of the land. The practice was that if the person in possession of the land failed to pay the rent for three consecutive years, the contract would be terminated.⁹⁰ Johnston remarks that the contract of *emphyteusis* was usually concluded for a long period or in perpetuity.⁹¹

In his discussion of the contract of *emphyteusis*, De Groot emphasises the fact that the rights of the person receiving the land were heritable. The Roman-Dutch

⁸⁴ Ledlie (n 82 above) 268-269.

⁸⁵ In his discussion of the Roman-Dutch law principle of *erfpachtrecht*, Van der Merwe compares it to *emphyteusis* and remarks that for all practical purposes the holder of the land took the place of the owner. Van der Merwe (n 14 above) 584.

⁸⁶ Johnston (n 83 above) 342.

⁸⁷ Ledlie (n 82 above) 269.

⁸⁸ Johnston (n 83 above) 338.

⁸⁹ Johnston remarks that the owner of the land had to exercise his pre-emptive right within two months from being informed of the proposed alienation of the land. Johnston (n 83 above) 343.

⁹⁰ Ledlie (n 82 above) 269-270; Johnston (n 83 above) 338.

⁹¹ Johnston (n 83 above) 343.

law principles relating to *emphyteusis*, as described by De Groot, provided that the owner of the land had to exercise his right of retraction within a year after he became aware of the fact that the possessor of the land had alienated the land.⁹²

10.6.2.2 Comparison between the loan place system and the contract of *emphyteusis*

Wessels is of the opinion that the loan place system was based on the Roman-Dutch law contract of *emphyteusis*.⁹³ He states that the non-indigenous settlers had squatter's rights in the land that they used as grazing in the interior of the Cape Colony. These squatter's rights, which Wessels describes as a 'mere concession', were transformed into an *emphyteutic* lease when the colonial government imposed the payment of recognition in terms of the resolution of 3 July 1714. He contends that the *emphyteutic* leases were converted into perpetual quitrent tenure by Cradock's proclamation of 1813. The essence of this argument is that the rights in land of non-indigenous settlers with loan places were almost the same as the rights of a person holding land in freehold.

Wessels' argument with regard to the nature of the loan place is not generally accepted by other South African writers. Denoon and Milton are of the opinion that the 1732 *erfpacht* system can be equated with Roman-Dutch law principles relating to *emphyteusis*.⁹⁴ Botha⁹⁵ and Milton⁹⁶ endorse the approach adopted in the minority judgment of the Chief Justice in *De Villiers v The Cape, Divisional Council (De Villiers)*.⁹⁷ He gave a summary of the land tenure system in the Cape Colony which

⁹² Lee (n 18 above) 241.

⁹³ Wessels (n 81 above) 563-564.

⁹⁴ Denoon (n 80 above) 182; Milton (n 7 above) 663.

⁹⁵ Botha (n 33 above) 231.

⁹⁶ Milton (n 7 above) 667-668.

⁹⁷ 1875 5 Buch 50. The Chief Justice's exposition of the land tenure system of the Cape Colony served as background to the *ratio* of his judgment. His finding that the Cradock proclamation was applicable to converted loan places and to land granted under the Cradock proclamation was confirmed on appeal by the Privy Council. *Divisional Council of the Cape Division v De Villiers* L.R., 2 App. C. 567. Maasdorp summarises the Chief Justice's judgment and that of the Privy Council as follows:

The provisions of the Proclamation of August 6, 1813, though in terms applying only to the case of loan places converted into perpetual quitrent, have been held, by virtue of the condition inserted in every perpetual quitrent grant in the following terms: 'The land thus granted being further subject to all such duties and regulations as either are already or shall in future be established respecting lands granted under similar tenure,' as well as by usage, to apply equally to every original grant in perpetual quitrent which has not been the result of a conversion from a loan place.

Maasdorp (n 13 above) 148. *De Villiers* is also discussed in section 7.3.1.2.1 of Chapter 7.

appears to be based on the reports that Truter gave to Caledon. However, a new aspect raised by him is the four perpetual quitrent grants that were made to non-indigenous settlers on 1 June 1812 before the Perpetual Quitrent Proclamation was published. He contends that these perpetual quitrent grants were made in terms of the Roman-Dutch law and that perpetual quitrent in terms of Roman-Dutch law 'is in all respects identical with the *emphyteusis* of the Roman Dutch Law'.⁹⁸ He then remarks that the perpetual quitrent tenure system that was based on Roman-Dutch law had many shortcomings.⁹⁹ These shortcomings were eliminated by the Perpetual Quitrent Proclamation which replaced the Roman-Dutch form of perpetual quitrent with a perpetual quitrent system based on statute.

The Perpetual Quitrent Proclamation formally introduced an *emphyteutic* form of tenure in the Cape Colony. The Proclamation was also specifically aimed at replacing the defective loan place system. If the loan place system was based on the Roman-Dutch law *erfpachtrecht* or *emphyteusis* it would make no sense to replace it with a system that was aimed at introducing *emphyteusis*.¹⁰⁰ This means that the arguments of Wessels or Botha, Denoon, Milton and the Chief Justice cannot stand. I am of the opinion that Wessels' interpretation of the resolution of 3 July 1714, namely that loan agreements were turned into *emphyteutic* leases, cannot be accepted. This is, firstly, because the Roman and Roman-Dutch law contract of *emphyteusis* was for a long period, whereas the loan place agreements had to be renewed on a yearly basis.¹⁰¹ Secondly, the loan place agreements did not include any condition that the non-indigenous settlers had to cultivate the land that was loaned to them, whereas the main purpose of the contract of *emphyteusis* was to ensure that waste land was brought into cultivation.¹⁰² Since Wessels' contention that loan places were turned into *emphyteutic* leases in 1714 is the basis for his argument that the non-indigenous settlers with loan places received rights in the land comparable to freehold ownership, this conclusion must also be rejected.

⁹⁸ De Villiers (n 97 above) 58.

⁹⁹ De Villiers (n 97 above) 60.

¹⁰⁰ The preamble and section 17 of the Perpetual Quitrent Proclamation contain several references to the defects of the loan place system and the advantages that the perpetual quitrent system has over the loan place system. Jackson (n 63 above) 12, 15.

¹⁰¹ Ledlie (n 82 above) 268.

¹⁰² Ledlie (n 82 above) 268; De Villiers (n 97 above) 59. Johnston emphasises the fact that the contract of *emphyteusis* was aimed at amelioration of the land subject to the contract. Johnston (n 83 above) 323, 324, 335-336, 337.

10.6.3 Non-indigenous settlers' rights in homesteads and cultivated land on loan places

Guelke and Shell advanced the theory that the non-indigenous settlers relied on the Dutch medieval law principle of *opstal* to obtain rights in the land used as grazing that amounted to *de facto* ownership of such land.¹⁰³ It appears that Guelke and Shell had in mind the Germanic law principle that if a builder builds a house on another man's land, he remains the owner of the house even if he is not the owner of the land. This was possible, because Germanic law did not have a principle similar to the Roman law principle that the superstructure follows the land (*superficies solo cedit*).¹⁰⁴ However, it must be borne in mind that Roman-Dutch law discarded the Germanic law principle concerned and adopted the principle that by accession all buildings attached permanently to land become the property of the owner of the land.¹⁰⁵ The merit of Guelke and Shell's contention that, in terms of the principle of *opstal*,¹⁰⁶ the non-indigenous settlers obtained rights that were almost as secure as freehold ownership in the loan places, is discussed in this section.

10.6.3.1 Roman and Roman-Dutch law principles relating to the rights in buildings

Roman law principles provided that a person who erected a building with his own materials on another person's land had a right in that building and the land on which it was built. This right was not ownership because of the principle of accession. Sohm remarks that the builder of the building obtained the same rights in that building as the receiver of land in terms of the contract of *emphyteusis*.¹⁰⁷ This contract was known as *superficies* and was a perpetual lease of the building erected on another person's land against the payment of an annual rent to that person. The

¹⁰³ L Guelke & R Shell 'Landscape of conquest: Frontier water alienation and Khoikhoi strategies of survival, 1652-1780' (1992) 18 *Journal of Southern African Studies* 814.

¹⁰⁴ HD Ploeger 'Verticale natrekking: Superficies-regel en eenheidsbeginsel na de codificatie' (1996) 13 *Groninger Opmerkingen en Mededelingen* 3.

¹⁰⁵ Lee (n 18 above) 117, 119; Ploeger (n 104 above) 3.

¹⁰⁶ I will not be using the term *opstal* in my discussion of Guelke and Shell's contention as it is not the term that was used in Roman and Roman-Dutch law. The term *superficies* that derives from Roman law principles and the Roman-Dutch law term *huisgebou-recht*, used by De Groot, are more appropriate terms to use.

¹⁰⁷ Ledlie (n 82 above) 270-271.

builder of the building therefore had almost the same rights as an owner, and he could alienate or bequeath the building as an owner would.¹⁰⁸

De Groot does not refer to the contract of *superficies*, but does refer to the rights of the builder of a building on another person's land as *huisgebou-recht*.¹⁰⁹ From his remarks it appears that, in terms of *huisgebou-recht*, the rights of a builder of a building on another person's land were the same as those conferred by the Roman law contract of *superficies*. He also remarks that the owner of the land effectively granted the right of *huisgebou-recht* to the builder of the building when he allowed the building to be erected on his land.¹¹⁰

The Roman law contract of *superficies* and the rights conferred on a person by the Roman-Dutch law principle of *huisgebou-recht* took away the owner of the land's right to use that portion of his land. For the purposes of Guelke and Shell's contention, it must be emphasised that this limitation of ownership is only applicable to permanent buildings. In other words, if a person inadvertently cultivates land which is the property of his neighbour he does not obtain any right in such land.

10.6.3.2 Perceptions of the non-indigenous settlers with regard to the nature of their rights in the loan places

The British colonial government officials who investigated the loan place system of the eighteenth century all realised that the perception that the non-indigenous settlers had of their rights in the loaned land did not accord with the legal rights that they had in the land. The report of the Office of the Receiver-General of Revenue identifies the half-hour principle and the transfer duty placed on the sale of homesteads in 1790 as the main reasons why the non-indigenous settlers perceived their rights in the loaned land to be secure.¹¹¹ The official compiling this report is the first to speculate about the exact object of the sale transactions between the non-indigenous settlers. He states that the non-indigenous settlers were well aware that they could not legally dispose of the land of the loan places, but that the prices that they fixed for the sale of the homestead were based on the value of the whole loan

¹⁰⁸ Ledlie (n 82 above) 271.

¹⁰⁹ Lee (n 18 above) 278.

¹¹⁰ Lee (n 18 above) 279; Ploeger (n 104 above) 3-4.

¹¹¹ Theal (1900) (n 51 above) 430-431.

place. The official therefore clearly thought that the non-indigenous settlers regarded the whole loan place, and not only the homestead, as the object of the sale.

Truter's insistence, in his report to Governor Caledon, that the colonial government had the right to revoke the loan of land obliges him to give a long explanation regarding the practice of the sale of homesteads by the non-indigenous settlers. He contends that the fact that the government allowed the settlers to sell the homesteads did not automatically mean that the new owner of the homestead had the right to receive the loaned land used as grazing. It was only because the non-indigenous settlers believed that an equitable government would not favour the seller above the buyer, that the buyer came to believe that he had the right to receive the grazing concerned in loan. According to Truter, such a belief did not place any obligation on the colonial government to in fact reissue the authorisation to utilise the grazing of the loan place to the buyer.¹¹²

Van Ryneveld's report, like that of the Receiver-General of Revenue, also emphasises the discrepancy between the apparent value of the homestead on a loan place and the prices that were paid for such homesteads. He remarks that homesteads that were clearly not worth more than 30 rixdollars were sold for up to 25 000 rixdollars. In such circumstances, the non-indigenous settler believed that he had obtained rights in the homestead, the cultivated land and the grazing of the loan place. He was of the opinion that the non-indigenous settlers had valid reasons to perceive that they had obtained permanent rights in the loaned land.¹¹³

10.6.3.3 Conclusion with regard to the non-indigenous settlers' rights in homesteads and cultivated land on loan places

Guelke and Shell's contention that the medieval law principle of *opstal* was used by the non-indigenous settlers to claim rights akin to ownership in the loan land took for granted the generally accepted view that the Company was the private law owner of all waste land in the Cape Colony. In view of my argument that the Company could not have been the private law owner of the land concerned, I do not subscribe to their argument. It is clear from the discussion in section 10.6.3.2 that the perception

¹¹² Theal (n 7 above) 96-97.

¹¹³ Theal (n 7 above) 258.

of the non-indigenous settlers was that they had acquired rights akin to ownership not only in the homesteads on the loan places, but also in the cultivated land and even the land used as grazing on the loan place. The Roman and Roman-Dutch law principles discussed in section 10.6.3.1 above were only applicable to buildings that were erected on land that was owned by another person and therefore cannot be used to substantiate such claims by the non-indigenous settlers. This means by implication that Guelke and Shell were also not correct in their contention.

10.7 Conclusion

The two parts of this thesis that are concluded by this chapter are aimed at changing the view that the land law principles that applied to the Cape Colony during the government of the Company were not materially different from the land law system established during British rule of the Cape Colony. As I remarked in section 10.1 these systems are fundamentally different, because the Company was not the private law owner of any land except the land used for government purposes.

The conclusion that must be made from the discussion of the rights in land of the non-indigenous settlers is that, while the non-indigenous settlers were able to obtain rights in the land that they cultivated and built their homesteads on, their rights in the land that they used as grazing were negligible. This situation was changed radically by the publication of the Perpetual Quitrent Proclamation in 1813. The British colonial government's preoccupation with encouraging agriculture had the effect that the advice of Truter was disregarded when drafting the Perpetual Quitrent Proclamation.¹¹⁴

Prior to 1795 little distinction could be made between the rights of the non-indigenous settlers in the land they used as grazing and the customary law rights of the indigenous communities in such land. The conversion of loan places to perpetual quitrent farms and the granting of land in terms of the Proclamation were detrimental to the existing rights of the indigenous communities in the interior of the Cape Colony. In the following chapters I discuss, amongst other things, the negation

¹¹⁴ The discussion of Truter's second report in section 6.5.3.2 of Chapter 6 refers to Truter's rule that envisaged that the land that should actually be granted in terms of the perpetual quitrent system should be the cultivated land on the loan places and not the land used as grazing.

of the customary law rights of indigenous communities and the enhancement of the non-indigenous settlers' rights in land used as grazing in the interior of the Cape Colony.

Part 4

Evolution of customary law systems in the study area

11 Customary land law of the indigenous communities in the study area

11.1 Introduction

In *Shilubana and Others v Nwamitwa*¹ (*Shilubana*) the Constitutional Court ('CC') provided the following guidelines for courts when dealing with customary law:²

As this court held in *Alexkor v Richtersveld Community*, customary law must be recognised as 'an integral part of our law' and 'an independent source of norms within the legal system'. It is a body of law by which millions of South Africans regulate their lives and must be treated accordingly.

As a result the process of determining the content of a particular customary law norm must be one informed by several factors. First, it will be necessary to consider the traditions of the community concerned. Customary law is a body of rules and norms that has developed over the centuries. An enquiry into the position under customary law will therefore invariably involve a consideration of the past practice of the community. Such a consideration also focuses the enquiry on customary law in its own setting rather than in terms of the common law paradigm, in line with the approach set out in *Bhe*. Equally, as this court noted in *Richtersveld*, courts embarking on this leg of the enquiry must be cautious of historical records, because of the distorting tendency of older authorities to view customary law through legal conceptions foreign to it.

The purpose of this chapter is to determine the 'rules and norms' relating to the occupation of land that were developed by the indigenous communities living in the study area. These rules and norms³ were developed before the permanent

¹ 2009 2 SA 66 (CC).

² *Shilubana* (n 1 above) 80-81.

³ In this chapter I refer to these rules and norms as the customary law systems of the indigenous communities living in the study area. Olivier remarks that 'customary law' refers to 'written' customary law while African customary law in fact consists also of unwritten legal rules. NJJ Olivier et al 'Indigenous law' in WA Joubert (ed) *Law of South Africa Volume 32 - Second Edition Volume* paragraph 1. Even though the customary law systems of the pastoral indigenous communities consist mostly of unwritten rules, the terminology used in the Constitution of the Republic of South Africa, 1996, is used. I do so cognisant of the potentially pejorative connotation that can be attached to this

settlement of non-indigenous persons at the Cape. Consequently, to determine the content of customary law systems I use the descriptions given by historians, archaeologists and anthropologists of the manner in which indigenous communities occupied the land.⁴

It is accepted as incontrovertible that, because it was pastoral indigenous communities that lived in the study area, they had the right to use water resources and grazing for their livestock. It is further accepted that indigenous communities in the study area that did not have livestock could not exercise these rights. In view of these assumptions, it is necessary to determine the spaces in which the indigenous communities could exercise these rights.⁵

Notwithstanding the negative effect that the permanent settlement of non-indigenous persons at the Cape had on the indigenous communities, they were initially able to continue occupying land in terms of their customary law systems. The

naming (instead of, for example 'African law'), and without endorsing that connotation – I simply use the term because it is the term used in the Constitution.

⁴ The appropriateness of using this method to determine the content of the customary law rights in land of an indigenous community is confirmed by the CC in *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 5 SA 460 (CC) 481 ('*Alexkor*'). Notwithstanding the court's caution in *Shilubana* about the use of historical records, it is submitted that this is the only practical manner to approach the study. The facts regarding the use of land that are obtained from histories of indigenous communities are used to reach logical conclusions regarding the manner in which the communities exercised their rights in land. For example: Logically it cannot be contended that all indigenous communities were able to exercise their rights in the whole area that they moved through in their nomadic orbits. The nomadic orbit of an indigenous community like the Namaqua covered an enormous territory (see L Hattingh 'Die Kaapse Koina' in C de Wet et al (eds) *Die VOC aan die Kaap 1652-1795* (2016) 278) in which there had to be areas that were not suitable as grazing or where there were no water resources. It is therefore reasonable to argue that there were specific areas within this vast territory where they exercised their rights. These were the physical spaces where indigenous communities exercised their rights in land. The exercise of these rights by indigenous communities over a long period of time led to the development of the community's customary law rights relating to land. When applying the abovementioned method I avoided, as far as possible, making use of Western legal concepts relating to land. However, it is necessary for the purposes of this thesis to compare the manner in which land was occupied by non-indigenous settlers in the interior of the Cape Colony before the second British occupation with the manner in which land was occupied by indigenous communities in the same period. I am of the opinion that this purpose is better served by comparing the spaces occupied by indigenous communities, rather than nomadic orbits, with the loan place system. These spaces are defined and discussed in section 11.2.2.

⁵ The purpose of identifying the spaces that were occupied is not to identify areas that were 'owned' by indigenous communities. In line with the guidelines in *Shilubana*, it is accepted that ownership of land as it is understood in Western legal systems, is a concept that is usually not found in customary law systems. These spaces are conceived as areas where specific indigenous communities were regarded as the primary users of the water resources and grazing as they had been using the water resources and grazing over a long period of time.

modifications that they had to make to these systems due to the changing circumstances are discussed in this chapter.

A major part of this chapter deals with the establishment of mission stations in the study area and the communities that developed at these mission stations. Although these developments appear not to relate to the customary law systems of indigenous communities, I illustrate that these stations played an important part in the demise of customary law systems in the South-Western and Southern Cape.

In the northern part of the study area, the establishment of mission stations did not have a direct influence on the occupation of land in terms of customary law systems. The actions of the British colonial government with regard to land at mission stations that were occupied in terms of customary law systems dispossessed the residents of land. Therefore, the discussion of the establishment of mission stations in this chapter is also necessary for the purposes of the discussion of dispossession of indigenous communities' customary law rights in land in Chapter 12.

11.2 Key concepts of customary law systems of the indigenous communities in the study area

Legal historians have not yet written a definitive work on the customary law systems of the indigenous communities that lived in the study area during the seventeenth century.⁶ Consequently, in this section an explanation is provided for some of the concepts that are unique to the customary law systems of these indigenous communities.

⁶ The only published work that I could find on the customary legal systems of exclusively pastoral indigenous communities in southern Africa is MO Hinz & A Grasshoff (eds) *Customary law ascertained Volume 3: The customary law of the Nama, Ovaherero, Ovambanderu, and San communities of Namibia* (2016).

11.2.1 Basis of pastoral indigenous communities' rights in land

Yanou describes the relationship between indigenous communities in Africa and the land they occupy as follows:⁷

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

From these remarks it seems clear that a basic feature of indigenous communities' perception of their right to occupy land⁸ is that it was given to them as a community. It is implicit in this approach that the community may use the land given to them in the manner that it regards as the most beneficial. Pastoral indigenous communities did not only have the general right to use the land to sustain themselves by gathering and hunting, but used specific areas of the land as grazing.⁹ It appears that, because pastoral indigenous communities' livestock used specific areas of grazing over a period of time, it gave them stronger rights in land than nomadic hunter-gatherer indigenous communities.¹⁰ It is accepted that the different pastoral indigenous communities that lived in a region developed rules that governed which resources each community may use in that region. In my opinion indigenous communities had occupied land for centuries but after they acquired livestock and became pastoral indigenous communities, they had to use the land subject to the customary law systems that had developed.

⁷ MA Yanou 'Access to land as a human right: The payment of just and equitable compensation for dispossessed land in South Africa' unpublished Doctoral dissertation, University of Rhodes, 2005 89-90.

⁸ In *Alexkor* the Constitutional Court ('CC') provides the following guidelines on the manner in which customary law rights must be applied:

It is clear, therefore, that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.

Alexkor (n 4 above) 479.

⁹ In section 2.4.1.2 of Chapter 2 I discuss the nomadic orbits used by indigenous communities in the study area to explain the manner in which they occupied land.

¹⁰ See section 2.3.2 of Chapter 2 for the reasons why the history of the occupation of land by nomadic hunter-gatherer indigenous communities is not discussed in this thesis.

11.2.2 Communal land use units

In this chapter I use the nomadic orbits as a starting point to determine the nature of the physical spaces in which indigenous communities exercised their customary law rights.

11.2.2.1 Use of nomadic orbits in the context of customary law rights in land
Elphick remarks that the social structure of the indigenous communities at the Cape was described by seventeenth century observers 'in terms appropriate to societies based on permanent occupation of land'.¹¹ He then points out that the reality was that the indigenous communities at the Cape were in fact mobile units that could not be described by using terms like 'village' and 'nation'.¹² In view of these remarks I deem it appropriate to take the use of nomadic orbits into account when determining the principles of the customary law systems of the indigenous communities in the study area.

A nomadic orbit needed the following three essential elements to come into existence:

- (a) a community;
- (b) livestock owned by individual members of the community; and
- (c) locations with water resources and associated grazing between which the sub-groups of the community migrated.

In the following sections each of these elements is discussed in order to identify the characteristics of the physical spaces occupied by indigenous communities at different times and locations in the nomadic orbit.

11.2.2.2 Meaning of community

Pastoral indigenous communities that lived in the study area in the seventeenth century were groups that migrated within a more or less defined region.¹³ Each of these groups was composed of a number of sub-groups.¹⁴ These sub-groups were

¹¹ R Elphick *Kraal and castle: Khoikhoi and the founding of white South Africa* (1977) 43.

¹² Elphick (n 11 above) 43.

¹³ These indigenous communities and their nomadic orbits are described in detail by Hattingh (n 4 above) 270-288. Hattingh uses the term 'groups' instead of the usual term 'tribes'. In line with his modern terminology, in this section I refer to 'tribes' as 'groups' and to 'clans' as 'sub-groups'.

¹⁴ I Schapera *The Khoisan peoples of South Africa: Bushmen and Hottentots* (1930) 225; E Boonzaier et al *The Cape herders: A history of the Khoikhoi of Southern Africa* (1996) 38-39.

composed of indigenous persons living in an encampment.¹⁵ For the purposes of this chapter a community is defined as a group composed of a number of sub-groups living in encampments.

11.2.2.3 Livestock: Defining feature of pastoral indigenous communities

Schapera remarks that land had value for indigenous communities 'chiefly as pasture and hunting ground'.¹⁶ I therefore contend that without livestock, indigenous communities did not obtain rights in land as such communities did not need water resources or grazing for livestock. To substantiate this contention, the role of livestock and the ownership of livestock are discussed in the following sections.

11.2.2.3.1 *Role of livestock in claiming water resources and its associated grazing*

When the members of sub-groups of a community owned livestock they had to look for the best water resources and grazing wherever these could be found.¹⁷ Large livestock units, like cattle, required large amounts of grazing.¹⁸ Therefore, depending on the climate and the fertility of the soil of the region, and the availability of open water, the subgroups of the community had to move from place to place to ensure that their livestock were adequately cared for. The bigger the herds and flocks of the members of a sub-group, the more extensive were the spaces occupied by the community.¹⁹

11.2.2.3.2 *Ownership of livestock*

Livestock was owned by the indigenous persons forming part of a sub-group and not by a community as a whole. The livestock belonging to different indigenous owners within a sub-group were often herded together, but this did not mean that the combined herds or flocks were the common property of the sub-group.²⁰ The fact

¹⁵ Boonzaier (n 14 above) 38.

¹⁶ Schapera (n 14 above) 286. As this thesis deals only with pastoral indigenous communities and not indigenous hunter-gatherer communities, the value of land as hunting ground is not taken into account.

¹⁷ Elphick (n 11 above) 57.

¹⁸ Boonzaier (n 14 above) 29.

¹⁹ Elphick substantiates this view with his comparison between the Cochoqua indigenous community and the indigenous communities that lived at or near the Cape Peninsula. Elphick (n 11 above) 117-118.

²⁰ Schapera (n 14 above) 293.

that livestock belonged to members of sub-groups made it relatively easy for a sub-group to separate itself from the community and become a group on its own.²¹

11.2.2.4 Water resources and associated grazing

An important feature of nomadic orbits is that they did not have defined boundaries.²² Schapera offers the following explanation of how nomadic orbits could exist without defined boundaries:²³

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

Schapera remarks that, as a general rule, grazing was much easier to obtain than open water resources. Over time, the practice developed that specific indigenous communities came to be regarded as the primary users of specific water resources.²⁴ The limits of the nomadic orbits of the communities were defined by the location of the water resources of which they were the primary users.

²¹ Elphick (n 11 above) 45. In view of the definition of 'community' in section 11.2.2.2, such a break-away sub-group would become a community when it was a group with sub-groups.

²² Schapera (n 14 above) 286-287.

²³ Schapera (n 14 above) 287.

²⁴ Schapera (n 14 above) 287; Guelke and Shell refer to remarks made by indigenous persons at the conclusion of the 1659 war that show that 'access to water was a critical factor in the Khoikhoi pastoral economy'. L Guelke & R Shell 'Landscape of conquest: Frontier water alienation and Khoikhoi strategies of survival, 1652-1780' (1992) 18 *Journal of Southern African Studies* 807. Contrary to Guelke's remarks, Elphick contends that the location of water resources as indication of a community's nomadic orbit was only applicable in Namaqualand. He remarks that in the South-Western Cape 'springs were apparently not of vital significance'. Elphick (n 11 above) 44. Smith is of the opinion that water was readily available in the South-Western Cape and therefore did not play an important role in determining the nomadic orbits of indigenous communities. AB Smith 'Environmental limitations on prehistoric pastoralism in Africa' (1984) 2 *The African Archaeological Review* 100. The remarks referred to by Guelke relate to a specific incident during the 1659 war, when the indigenous communities of the Cape experienced that Oedaso, the chief of the indigenous community living in the vicinity of Saldanha Bay, denied them access to the best water resources of the area. This was one of the reasons why the Cape indigenous communities were persuaded to seek peace with the Company. I am of the opinion that Guelke's contention is preferable to that of Elphick, as it reflects the views of persons who had experienced firsthand how water resources were controlled by the community that was the primary user thereof. The phrase 'primary users' is used for a community that had the necessary power to prevent another community from using a water resource. This means that in cases where the nomadic orbits of indigenous communities overlapped, the stronger community would be the occupier of a communal land use unit. However, when the stronger community moved away, the community left in possession would become the primary user of that water resource. See note 39 for an example of such overlapping of nomadic orbits.

11.2.2.5 Definition of a communal land use unit

Pastoral indigenous communities had the customary law right to use water resources and grazing for their livestock. The purpose of the discussion in sections 11.2.2.2 to 11.2.2.4 is to find a definition to describe the physical spaces where they exercised these rights. This must be done without resorting to comparisons with the legal concepts of property and ownership as defined by South African common law.²⁵ In view of the discussion in the said sections, the following characteristics of the physical spaces occupied by a community can be identified:

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

In view of these characteristics, the said physical spaces may be defined as areas of grazing used by the combined livestock of a community in the vicinity of a water resource where that community was acknowledged as the primary user of the resource. In this thesis I will refer to such defined spaces as communal land use units.

11.2.2.6 Differences between nomadic orbits and communal land use units

From the definition of communal land use units it is clear that nomadic orbits and communal land use units are not necessarily the same. In more arid areas, where a water resource could dry up during certain times of the year, the indigenous communities had water resources of which they were the primary users in different geographical areas. Such a community could therefore have communal land use units in a winter rainfall area and in a summer rainfall area. The nomadic orbits of indigenous communities are described as covering the whole territory between two

²⁵ This principle has been laid down by the CC in *Alexkor* (n 4 above) 480-481 and *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 1 SA 580 (CC) 640.

such geographical areas.²⁶ There could be several communal land use units within a nomadic orbit of a community.

Where a water resource was sufficient to last for an extended period, the primary user would only have to migrate in the area around that water resource to ensure sufficient grazing for its livestock. In such a case the nomadic orbit of the community, which was the area used as grazing around that water resource, would be the same as the communal land use unit of the community concerned.²⁷

11.2.3 Exercise of rights in a communal land use unit

Schapera gives the clearest description of which persons had rights that they could exercise in an indigenous community's communal land use unit:²⁸

All the land claimed by a tribe was the common property of that tribe. It could under no circumstances become the property of an individual, nor was it the property of the chief; and it was generally regarded as unalienable.

For the purposes of this chapter, the rights described by Schapera must be interpreted in the light of the definition of a communal land use unit in section 11.2.2.5. This means that land was claimed by the sub-groups of a community, by using land as grazing in the vicinity of a water resource of which that community was the primary user. A community could not claim land that it was not using or did not reasonably need to provide sufficient grazing for the combined livestock. Naturally, they could claim the land on which their encampment stood and where they erected enclosures for the safety of the combined livestock.

Although a member of a sub-group who had acquired a water resource by his labour, for example by digging a well, had prior rights to this resource, he was not

²⁶ See for example the description of the nomadic orbit of the Cochoqua indigenous community. Hattingh (n 4 above) 274. Hattingh describes their nomadic orbit as being from the Hottentots Holland Mountains to Saldanha Bay. If it is accepted that their migration was seasonal in nature, in other words, the Saldanha Bay area was not able to sustain their livestock in a given season and *vice versa*, then they would have had a communal land use unit in the Saldanha Bay area and in the Hottentots Holland Mountain area. It does not mean that the whole territory between those points is the communal land use unit of the Cochoqua.

²⁷ Elphick remarks that there was such a region behind the Tygerberg. Elphick (n 11 above) 58. It appears reasonable to assume that in cases where an indigenous community was the primary user of a perennial river or stream, it would not be necessary to migrate to another water resource.

²⁸ Schapera (n 14 above) 290.

authorised to monopolise the use of the water.²⁹ In other words, a single member of a sub-group who uncovered a water resource in the relevant area had no ownership rights in the water he uncovered. The well became an inalienable water resource of the community to which he belonged. In view of the importance of water resources, it must be accepted that the inalienability of water resources was a central principle of customary law systems.

11.2.4 Mutual use of water resources and grazing

In the more arid parts of the study area the control of water resources was the key determinant of an indigenous community's territorial claims. The fact that a specific community was the primary user of a water resource, meant that other indigenous communities had to obtain permission to use that water resource while the primary user was in occupation thereof.³⁰ This necessarily implied that permission also had to be obtained to use the land as grazing. The primary user could also demand payment of a tribute from another indigenous community for the use of a water resource and grazing.³¹ Boonzaier's work relates to the indigenous communities that lived in the whole of the study area and not only in the more arid areas in the northern part of the study area. Like Schapera, he also remarks that permission had to be obtained if a community wanted to use a water resource in another community's communal land use unit.³²

11.3 Modification of customary law systems after 1652

In section 8.2.2.1 of Chapter 8 it is stated that in 1652 the colonial government did not know that the indigenous communities at the Cape had any rights in land. Therefore, the colonial government also did not realise that the indigenous communities had customary law systems that regulated the rights of the indigenous occupiers of land. Due to the ignorance of the colonial government, its actions had a

²⁹ Schapera (n 14 above) 291.

³⁰ Schapera (n 14 above) 287. It is interesting to note that theorists about the manner in which man first obtained rights in land, like Pufendorf, postulate that even in the time when there was an abundance of resources, there had to be agreement between persons about the taking of basic things from nature that were needed for their survival. K Olivecrona 'Locke's theory of appropriation' (1974) 24 *The Philosophical Quarterly* (1950-) 221.

³¹ Schapera (n 14 above) 288.

³² Boonzaier (n 14 above) 39. Schapera's remarks appear to be limited to the conduct of indigenous communities in the arid areas occupied by indigenous communities in the present day Namibia.

significant effect on the manner in which indigenous communities exercised their customary law rights. The actions of colonial governments and non-indigenous settlers sometimes led to the dispossession of the indigenous communities' rights in land.³³ In other cases, the indigenous communities had to exercise their rights to use water resources and grazing in a different manner due to the actions of non-indigenous persons. These changes were modifications of customary law systems and are discussed in the following sections.

11.3.1 Modifications to customary law systems in the seventeenth century

Before 1652, when land was mainly occupied by way of nomadic orbits, the various indigenous communities who lived in the study area must have had knowledge regarding which communities were primary users of water resources. This is evident from the fact that leaving such a water resource unattended for other communal land use units during a period of migration, usually did not mean that a community lost its status as primary user of that communal land use unit.³⁴

Sleigh expresses the opinion that the streams located in the Table Valley were not perennial. It is however generally accepted that the Liesbeek River was a perennial stream.³⁵ Bottaro therefore postulates that the Liesbeek Valley became a highly sought after and contested area at the Cape.³⁶ The contention for the water and grazing in the Liesbeek Valley started before non-indigenous persons settled permanently at the Cape.³⁷ The indigenous communities who claimed the Liesbeek Valley as their communal land use unit had to vacate the valley or at least a part of it, when stronger indigenous communities from the interior migrated to the Cape as part of their nomadic orbit.³⁸ It is not possible to determine whether these stronger

³³ These actions are discussed in Chapter 12.

³⁴ Guelke (n 22 above) 805.

³⁵ Personal communication made by D Sleigh to J Bottaro. J Bottaro 'The changing landscape of the Liesbeek River Valley: An investigation of the use of an environmental history approach in historical research and in classroom practice' unpublished Masters dissertation, University of Cape Town, 1996 19 footnote 18.

³⁶ Bottaro (n 35 above) 19.

³⁷ Bottaro (n 35 above) 22.

³⁸ As above.

indigenous communities asked permission from the occupying communities to use the water resources and grazing in the Liesbeek Valley.³⁹

Prior to May 1656 the cutting down of trees in the Liesbeek Valley by the colonial government was the only activity that caused a permanent change in the valley.⁴⁰ The cutting down of trees did not have a direct influence on the water and grazing in the Liesbeek Valley. There is also no historical evidence that the indigenous communities at the Cape regarded the cutting down of the trees as an infringement of their rights. In May 1656 the colonial government for the first time prepared land to sow wheat and other crops on an experimental basis in the Liesbeek Valley.⁴¹ The experiment with the wheat and other grain was the beginning of agriculture in the Liesbeek Valley and was actively resisted by the indigenous communities.⁴² The erection of fortifications, stores and homes for the indigenous settlers, and the ploughing of fields to produce crops had a serious impact on access to the river and the available grazing. The outspoken opposition expressed by the indigenous communities against the actions of the colonial government makes it certain that they did not give permission for agriculture to be conducted in the Liesbeek Valley.⁴³

³⁹ If the conduct of the Cochoqua, a powerful indigenous community from Saldanha Bay, towards the indigenous communities of the Cape during February 1662 may be used as representative of their conduct before 1652, it must be accepted that they did not ask permission from the Cape indigenous communities to use the resources in the Liesbeek Valley. The entries of 22 to 24 February 1662 in Van Riebeeck's journal relate how the Cape indigenous communities had to retire within the boundary of the Company's settlement because they were afraid that the Cochoqua would take their livestock from them. They requested that the Company should protect them against the Cochoqua. HCV Leibbrandt *Precis of the archives of the Cape of Good Hope January, 1659 May, 1662: Riebeeck's journal, &c.* (1897) 335-337. A possible scenario may have been that the livestock owning Goringhaiqua and Corachouqua (see section 2.3.1 of Chapter 2) may have been the regular primary users of the water resources at the Cape. In such a case the Goringhaicona of Herry, after they had obtained livestock, would have had to ask permission from the said communities to use their water resources, as they were the weaker community. However, we do not know whether the Cape was part of the nomadic orbit of the Cochoqua or whether they just came there occasionally. In the first case, the Goringhaicona and Corachouqua would have had to yield to the stronger Cochoqua who would then have become the primary users of the water resources.

⁴⁰ Bottaro (n 35 above) 25-26.

⁴¹ HCV Leibbrandt *Precis of the archives of the Cape of Good Hope January, 1656 December, 1658: Riebeeck's journal, &c.* (1897) 19.

⁴² Guelke (n 24 above) 806-807. See also section 2.3.1 of Chapter 2 and section 8.2.2.1 of Chapter 8 with regard to the indigenous communities' reaction to the physical occupation of the land by the colonial government and non-indigenous settlers.

⁴³ L Hattingh 'Die ekonomiese stryd tussen die VOC en die Koina, 1652-1795' in C de Wet et al (eds) *Die VOC aan die Kaap 1652-1795* (2016) 299.

Schapera remarks that failure to ask permission to use the water resources and grazing of an indigenous community's customary land use unit caused friction between the resident and encroaching indigenous communities. Such friction often developed into open warfare.⁴⁴ The unauthorised encroachment in terms of customary law by the colonial government and non-indigenous settlers on the water and grazing in the Liesbeek Valley may therefore have been a contributory cause of the 1659 war. However, the negative outcome of the 1659 war for the indigenous communities had the effect that they had to accept that non-indigenous persons would in future use their water resources and grazing without asking permission.⁴⁵

The non-indigenous settlers' method of occupation of land at Stellenbosch and along the Berg River was similar to the method adopted in the Liesbeek Valley.⁴⁶ As far as can be determined, this occupation also took place without obtaining permission from the indigenous communities that were using the Eerste River and Berg River as water resources.

11.3.2 Modifications to customary law systems in the eighteenth century

Elphick contends that the most important reason why the indigenous communities, first in the South-Western Cape and then in the Southern Cape, entered into a period of serious economic and social decline at the end of the seventeenth century was the dwindling size of their herds and flocks.⁴⁷

⁴⁴ Schapera (n 14 above) 287, 288.

⁴⁵ Guelke (n 24 above) 808. See the remarks in note 39 which indicate that the indigenous communities at the Cape had to make similar concessions to stronger indigenous communities that came to the Cape. The point is that during the seventeenth century the indigenous communities had to accept that the presence of non-indigenous settlers had permanently changed the customary law system relating to mutual use of water resources and grazing and asking permission from the primary user for such use.

⁴⁶ Guelke (n 24 above) 811, 813. See also section 2.4.2.2 of Chapter 2. Guelke is correct that the occupation of land by non-indigenous settlers at Stellenbosch denied indigenous communities access to the Eerste River at that location. He does, however, exaggerate by stating that the indigenous communities were denied access to the 'waterways' of the area. It is common cause that the banks of the Eerste River were not settled by non-indigenous settlers from its source to its mouth during the seventeenth century. Clearly, there was enough space left for the indigenous communities to regard the Eerste River as a water resource at other locations and to provide grazing in the vicinity for their livestock. He also contradicts himself by stating at 813 that in 1687 there were still independent indigenous communities in the Stellenbosch district.

⁴⁷ Elphick (n 11 above) 238; R Elphick & VC Malherbe 'Die Khoisan tot 1828' in H Giliomee & R Elphick (eds) *'n Samelewing in wording: Suid Afrika 1652-1840* (1990) 17; Guelke (n 24 above) 807.

The reduction in the size of the herds and flocks of indigenous communities had the effect that the communities started to break up. In the South-Western Cape this is evidenced by the fact that, by the end of the seventeenth century, there were no longer different sub-groups that owed allegiance to one chief.⁴⁸ Each sub-group had its own leader and did not migrate together with the other remaining sub-groups.

The communities of the Southern Cape went through the same breaking up process from around the middle of the eighteenth century.⁴⁹ The existence of several sub-groups, each owning livestock and able to maintain its own encampments, is attested to by Sleigh's description of the trading that took place in the Swellendam district between colonial government officials and these sub-groups.⁵⁰

Schapera remarks that sub-groups were the primary political unit of the Nama indigenous communities.⁵¹ Elphick's description of the groups and sub-groups of the indigenous communities of the study area also makes it clear that sub-groups were a more stable political unit than the groups. This meant that communities tended to break up when a sub-group became rich in livestock and decided to move away from the nomadic orbit used by the parent community.⁵² Sub-groups, on the other hand, tended not to divide into smaller units.

Customary law systems had to adapt to the circumstances of the eighteenth century. For the purposes of the definition of a communal land use unit, this means that the group was replaced by the sub-group. Guelke remarks that although sub-groups were able to retain their livestock, some members of the sub-group had to enter the labour market by working for non-indigenous settlers.⁵³ As a result the

⁴⁸ Elphick (n 47 above) 19.

⁴⁹ CI Arthur 'The Khoekhoen of the Breede River Swellendam: An archaeological and historical landscape study' unpublished Masters dissertation, University of Cape Town, 2008 68.

⁵⁰ D Sleigh *Die buiteposte: VOC-buiteposte onder Kaapse bestuur 1652-1795* (2007) 577. Sleigh remarks that when the indigenous sub-groups were reluctant to come and trade with the colonial government officials, the government officials went to their encampments to obtain livestock. The breaking up process of indigenous communities in the Southern Cape is discussed in more detail in section 12.4.2 of Chapter 12, in the context of the dispossession of sub-groups that did not merge with mission stations.

⁵¹ Schapera (n 14 above) 227.

⁵² Elphick (n 11 above) 44-45.

⁵³ Guelke (n 24 above) 812.

mobility of sub-groups was limited and they became sedentary.⁵⁴ This meant that sub-groups no longer had nomadic orbits. The fact that nomadic orbits were no longer in use did not mean that communal land use units could not exist. If the sub-group retained its livestock, it had to have access to a water resource and land to use as grazing. Therefore, such sub-groups could still occupy a communal land use unit.

11.4 The establishment of mission stations in the study area

It is a fact that by the time of the first British occupation, many of the indigenous communities in the study area no longer occupied the land in the manner described in sections 2.4.1.2, 2.4.1.2.1 and 2.4.1.2.2 of Chapter 2. Many of the remaining sub-groups of former indigenous communities settled at mission stations to avoid being absorbed into the labour market.⁵⁵ The establishment of mission stations by various missionary societies is discussed in this chapter, because it had a significant effect on customary law systems of sub-groups in the study area.

11.4.1 Mission stations established by the Moravian Church

The first missionary society that established a mission station in the Cape Colony was the Moravian Church ('Moravians'). After the first mission station established by Georg Schmidt at Baviaanskloof⁵⁶ was abandoned in the early 1740's, it was re-established in 1793 at the same location.⁵⁷ The Moravians did not receive any grant or title for the land occupied at Baviaanskloof and the land did not have fixed boundaries.⁵⁸ The presence of the mission station of the Moravian Church was not welcomed by all the non-indigenous settlers, as it was not long before the mission station attracted large numbers of indigenous persons and sub-groups.⁵⁹ While the land occupied by the mission station was only half of the usual size of loan places, it

⁵⁴ Guelke (n 24 above) 812, 817, 820.

⁵⁵ JS Marais *The Cape Coloured people 1652-1937* (1968) 109.

⁵⁶ The name of the Baviaanskloof mission station was changed to Genadendal during the Batavian period. B Krüger *The pear tree blossoms: A history of the Moravian mission stations in South Africa 1737-1869* (1966) 99.

⁵⁷ Krüger (n 56 above) 53.

⁵⁸ Krüger (n 56 above) 65; see also the 'Report of J. T. Bigge, Esqre., upon the Hottentot and Bushman population of the Cape of Good Hope, and of the missionary institutions' reproduced in GM Theal *Records of the Cape Colony from December 1827 to April 1831* (1905) 329.

⁵⁹ Krüger (n 56 above) 55.

had to accommodate an ever increasing number of indigenous persons and their livestock.⁶⁰

The Moravians established their second mission station at the request of the British colonial government at Groenekloof, a government farm.⁶¹ When the land was allocated to the Moravians in 1808 a sub-group still resided on the land.⁶² The land at the new institution was also not granted to the Moravians and its boundaries were not identified.⁶³ The third mission station established by the Moravians on land allocated by the British colonial government was on the Witte River, a tributary of the Sundays River in the eastern part of the study area. Here also the Moravians were unable to persuade the British colonial government to give them title in the land that they occupied at the mission station.⁶⁴ The first mission station established on land purchased by the Moravians was near Cape Agulhas in the Southern Cape and received the name Elim.⁶⁵ At the request of the British colonial government, a mission station called Clarkson was established in the Tsitsikamma in 1839.⁶⁶ The farm on which Clarkson was established was granted to the superintendent of the Moravians in 1851 to hold in trust for the Fingo indigenous community.⁶⁷

11.4.2 Mission stations established by the London Missionary Society

The London Missionary Society ('LMS') was the first society after the Moravians to commence missionary work amongst the indigenous communities of the study area. The first permanent mission station established by the LMS was Bethelsdorp near the present Port Elizabeth. Bethelsdorp was established on land allocated to the

⁶⁰ Krüger (n 56 above) 80; H Clift 'A sortie into the archaeology of the Moravian mission station, Genadendal' unpublished Masters dissertation, University of Cape Town, 2001 54-55.

⁶¹ Krüger (n 56 above) 101-102. In addition to the farm Groenekloof, the Moravians also received the farms Louw's Kloof and Cruywagens Kraal. In 1854 the Moravians changed the name of the station from Groenekloof to Mamre. Krüger (n 56 above) 251. The institution was situated at the present town of Mamre.

⁶² Krüger (n 56 above) 101, 102; GM Theal *History of South Africa from 1795 to 1872 Vol I* (1915) 229-231.

⁶³ Krüger (n 56 above) 102.

⁶⁴ Krüger (n 56 above) 133-134. This mission station on the Witte River later received the name Enon.

⁶⁵ Krüger (n 56 above) 152.

⁶⁶ Krüger (n 56 above) 198-200; C Jannecke 'Constituting community: The contested rural land claim of the Tsitsikamma 'Fingo/Mfengu' and Clarkson Moravian Mission in South Africa' (2006) 32 *Kronos* 193.

⁶⁷ Jannecke (n 66 above) 194.

LMS by the Batavian colonial government.⁶⁸ Appel remarks that the Bethelsdorp mission station was surveyed in 1813, but that no title deed was given to the LMS.⁶⁹ In 1811 Zuurbraak mission station was established near Swellendam. The original residents of this mission station were the remaining members of the Attaqua indigenous community that lived in that region when Van Riebeeck arrived at the Cape.⁷⁰ In 1813 the chief of an indigenous community living at Hooge Kraal near the present day George requested the LMS to establish a missionary station at his encampment.⁷¹ The mission station was later named Pacaltsdorp after its first missionary. Dysselsdorp mission station was established by the LMS near the modern day Oudtshoorn in the late 1830's.⁷²

Apart from the remarks of Appel above relating to the rights in land of the LMS at Bethelsdorp, very little information is available about such rights, if any, at Zuurbraak, Pacaltsdorp and Dysselsdorp. It is however certain that prior to the establishment of Pacaltsdorp, the British colonial government had reserved the land at Hooge Kraal for the indigenous community that was living there.⁷³ In evidence given on 17 May 1872 at a hearing of the Parliamentary Select Committee appointed

⁶⁸ Marais (n 55 above) 142-143; R Lovett *The history of the London Missionary Society 1795-1895 Vol I* (1899) 502. Lovett's description of this allocation of land does not indicate on what basis the land was given to the LMS. He merely states that Governor Janssens found a place that was 'not in the possession of the farmers'.

⁶⁹ A Appel 'Grondbesetting en grondbesit op Bethelsdorp, 1828-1945' (1988) 23 *Contree* 23.

⁷⁰ J du Plessis *A history of Christian missions in South Africa* (1911) 245. In evidence given in 1872 to the Select Committee appointed to consider and report on the Missionary Institutions Bill, W Thompson remarked that Governor Caledon had in 1808 given an undertaking to the indigenous community living at Zuurbraak that they would not be disturbed in the possession of the land that they occupied. *Report of the Select Committee appointed to consider and report on the Missionary Institutions Bill, 1872* 21-22; Zuurbraak is also referred to as the Caledon Institution. Theal (n 58 above) 332.

⁷¹ J Philip *Researches in South Africa illustrating the civil, moral, and religious condition of the native tribes Vol I* (1828) 237-238; Du Plessis (n 68 above) 245-246; Theal (n 58 above) 270-271.

⁷² Little is known about the date and circumstances of the establishment of this mission station. Horner and Wilson remark that Dysals Kraal (the original name of the place) was an outstation of the Pacaltsdorp mission station for grazing cattle. D Horner & F Wilson 'A tapestry of people: The growth of population in the Province of the Western Cape' A Southern Africa Labour and Development Research Unit Working Paper Number 21 (2008) 39. Appel comments on the fact that Marais (n 55 above) and Du Plessis (n 70 above) fail to make any mention of the establishment of the mission station. He confirms that there was a connection between the mission stations of Pacaltsdorp and Dysselsdorp. He also remarks that the LMS's activities at Dysselsdorp commenced in 1838. A Appel 'Die Klein-Karoo: Historiografiese Aspoestertjie' (1983) 28 *Historia* 40, 43.

⁷³ The loan place Hooge Kraal was allocated to a non-indigenous settler in 1762, but after his death the loan place was not again granted to a non-indigenous settler. Applications made for the loan place in 1782 and 1809 were turned down because the colonial governments had ceded the place to the indigenous community in accordance with 'ancient custom'.

http://www.sahra.org.za/sahris/sites/default/files/heritagereports/Heritage%20Statement_0.PDF (accessed 6 March 2018)

to consider and report on the Missionary Institutions Bill, it was remarked that the LMS had held the land at Pacaltsdorp under a 'ticket of occupation' since 1813.⁷⁴

The LMS also established mission stations at Komaggas and Steinkopf in the northern part of the study area. In the period between 1810 and 1816 the LMS established a mission station outside the northern boundary of the Cape Colony near the present day town of Steinkopf.⁷⁵ Komaggas was established at the request of one of the leading indigenous persons of a settlement lying south of the Buffels River, approximately 40 kilometres south-west of the modern day town Springbok.⁷⁶ The LMS complied with this request when JH Schmelen established a mission station in 1829.⁷⁷ The British colonial government had the land surveyed for the indigenous community in 1831.⁷⁸ In 1838 the LMS decided to discontinue its work in the northern part of the study area and transferred its operational mission stations at Komaggas and Steinkopf to the Rhenish Missionary Society ('RMS').⁷⁹

11.4.3 Mission stations of the Rhenish Missionary Society

The missionary work of the RMS in the Cape Colony started in 1830. The first missionaries of the RMS to arrive were asked to minister to the slaves in the small towns Stellenbosch and Tulbagh. Shortly afterwards, the first mission station of the RMS, Wuppertal, was established in the Cederberg on land bought from a non-indigenous settler.⁸⁰

⁷⁴ Select Committee (n 70 above) 33. The meaning of 'ticket of occupation' is discussed in section 12.3.3.5 of Chapter 12.

⁷⁵ P Carstens *The social structure of a coloured reserve: A study of racial integration and segregation in South Africa* (1966) 19; S Berzborn "'Ek is 'n Nama, want ek praat die taal": The Richtersveld and the National Language Policy in South Africa' in T Hohmann (ed) *San and the state: Contesting land, development, identity and representation* (2003) 341-342; R Oakley 'Collective rural identity in Steinkopf, a communal Coloured Reserve, c.1926-1996' (2006) 32 *Journal of Southern African Studies* 492.

⁷⁶ NG Penn 'Land rights, missionaries and surveyors: Khoisan identity and the Komaggas community' in R Fisher (ed) *History of surveying and land tenure. Collected papers Volume Two. Surveying and land tenure at the Cape 1813-1912* (2004) 155-156; J Bregman 'Land and society in the Komaggas region of Namaqualand' unpublished Masters dissertation, University of Cape Town, 2010 47; PE Raperet al *Dictionary of Southern African place names* (2014) 245.

⁷⁷ JO Choules & T Smith *The origin and history of missions Vol I* (1837) 453; Penn (n 76 above) 156.

⁷⁸ Penn (n 76 above) 157; Bregman (n 76 above) 47-48.

⁷⁹ Carstens (n 75 above) 20.

⁸⁰ Du Plessis (n 70 above) 202.

The second RMS mission station, Ebenhaeser, was established in 1832 near the mouth of the Olifants River on land that was occupied by a sub-group. The field-cornet of the ward within which the sub-group's land was situated, had early in the nineteenth century petitioned the Governor to grant the land to the community as a loan place. The matter was referred to the landdrost and heemraden of the district of Stellenbosch, who decided that as the land had always been occupied by the original possessors (*oregineelee bezitters*) it therefore should not be made subject to the payment of recognition.⁸¹ In 1832 the chief of the sub-group at the Olifants River requested one of the missionaries working at Wuppertal to start a mission station amongst his community. The Governor, Sir Lowry Cole, also requested the missionary concerned to establish such a mission station.⁸²

During the LMS period at Steinkopf, the mission station also had to serve the people living to the north-west in the remote region that is known today as the Richtersveld. In 1844 the RMS, that had succeeded the LMS at Steinkopf, sent JF Hein to serve as the permanent representative of the RMS in that region.⁸³ The small settlement Khubus developed around the headquarters of the RMS established in the Richtersveld.⁸⁴

11.4.4 Mission station established by the Wesleyan Methodist Missionary Society

The Wesleyan Methodist Missionary Society ('Wesleyans') established only one mission station in the study area, as it perceived its principal field of mission work to fall outside the boundaries of the Cape Colony.⁸⁵ The Wesleyans were the first missionary society to establish a mission station in the Northern Cape within the boundaries of the Cape Colony. The mission station was established in 1816 by the missionary Barnabas Shaw. According to his own account, he intended to

⁸¹ PL Scholtz 'Die historiese ontwikkeling van die Onder-Olifantsrivier 1660-1902' in *Argief-jaarboek vir Suid-Afrikaanse geskiedenis Deel II* (1966) 120. The discussion of the nature of the payment of recognition in section 9.3.3.2.2 of Chapter 9 makes it clear that the indigenous community who occupied the land concerned from before 1652 should not have been obliged to pay recognition to the Company.

⁸² Scholtz (n 81 above) 121.

⁸³ Carstens (n 75 above) 206.

⁸⁴ Berzborn (n 75 above) 342.

⁸⁵ See BE Seton 'The founding of Methodist missions in South Africa' (1967) 5 *Andrews University Seminary Studies* 73, 77-86.

accompany a missionary of the LMS to work among the Namaqua indigenous communities living north of the Gariiep River in the present day Namibia.⁸⁶ After crossing the Olifants River, the missionaries encountered members of a Namaqua sub-group and their chief travelling towards Cape Town with the intention to obtain the services of a missionary to teach the gospel in their community. Taking this as an intervention of God, Shaw and his companions decided to divert their journey towards the Kamiesberg where the chief and his community were living.⁸⁷ On being informed that the community was genuinely desirous to receive instruction in the gospel and was willing to allow a missionary to build a house and plant gardens on their land, the travelling party resolved that Shaw and his wife would remain.⁸⁸ Shaw and his wife then travelled to the summer residence of the Namaqua indigenous community at a place called Leliefontein.⁸⁹ This was also the name that was given to the mission station.

11.5 Application of customary law systems at mission stations in the study area

When sub-groups joined mission stations or mission stations were established on the land of sub-groups, the missionaries exercised an influence on the manner in which these sub-groups conducted their lives. The new communities that were formed due to the influence of missionaries and mission stations and the application of customary law systems by these new communities, are discussed in this section.

11.5.1 New communities formed at mission stations

By the end of the eighteenth century most of the indigenous communities that had occupied communal land use units in terms of their customary law systems before 1652, had devolved into sub-groups. Some of these sub-groups still owned livestock and occupied land in terms of their customary law systems that had been modified to conform to their new circumstances. With the advent of mission stations, many of the remaining sub-groups were absorbed into new communities that developed at

⁸⁶ B Shaw *Memorials of Southern Africa* (1841) 63.

⁸⁷ Shaw (n 86 above) 68.

⁸⁸ Shaw (n 86 above) 69-71.

⁸⁹ Shaw (n 86 above) 71; CJ Kelso 'On the edge of the desert - A Namaqualand story: 1800-1909 Climatic and socio-economic drivers of decline' unpublished Doctoral dissertation, University of the Witwatersrand, 2010 140.

mission stations. For the purposes of this chapter, the nature of these communities must be considered to determine whether they could take the place of communities and sub-groups and could occupy communal land use units in terms of the existing customary law systems.

11.5.1.1 New communities at Moravian mission stations

Not all members of sub-groups living in the vicinity of mission stations prior to their establishment joined the mission communities. In the case of Groenekloof, the chief of the sub-group that occupied the farm Louw's Kloof initially refused to join the community. He resented the fact that Louw's Kloof was incorporated in the land given to the Moravians. He was only converted to Christianity in 1839 and then joined the community of Groenekloof with his family. Also, from the description given by Krüger of the first residents that settled at Baviaanskloof and Groenekloof, it is clear that not only members of the sub-groups living in the vicinity of the mission station joined these communities.⁹⁰ Persons that had no attachment to the said sub-groups, members of other indigenous communities and emancipated slaves were all welcomed as members of the mission stations, provided that they were willing to abide by the rules of the Moravians.⁹¹ At Enon the first residents were families from Genadendal who accompanied the missionaries who established the mission station. Indigenous persons living in the vicinity of Enon soon applied for permission from the landdrost of Uitenhage to settle at the station.⁹² The farm that was bought by the Moravians for the establishment of Elim was not the residence of any indigenous communities or sub-groups. The Moravians therefore made sure that the indigenous persons settling at the mission station would undertake to adhere to the regulations drafted specifically for Elim.⁹³ The British colonial government requested the Moravians to establish a mission station in the Tsitsikamma to provide for the 'spiritual wellbeing' of the Mfengu indigenous communities that had been relocated from Fort Peddie on the eastern frontier.⁹⁴ However, the majority of the members of the Mfengu indigenous communities preferred to reside in their encampments and

⁹⁰ Krüger (n 56 above) 102-103, 212.

⁹¹ Krüger (n 56 above) 55,103.

⁹² Krüger (n 56 above) 133.

⁹³ Krüger (n 56 above) 152.

⁹⁴ Krüger (n 56 above) 198.

not to live on the mission station's land.⁹⁵ Jannecke describes the community that developed at Clarkson as follows:⁹⁶

Participation in Moravian rituals, conformance with the mission station's spatial landscape, and compliance with the mission's order and governance set the Clarksoners apart. Those who did not remain on the mission, and were on land adjacent to it, retained the pre-designation of 'Fingo/ Mfengu'. The 'Fingo/Mfengu' who resided on the mission land became included as Moravian Clarksoners, while those on the adjacent land held on to the 'Fingo/ Mfengu' classification.

Krüger summarises the situation with regard to the communities at Moravian mission stations as follows:⁹⁷

The settlements have been criticised for replacing the indigenous mode of living by Moravian customs. ... However, in South Africa, at least in the Western Province, there was nothing to preserve. ... Later the missionaries gathered a mixed population of people without customs and traditions in the settlements, where they were bound together by the faith and the mode of living of the missionaries.

The conduct of the residents of Moravian mission stations was governed by regulations that were drawn up for Genadendal in 1816 and were accepted by the residents. These regulations were later made applicable to the residents of Groenekloof and served as blueprint for regulations that were issued to residents at the other Moravian mission stations.⁹⁸ Paragraph 11 of these regulations provided as follows:⁹⁹

When any one has obtained leave to reside in Genadendal, and is desirous to build a house and have some land for a garden, he must address himself to the Missionary, who has the inspection over buildings and gardens, and be willing to follow his advice. In the same manner previous notice must be given, before one is allowed to enlarge his house.

⁹⁵ Krüger (n 56 above) 201.

⁹⁶ Jannecke (n 66 above) 194.

⁹⁷ Krüger (n 56 above) 295. This summary of the situation may create the impression that indigenous communities at Moravian mission stations did not retain their own cultural identity and were absorbed into the dominant European culture. It may well be that these remarks are unfair to the communities that developed at places like Genadendal. However, I am of the opinion that as far as the maintenance of the customary law system of occupation of land as described in the sections above is concerned, the remarks must be accepted as correct. This point is elaborated on in section 11.5.2.1.

⁹⁸ Krüger (n 56 above) 127-128.

⁹⁹ Krüger (n 56 above) 305.

From this paragraph it is clear that the control and use of land on the mission stations did not reside in the community, but were subject to the control of a missionary.

11.5.1.2 New communities at LMS mission stations

The first residents of Bethelsdorp were refugees. During the period of war and unrest in the District of Graaff-Reinet in 1801, a number of disaffected indigenous workers on farms of non-indigenous settlers had gathered in Graaff-Reinet to be under the protection of the local landdrost.¹⁰⁰ There, Dr JT van der Kemp of the LMS started his missionary work amongst the refugees.¹⁰¹ The British colonial government resolved that he and his followers could not remain at Graaff-Reinet and directed them to move to where the modern day Port Elizabeth is situated.¹⁰² From Bigge's report,¹⁰³ made in 1830, it appears that in the first years of the existence of the mission stations Zuurbraak and Pacaltsdorp, the sub-groups that initially occupied the land remained the majority of the residents.¹⁰⁴

Before Bethelsdorp was established, Van der Kemp wrote to the acting governor of the Cape Colony that it was the intention of the LMS to establish a stable society that would be subject to rules set by the LMS.¹⁰⁵ It is possible that these goals were reached by the LMS, but by the middle of the nineteenth century the situation had changed. From a letter published in 1848 by a missionary who had served at various LMS mission stations in the Cape Colony, it is clear that the composition and conduct of the communities at Bethelsdorp, Zuurbraak and Pacaltsdorp had changed fundamentally.¹⁰⁶ He remarked as follows in this regard:¹⁰⁷

¹⁰⁰ Marais (n 55 above) 115, 142.

¹⁰¹ Lovett (n 68 above) 496.

¹⁰² Marais (n 55 above) 142; Du Plessis (n 70 above) 124.

¹⁰³ The British government and British colonial government were aware that the circumstances prevailing at mission stations had to be investigated. Part of the task of the commissioners who enquired into the state of the Cape Colony, Mauritius and Ceylon in the early 1820's was to investigate the condition of the indigenous people of the Cape Colony. JT Bigge was one of the commissioners entrusted with this task. See also n 56.

¹⁰⁴ Theal (n 58 above) 332-337.

¹⁰⁵ Lovett (n 68 above) 499.

¹⁰⁶ According to Backhouse, the mission station at Dysals Kraal (Dysselsdorp) was not intended to be a settlement with residents but as a place where indigenous persons and emancipated slaves could receive religious instruction. He remarks that the establishment of mission stations was only necessary as places of refuge from oppression. J Backhouse *A narrative of a visit to the Mauritius and South Africa* (1844) 138. Consequently, I do not refer to Dysselsdorp in this context.

The rights and liberties of the Hottentot are recognized and protected by colonial law; he, like any other man, may go where he pleases, without a pass, and take his labour or his produce to the best market. He needs no city of refuge. In proportion as the necessity of our missionary institutions has been superseded by the altered state of things, the evils incident to them have been increased. The authority of the missionary has been diminished; the population of the missionary institutions has become injuriously dense, by a vast influx of late apprentices and other persons of colour, who prefer abundant leisure and unrestrained freedom, to those habits of industry, and those salutary restraints, which must be sustained and submitted to in ordinary social life.

These remarks may be an indication why the LMS in the middle of the nineteenth century initiated the process to divest itself of the land that it held in trust for the communities living at its mission stations.¹⁰⁸ This initiative led to the enactment in 1873 of an Act 'To Provide for the Granting of Titles in Freehold to the Inhabitants of certain Missionary Institutions, and for the better Management of such Institutions'¹⁰⁹ which totally transformed the settlements at the LMS mission stations.¹¹⁰

11.5.1.3 New communities at Komaggas and RMS and Wesleyan mission stations

The new communities discussed in this section were situated around mission stations located from the Olifants River and Cederberg region along the west coast to the Gariep River in the north.¹¹¹ The circumstances under which the mission stations Wuppertal, Ebenhaeser, Leliefontein and Komaggas were established differed from those under which the mission stations outside the northern boundary of the Cape Colony were established.

¹⁰⁷ Lovett (n 68 above) 573.

¹⁰⁸ Appel (n 69 above) 24; *Select Committee* (n 70 above) 2-3. The sentiments in the quoted remarks are repeated in the testimony given by the Reverend W Thompson before the Select Committee.

¹⁰⁹ 12 of 1873. EM Jackson *Statutes of the Cape of Good Hope 1652-1905 Vol I, 1652-1879* (1906) 1280. The short title of this Act was the 'London Missionary Society's Institutions Act, 1873'.

¹¹⁰ The changes in the settlements and the effect these changes had on the exercise of customary law rights at the settlements are discussed in section 11.5.2.1.

¹¹¹ In the following sections I divide the discussion between the mission stations north and south of the Buffels River, which was the northern boundary of the Cape Colony up to 1847.

11.5.1.3.1 *New communities south of the Buffels River*

The first residents of Wuppertal, the RMS mission station in the Cederberg, were indigenous persons who had been living in the vicinity.¹¹² Du Plessis remarks that the missionary Leipoldt concentrated on making Wuppertal a prosperous mission station by encouraging industrial enterprises and agriculture.¹¹³ Marais also refers to the agricultural activities at Wuppertal and is of the opinion that the RMS missionaries adopted the same attitude that the Moravians had to the management of the indigenous residents of the mission stations.¹¹⁴ I could find no information that indicates that any sub-group community lived at or near Wuppertal. I could also find no evidence that the land at the mission station was used as grazing for the indigenous residents' livestock.¹¹⁵

The fact that the indigenous sub-group living at Ebenhaeser requested the RMS to begin a mission station created a relationship between the missionaries and the community that was totally different from the relationship that was created at Wuppertal and the Moravian and LMS mission stations discussed above. The first resident RMS missionary realised that he would have to enter into an agreement with the chief of the sub-group in order to be able to perform his task as missionary.¹¹⁶ In terms of this agreement the chief ceded the management of the affairs of the indigenous community to the RMS missionary.¹¹⁷ The RMS missionaries were of the opinion that the community should not be reliant on stock farming as there was not enough grazing available and the area was prone to droughts. As Ebenhaeser is situated next to the Olifants River, the RMS went to great lengths to try to establish an irrigation system so that the land could be cultivated.¹¹⁸ However, livestock farming in the traditional manner continued at Ebenhaeser. This is evidenced by the comments of the missionaries that their

¹¹² Marais (n 55 above) 247; Du Plessis (n 70 above) 202-203; Horner (n 70 above) 40. 'Rooibos heritage route podcast' <http://www.rooibosroute.com/route/rooibos-heritage-route.pdf> (accessed 27 March 2018).

¹¹³ Du Plessis (n 70 above) 202-203.

¹¹⁴ Marais (n 55 above) 247

¹¹⁵ It is accepted that the necessary working cattle were kept at the mission station, but that livestock farming was not conducted on a large scale.

¹¹⁶ Scholtz (n 81 above) 121.

¹¹⁷ As above.

¹¹⁸ Scholtz (n 81 above) 122.

mission work was hampered by the practice of the indigenous community to migrate with their livestock during the winter.¹¹⁹

The Wesleyan mission station Leliefontein was, like Ebenhaeser, established at the request of the chief of a sub-group.¹²⁰ The indigenous residents of Leliefontein succeeded in adjusting their traditional lifestyle in line with the wishes of the resident missionaries, without sacrificing their transhumant way of livestock farming.¹²¹ The new community accepted that they had to improve their economic circumstances by planting crops. Agricultural activities like sowing and harvesting were conducted outside winter time, when the residents migrated with their livestock to lower lying winter grazing.¹²²

According to Penn, the LMS was approached by the head of the Cloete family to establish a mission station at their settlement Komaggas.¹²³ The request to the British colonial government by the LMS to establish a mission station included a request that the land used by the community should be secured by the government.¹²⁴ When a surveyor was sent to Komaggas by the British colonial government, members of the Komaggas community and the resident LMS missionary accompanied him to point out the land and water resources that were used by the community.¹²⁵ By adopting this procedure, the members of the Komaggas community made it clear that they regarded the land and water resources that were used by their livestock as belonging to the community.

11.5.1.3.2 *Conclusions regarding the new communities south of the Buffels River*

The indigenous sub-groups that became the residents of Ebenhaeser, Leliefontein and Komaggas were independent communities that made the decision to request a missionary to establish a mission station on the land that they had been occupying for a long time. By making this decision they pre-empted a situation in which they

¹¹⁹ As above.

¹²⁰ It must be noted that, in the case of Leliefontein, the sub-group is identified as previously forming part of the Namaqua indigenous community. Kelso (n 89 above) 142.

¹²¹ Kelso (n 89 above) 147, 157, 159.

¹²² Kelso (n 89 above) 149, 153, 157.

¹²³ Penn (n 76 above) 155.

¹²⁴ Penn (n 76 above) 156.

¹²⁵ Penn (n 76 above) 157.

were forced by circumstances to abandon their land or seek refuge at a mission station that had already been established. Kelso is of the opinion that indigenous sub-groups, by requesting the establishment of a mission station on their land, added to the usual ways in which indigenous communities responded to direct threats to their existence.¹²⁶ She remarks as follows in this regard:¹²⁷

It can be argued however, that there was a fifth possibility: that which was enacted by the Namaqua Khoikhoi who chose to remain in Namaqualand. This involved seeking actively to retain control over their livelihoods and means of production by obtaining a missionary and constituting themselves as a mission station. This allowed them to retain their access to land and the opportunity to perpetuate their existing nomadic pastoral existence and secure their livelihoods in a hostile environment.

The new communities that came into existence after the establishment of mission stations on the land they occupied differed from the indigenous communities that existed in the seventeenth century. The missionaries who settled at the mission stations had an influence on the manner in which the sub-groups conducted their lives. However, the missionaries were not able to change the traditional manner in which the sub-groups occupied their land. The new communities continued to migrate with their livestock to the places where the best available water resources and grazing were.¹²⁸

11.5.1.3.3 *New communities north of the Buffels River*

When the LMS started its missionary work in the area between the Buffels and Gariiep Rivers, the territory was ruled by the Namaqua indigenous community. For the purposes of governing the territory, it was divided into three areas of which the Richtersveld was the western area and Steinkopf the central area.¹²⁹ Steinkopf and the Richtersveld were under the jurisdiction of sub-chiefs who were appointed by the

¹²⁶ She refers to the four responses mentioned by Elphick namely—

- (a) migrating to a new territory;
- (b) reverting to a hunter-gathering lifestyle;
- (c) working as a client of a wealthier indigenous community; or
- (d) meeting the threat by warfare.

Kelso (n 89 above) 145-146.

¹²⁷ Kelso (n 89 above) 146.

¹²⁸ P Carstens 'Opting out of colonial rule: The Brown Voortrekkers of South Africa and their constitutions' (1983) 42 *African Studies* 146.

¹²⁹ Carstens (n 75 above) 18. Although these parts of the territory were not known as Richtersveld and Steinkopf at that stage, I use the names to prevent confusion.

chief of the Namaqua indigenous community, Kupido Witbooi, who governed the eastern area of the territory.¹³⁰ The LMS missionaries conducted the missionary work at Steinkopf and in the Richtersveld on their own initiative without being invited by the sub-chiefs.¹³¹ Carstens remarks that by the time that the RMS took over the LMS's missionary activities, the majority of the Steinkopf community was still a semi-nomadic pastoral community.¹³² The extension of the boundaries of the Cape Colony to the Gariep River in December 1847 did not change the nature of the community.¹³³ The main change brought about by the RMS was the establishment of the village of Steinkopf where the church was built. The resident missionary encouraged more extensive agriculture at this village, as it was located near two good water resources.¹³⁴

The Richtersveld community remained a purely pastoral community that had to adopt a semi-nomadic lifestyle in order to sustain their livestock. As was the case with Steinkopf, the only change brought about by the settlement of a missionary in the territory was that the mission village of Khubus was established. The harsh climate of the Richtersveld prevented any chance of the land being cultivated.¹³⁵

11.5.1.3.4 *Conclusions regarding the new communities north of the Buffels River*

The fact that the Steinkopf and Richtersveld communities were only incorporated into the Cape Colony at the end of 1847 distinguishes them from the new communities south of the Buffels River. The missionaries could do very little to change the traditional pastoral lifestyle of the communities. The Steinkopf and Richtersveld communities continued to use their land in exactly the same way that they had been doing before any missionary appeared on the scene.

¹³⁰ Carstens (n 75 above) 18.

¹³¹ Carstens (n 75 above) 19-20.

¹³² Carstens (n 75 above) 21. The LMS had established their station amongst the mixed race community at a place called Besondermeid who, in addition to their livestock farming, also grew wheat when possible. Carstens (n 75 above) 19, 21.

¹³³ Carstens (n 75 above) 23-24. Carstens (n 130 above) 147.

¹³⁴ Carstens (n 75 above) 22.

¹³⁵ *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 3 SA 1293 (LCC) 1306, 1322-1323.

11.5.2 Application of customary law systems by new communities

At the beginning of the nineteenth century the customary law systems of the indigenous communities in the study area had been modified several times due to external pressures applied to the communities' traditional lifestyle. Communities had been reduced to sub-groups who made a precarious living from the livestock they still had. In the South-Western and Southern Cape nomadic orbits no longer existed, but, because some of the remaining sub-groups still had livestock, communal land use units were still in existence. The customary law systems of the sub-groups remained intact, as all the essential elements in the definition of a communal land use unit were still present. This section considers the question whether the new communities at mission stations still exercised their customary law rights in land.¹³⁶

11.5.2.1 Land use by new communities at Moravian and LMS mission stations

The new communities living at the Moravian and LMS mission stations were composed of indigenous persons who were forced by circumstances to take refuge at the mission stations.¹³⁷ They believed that by settling at mission stations they would be able to better their circumstances. In order to be accepted into a community that was based on Christian and European values, the indigenous persons had to make major changes to their traditional lifestyle.¹³⁸ Although it cannot be denied that the members of the new communities had rights in land at the mission stations, these rights were determined by the missionary societies and the colonial governments.

The livestock of the residents of the mission stations used the communal pasture that was available on the land of the mission station.¹³⁹ From the discussion in section 11.5.1.1 it is clear that the new communities at Moravian mission stations did not claim the grazing at the mission stations for use in terms of their customary law systems. These new communities had subjected themselves to the administration of the missionary societies and were no longer indigenous

¹³⁶ To be able to exercise rights in terms of customary law systems a community had to have livestock. As I remarked in section 11.5.1.2.1, I could not find information that the residents of Wuppertal owned livestock. For the purposes of this thesis, Wuppertal is excluded from consideration.

¹³⁷ Marais (n 55 above) 123, 135-136, 137; Du Plessis (n 70 above) 126.

¹³⁸ Marais (n 55 above) 148, 150.

¹³⁹ I Balie *Die geskiedenis van Genadendal 1738-1988* (1988) 101; Theal (n 58 above) 350.

communities that could exercise their rights to grazing and water resources in terms of customary law systems.

In the Preamble to the London Missionary Society's Institutions Act it is stated that, as the secular control of the LMS over the inhabitants of the LMS mission stations will cease, new rules and regulations will have to be provided for them.¹⁴⁰ Section 2 of this Act provided that a surveyor could divide the land occupied at the mission stations into surveyed lots which had to be allocated to the inhabitants in accordance with 'the customs in force in such institutions'.¹⁴¹ Section 7 of the Act authorised the Governor to make regulations for, amongst other things—

- (a) the proper control and equitable distribution of—
 - (i) all streams and springs of water;
 - (ii) the salt in saltpans belonging to such community;
- (b) the management of the commonage and regulation and protection of the rights of pasturage thereon.¹⁴²

From these provisions of the Act it is clear that, after 1873, the rights to grazing and water resources of the new communities living at the LMS mission stations were determined by legislation and no longer by customary law systems.¹⁴³

11.5.2.2 Land occupied by new communities at Ebenhaeser, Leliefontein, Komaggas, Steinkopf and Richtersveld

The sub-groups living at Ebenhaeser and Leliefontein and the Cloete family at Komaggas did not join a mission station, but invited a missionary to establish a mission station on land that they had been occupying for a long time. At Steinkopf and in the Richtersveld the missionaries acted on their own initiative when they joined the indigenous communities. These facts are the key difference between the abovementioned mission stations and the Moravian and LMS mission stations discussed in section 11.5.2.1.

¹⁴⁰ Jackson (n 109 above) 1280.

¹⁴¹ As above.

¹⁴² Jackson (n 109 above) 1282.

¹⁴³ See also the remarks of Appel with regard to the rights of the residents of the LMS mission stations. Appel (n 69 above) 25.

The establishment of mission stations did not change the manner in which land was occupied. Marais remarks that due to the arid nature of the land at Leliefontein, Steinkopf and in the Richtersveld, the communities were compelled to occupy land by way of nomadic orbits between winter and summer rainfall regions.¹⁴⁴ Although the missionaries were able to change the lifestyle of the communities, by introducing agriculture and establishing villages where members of the communities settled, they did not change the manner in which the land used as grazing was occupied.¹⁴⁵ The communities at Ebenhaeser, Leliefontein, Komaggas, Steinkopf and in the Richtersveld still occupied communal land use units after the mission stations were established. The active role that the missionaries assumed in the management of the new communities had an influence on how the customary law systems were applied, but this did not lead to the displacement of these systems.

11.6 Conclusion

The historical facts relating to the gradual decline and dissolution of indigenous communities in the study area are well known.¹⁴⁶ It has been established that the conduct of non-indigenous persons towards indigenous communities was one of the major reasons for the dispossession of the land of indigenous communities. However, very little attention has been focussed on the elements of the traditional lifestyle of indigenous communities that survived the vicissitudes of time.

In this chapter the history and content of relevant customary law systems that governed the occupation of land by the indigenous communities of the study area have been discussed in broad outline. Although not all the customary law systems of the indigenous communities have survived, it has been shown that in the northern part of the study area there were communities that continued to occupy land in terms of these systems.

¹⁴⁴ Marais (n 55 above) 75-76.

¹⁴⁵ Marais (n 55 above) 76-77.

¹⁴⁶ PJ van der Merwe *Die trekboer in die geskiedenis van die Kaapkolonie 1657-1842* (1938) 34-35; Marais (n 55 above) 109; Elphick (n 11 above) 229-234; Elphick (n 47 above) 19-22; Hattingh (n 43 above) 301-311.

By broadly establishing what the rights in land of pastoral indigenous communities were and by showing where the communities exercised these rights, the way is prepared for the discussion of the infringements and dispossession of these rights in Chapter 12.

12 Dispossession of the land of the indigenous communities in the study area

12.1 Introduction

During the colonial period, colonial governments, missionary societies, mining companies and non-indigenous settlers all engaged in conduct that had a serious effect on the lifestyle and rights in land of indigenous persons living in the study area. On a national and worldwide scale, this type of conduct has been, and in many cases continues to be, so disruptive that colonialism and its aftermath have become synonymous with dispossession of the rights of indigenous communities living in the previously colonised territories of the world. This is also often the view of dispossession currently portrayed in the media.¹

It is important to bear in mind that in this thesis I develop the argument that the exclusion of the majority of the descendants of pastoral indigenous communities in the Northern Cape from the restitution sub-programme of the constitutional land reform programme may be remedied by making amendments to existing legislation.² I contend that following this approach makes it necessary to focus on the manner in

¹ See for example the following remarks made in recent newspaper articles:
Each time the land question comes up, they deliberately disregard the evident and indisputable history of dispossession. Their argument, in essence, is that government must pay white people for land that was taken through a systematic crime against humanity,
'EFF hits back at DA over Equality Court threat' *News24* 2 March 2018
<https://www.news24.com/SouthAfrica/News/eff-hits-back-at-da-over-equality-court-threat-20180302> (accessed 18 March 2018).

This allows them to remain inactive in addressing a key component of historical trauma and settler colonialism: the dispossession and exploitation of land. The government can thus simultaneously control the reserve, through services that "help" the Indigenous community, while obscuring and distracting from pressing systemic issues that continue to marginalize and dominate Indigenous peoples, such as logging and mining.

'The ways in which we justify settler-colonialism: Working in solidarity with the Algonquins of Barriere Lake' *The McGill Daily* 3 April 2017
<https://www.mcgilldaily.com/2017/04/the-ways-we-justify-settler-colonialism/> (accessed 18 March 2018).

The realities of colonial dispossession and consequent destruction of Aboriginal society are the incontrovertible founding truths of our national existence.

'Changing date of Australia Day would distort our present' *The Weekend Australian* 20 January 2018
<https://www.theaustralian.com.au/news/inquirer/changing-date-of-australia-day-would-distort-our-present/news-story/e25affcdc7dde05ac6a351448cc935d8> (accessed 18 March 2018).

"Columbus did not "discover" anything - the Americas were inhabited by a great diversity of people and cultures," the petition reads. "Instead, Columbus established the beachhead for ruthless conquest and settler colonialism and inaugurated the genocidal devastation of whole continents."

<https://www.wkbw.com/news/petition-to-remove-statue-and-change-name-of-columbus-park> (accessed 18 March 2018).

² The reasons why these communities are excluded from the restitution sub-programme are discussed in section 14.4.4 of Chapter 14.

which the dispossession of the land of pastoral indigenous communities in the study area occurred. Therefore, a part of the purpose of this chapter is to consider how these communities were dispossessed of their land, in order to find the most appropriate manner in which to amend the legislation concerned.

The colonial governments were supposed to act lawfully by ensuring that they stayed within the parameters laid down by the international law and domestic law rules in force during the period concerned. In line with the approach that I adopt in this chapter,³ I give an overview of the extent to which they succeeded in doing this.

The actions of colonial governments that are discussed, are the waging of war against indigenous communities, the survey and demarcation of land units and legislation and administrative measures⁴ that were adopted that intentionally or unintentionally caused the dispossession of the rights in land of indigenous communities.

In many of the instances in which the rights of indigenous communities were adversely affected by the actions of the colonial governments, those governments were not acting on their own. Missionary institutions and mining companies often submitted requests to the colonial governments relating to land. The effect that the granting of such requests had on the rights in land of indigenous communities is discussed in this chapter.

The Company and the colonial government in general tried to perform their function of protecting the rights of indigenous communities falling under their jurisdiction.⁵ However, fiscal constraints, corruption and administrative incompetence allowed non-indigenous settlers to adopt practices that infringed on the rights in land of the indigenous communities. Generally speaking, the actions of commandos, composed mostly of non-indigenous settlers and under command of a non-

³ See section 12.2.

⁴ The issuing of Tickets of Occupation by the governor, which is discussed in section 12.3.3.5, is regarded as an administrative measure for the purposes of this thesis.

⁵ JS Marais *The Cape Coloured people 1652-1937* (1968) 111; R Elphick *Kraal and castle: Khoikhoi and the founding of white South Africa* (1977) 181, 188.

indigenous settler, had a detrimental effect on the rights in land of indigenous communities.

I am of the opinion that by focussing on specific circumstances in which the rights in land of pastoral indigenous communities were limited or extinguished, I am able to make suggestions regarding the restoration of the rights of these communities in the Northern Cape region where their descendants still live.

12.2 Definition of dispossession of indigenous communities' rights in land in the study area

Beinart and Delius give the following description of dispossession of land before the enactment of the Natives Land Act.⁶

A critical point to understand at the outset is that land dispossession had largely taken place before the Natives Land Act of 1913. Alienation of land from Khoisan and Africans to whites resulted from conquests in the seventeenth to nineteenth centuries, as settlers and colonial states expanded their authority into the interior of southern Africa. This expansion involved both violence and legal measures: annexations, the survey and privatisation of land, and the establishment of a new colonial civil authority.

Using this description as a definition of dispossession in the study area would align this thesis with the arguments advanced by, for example, Ramose and Dladla that colonisers relied on the right of conquest to wage unjust wars of colonisation to subjugate indigenous persons.⁷

⁶ W Beinart & P Delius 'The Natives Land Act of 1913: A template but not a turning point' in B Cousins & C Walker (eds) *Land divided, land restored: Land reform in South Africa for the 21st century* (2015) 25.

⁷ See MB Ramose 'In memoriam: Sovereignty and the 'New' South Africa' (2007) 16 *Griffith Law Review* 310-329; N Dladla 'Towards an African critical philosophy of race: Ubuntu as a philo-praxis of liberation' (2017) 6 *Filosofia Theoretica: Journal of African Philosophy, Culture and Religions* 39-45. The definition of dispossession given in this section does not serve to contradict or disprove the theories and arguments advanced by Ramose and Dladla. See also the remarks in note 51 of Chapter 1. Chapter 2 makes it clear that this thesis is only concerned with the events that occurred in a roughly L-shaped territory stretching from the Gariep River along the west coast to the Cape Peninsula and from there along the south coast to around the present day city of Port Elizabeth. The limited nature of the study area has the effect that the arguments advanced in this thesis do not have any impact on the contentions of the abovementioned writers. This thesis does not address or engage with the question of the injustice of colonisation and conquest. It is primarily concerned with the manner in which land was occupied by the various communities and the rights they had in the land they occupied. The wars discussed in this chapter did not cause a dramatic change in the manner in which land was occupied. The approach to conquest in this thesis is that at the Cape the Company did not attain any of the rights that international law rules conferred on colonising sovereigns that

However, because it is contended in this thesis that the manner in which land was occupied played an important part in establishing the rights in land of communities, dispossession must be given a different meaning for the purposes of this thesis. In this thesis dispossession is concerned with cases where indigenous communities were dispossessed of their customary law rights in land by the introduction of legislation which, over time, precluded them from exercising the rights in land they had acquired by occupation of such land. This approach makes it possible to clearly identify the dispossession that took place due to the type of colonial exploitation that was introduced by the legislation adopted by the British colonial government. It also makes it possible to suggest practical measures that may be introduced to address such dispossession, notwithstanding the retention of the 19 June 1913 cut-off date in section 25(7) of the Constitution of the Republic of South Africa, 1996 ('Constitution'). The loss of land in the study area due to the other effects of colonialism, such as disease, loss of livestock through injudicious trading and the disintegration of indigenous communities, must be remedied by the process of redistribution of land. This process will have to be facilitated by the executive and legislative branches of government.

For the purposes of this thesis, dispossession is defined as the acts of colonial governments and non-indigenous settlers that permanently prevented pastoral indigenous communities from exercising their customary law rights in land in the study area with regard to water resources and grazing of which they were the primary users. The discussion in this chapter is not limited to cases where indigenous communities were dispossessed of their rights, but also includes cases where their rights were infringed by the actions of colonial governments and non-indigenous settlers.

12.3 Legal measures adopted by colonial governments that had an impact on the occupation of land

The actions initiated by sovereign rulers in terms of international law rules at the Cape, the actions of colonial governments in terms of the domestic law of the Cape

acquired territory by conquest. With regard to the powers of a sovereign that acquires territory by conquest see L Oppenheim *International law A treatise Vol I Peace* (1912) 305.

Colony and legislation applicable in the Cape Colony are legal measures that dispossessed the indigenous communities of their land or infringed their rights in land. In this section, I discuss the various legal measures relating to land adopted by successive colonial governments in the Cape Colony and the extent to which these measures played a role in dispossessing the indigenous communities of their rights in land. These measures include official acts conducted in terms of international law and in terms of domestic law.

12.3.1 War between the Company and indigenous communities

The military forces of the Company stationed at the Cape engaged in two wars⁸ against the indigenous communities during the period from 1659 to 1677.⁹ In this section it is only necessary to determine the objectives for which war was waged by indigenous communities and the Company respectively. Oppenheim defines the objectives of war as ‘those objects for the realisation of which a war is made’.¹⁰

12.3.1.1 The 1659 war

The objectives that the two parties to the 1659 war wished to achieve were clear. The indigenous communities, under the capable leadership of the former interpreter

⁸ The arguments of the writers referred to in note 7 make it necessary to include the section on war between the Company and indigenous communities at the Cape in this thesis. I use a definition of ‘war’ that is specifically adapted to the circumstances that prevailed at the Cape in the seventeenth century. The definition is based on the definition of war in L Oppenheim *International law A treatise Vol II War and Neutrality* (1912), which was published when warfare had not yet been made illegal in international law. Oppenheim (above) 59-60. Oppenheim defines war as follows:

War is the contention between two or more States through their armed forces for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.

Oppenheim (above) 60. The main objection to the use of this definition for the purposes of this thesis is that the indigenous communities that engaged in war against the Company were not regarded as States in the seventeenth century. However, Oppenheim remarks that Bluntschli and Fiore, whose works are in German and French and not accessible to me, argue that ‘a contention between a State and the armed forces of a party fighting for public rights must be considered as war’. Oppenheim (above) 62 footnote 1. As there can be little doubt that, at least as far as the 1659 war is concerned, the indigenous communities involved were fighting for a public right, I contend that in the circumstances that prevailed at the Cape during the wars concerned, they must be wars in terms of international law rules as contemplated by Bluntschli and Fiore.

⁹ The 1739 war, which was the last war against the indigenous communities in which Company forces and the colonial government played an active role (see N Penn *The forgotten frontier: Colonist and Khoisan on the Cape’s northern frontier in the 18th century* (2005) 78), did not lead to acquisition of territory by conquest in terms of international law rules and its objective was primarily to quell the incursions of indigenous persons into territory occupied by non-indigenous settlers. Penn (above) 65-66. The result of the war was, however, that non-indigenous settlers gained access to the land of the indigenous communities and occupied it. The 1739 war is discussed in section 12.4.1, which deals with dispossession of the indigenous communities’ rights in land by non-indigenous settlers.

¹⁰ Oppenheim (n 8 above) 76.

Doman, resolved to render the further occupation of the Cape by the Company impossible. To this end a campaign was launched to reduce the livestock of the non-indigenous settlers by raiding and to destroy their crops. By adopting these tactics it was hoped that the Company and the non-indigenous settlers would be reduced to a state of helplessness and would have to vacate the Cape.¹¹ The colonial government's objectives in engaging in war with the indigenous communities were the following:¹²

The Commander and Council ... having carefully weighed and considered all in the premises which required consideration, it was at length unanimously thought fit and resolved ... that we shall take the first opportunity, as being the best, to attempt suddenly to surprise and attack them with a strong force, taking as many cattle, and as many male prisoners as possible, avoiding at the same time, as much as possible, all unnecessary bloodshed, but keeping the prisoners as hostages, so as thus to hold those who may escape, in check and subjection - in hopes that quiet may thus be restored;

From these objectives for which the 1659 war was waged it appears that only the indigenous communities had an indirect objective that related to the territory at the Cape.¹³

When the 1659 war came to an end in May 1660, neither the colonial government nor the indigenous communities had achieved any of their objectives. The war therefore ended in a stalemate, but it was the indigenous communities that sued for peace.¹⁴ However, as the indigenous communities had not been defeated the colonial government was not in a position to impose harsh conditions when negotiating the peace agreement. The Company was already in control of the land west of the established boundary before the commencement of the war and merely confirmed this position in the peace agreement by limiting the free access of the

¹¹ Elphick (n 5 above) 111; D Visser 'Beveiliging van die Kaap teen binnelandse bedreigings' in C de Wet et al (eds) *Die VOC aan die Kaap 1652-1795* (2016) 210.

¹² D Moodie *The record or a series of official papers relative to the condition and treatment of the native tribes of South Africa* (1960) 164-165.

¹³ It was an indirect objective in view of the tactics that the indigenous communities adopted. If they had decided to launch a conventional attack on the defences and armed forces (soldiers and non-indigenous militia) of the Company, it would obviously have been their objective to regain control of the land in the Liesbeek and Table Valleys.

¹⁴ Visser (n 11 above) 213.

indigenous communities to this territory.¹⁵ In terms of international law rules, the 1659 war did not lead to the dispossession of the rights in land of the indigenous communities at the Cape.¹⁶ If anything, the outcome of the war delayed the further expansion of the territory of the Company beyond the Liesbeek boundary to at least 1672, when the first outpost of the Company was established at Hottentots Holland.¹⁷

12.3.1.2 The 1673 war

Historians are not in agreement about the objectives of the indigenous community under the leadership of Gonnema and some of its client communities in waging war against the Company in 1673.¹⁸ In the period leading up to the declaration of war by the colonial government on 11 July 1673, there had been several attacks on non-indigenous hunting parties in the area usually occupied by Gonnema's community. The Company's outpost at Saldanha Bay was also attacked.¹⁹ Elphick advances convincing arguments why there were no good reasons for Gonnema to enter into a war with the Company.²⁰ Marks contends that Gonnema was concerned about rivalry over trade and encroachment on his territory by the colonial government. With regard to the second reason, Marks refers to the establishment in 1672 of the

¹⁵ Visser (n 11 above) 213. See also the discussion of the consequences of the 1659 war in section 3.2.1 of Chapter 3 and section 8.2.2.2 of Chapter 8.

¹⁶ If there remained any land in the Liesbeek Valley west of the colonial boundary of which the indigenous communities concerned had not yet been dispossessed (see section 12.3.2.1), the peace agreement dispossessed them of such land. However, it appears that the indigenous communities were totally excluded from the western side of the Liesbeek Valley before 1659. It is not clear whether the peace agreement of 1660 prevented the indigenous community from watering their livestock on the eastern side of the Liesbeek River. If the indigenous communities who were the primary users of the Liesbeek River were prevented by the peace agreement from using the river as water resource, they were dispossessed of their customary law rights in land.

¹⁷ L Guelke & R Shell 'Landscape of conquest: Frontier water alienation and Khoikhoi strategies of survival, 1652-1780' (1992) 18 *Journal of Southern African Studies* 805.

¹⁸ This uncertainty about the objectives of the war may be because of the fact that, in contradistinction to the 1659 war when the indigenous leaders had on several occasions complained to Van Riebeeck regarding the encroachment on their land, no sources record that such declarations were made by Gonnema or his subordinates.

¹⁹ Visser (n 11 above) 215; Elphick (n 5 above) 127-128.

²⁰ Elphick (n 5 above) 129. Elphick remarks that the alleged attacks by Gonnema could not have been to defend his grazing as it was not threatened. The non-indigenous hunters were allegedly killed by indigenous hunter-gatherer clients of Gonnema because they hunted hippopotami 'belonging' to the hunter-gatherers. Elphick deems it unlikely that Gonnema would have engaged a strong enemy like the Company on behalf of his clients' hippopotami. He further contends that the nature of the attacks on the non-indigenous settlers did not signify an intention to destroy the colony. If he intended to do so, the attacks would have been on a much larger scale, and would also have been aimed at the Company and non-indigenous settlers' livestock.

Company outpost at Hottentots Holland as a possible catalyst for the 1673 war.²¹ Guelke suggests that Gonnema was seeking to re-establish control over the indigenous community's grazing and therefore attacked non-indigenous settlers entering their territory.²² However, Elphick's reasoning appears to be more convincing. This is evidenced by the fact that when the colonial government mounted its first campaign in 1673, Gonnema's main objective was to avoid being lured into any battle with the armed forces of the Company.²³ The colonial government, on the other hand, had a clear objective it wanted to achieve, which is provided for in the relevant part of the resolution of 11 July 1673 as follows:²⁴

It is, therefore, after full preliminary deliberation, and after weighing everything connecting with these wicked proceedings that ought to be taken into consideration, - resolved and appointed, in order to deliver our 8 said inhabitants, should they still be alive, out of the said durance, to send out a force of 36 Company's servants and an equal number of burgers ... with positive order and authority, should it be found that any violence has been done ... to the said Netherlanders, by the said Hottentot chief, to take such revenge upon him Gonnema, and all who may with him have raised their hands against our men, that their posterity may retain the impression of fear, and may never again offend the Netherlanders.

This resolution indicates that the expedition was purely punitive in nature and not in any way directed at obtaining territory from Gonnema. When the next expedition was sent out against Gonnema on 26 March 1674, the objectives of the colonial government remained the same.²⁵ In the orders given to the leaders of the expeditions in March and October 1676, the objectives of the colonial government are extended to include the capture of the cattle of Gonnema.²⁶

The objectives of the colonial government in waging the 1673 war against Gonnema reveal no intention on the part of the Company to gain the territory that was occupied by his indigenous community. This conclusion is confirmed by the fact that after the conclusion of peace with Gonnema in 1677, no effort was made by the

²¹ S Marks 'Khoisan resistance to the Dutch in the seventeenth and eighteenth centuries' (1972) 13 *The Journal of African History* 66-67.

²² Guelke (n 17 above) 808.

²³ Elphick (n 5 above) 131. If Gonnema had in mind any of the objectives suggested by Marks and Guelke he would have tried to attain them in some manner during the war.

²⁴ Moodie (n 12 above) 327.

²⁵ Moodie (n 12 above) 336-337.

²⁶ Moodie (n 12 above) 342, 344-345.

colonial government or non-indigenous settlers to occupy the territory towards Saldanha Bay which was regarded as Gonnema's territory.²⁷

12.3.2 Surveying of land and boundary beacons

In section 2.3.1 of Chapter 2 I remark that in the South-Western Cape, non-indigenous persons occupied the land primarily by erecting buildings thereon and using land for agricultural purposes. The legal measure that accompanied this type of occupation of land was the surveying of land and determining boundaries for the land. In this section, the measures relating to the survey and demarcation of the land given to the non-indigenous settlers by the colonial government or granted or sold to them by the British colonial government are discussed.

12.3.2.1 Survey and demarcation of land for the purposes of ownership transactions

The principle that land given to non-indigenous settlers must be surveyed was introduced in the Cape Colony by Commissioner Van Goens in 1657.²⁸ Van Goens instructed that the land given to the non-indigenous settlers had to be surveyed and demarcated by a surveyor by erecting permanent beacons on the four corners of the surveyed land unit. The removal of these beacons had to be made a criminal offence subject to a heavy penalty.²⁹ The colonial government gave effect to this instruction in a resolution recorded in Van Riebeeck's journal on 7 February 1659.³⁰ It is because of the instruction issued by Van Goens that a legal measure was created in terms of which indigenous communities could be dispossessed of their land at the Cape.³¹

Each time land which was surveyed for the purposes of ownership transactions and sold or leased to a non-indigenous settler included a water resource and grazing of an indigenous community, the community was dispossessed

²⁷ Elphick (n 5 above) 132-133. Guelke (n 17 above) 808.

²⁸ See section 5.5.1 of Chapter 5.

²⁹ HCV Leibbrandt *Precis of the archives of the Cape of Good Hope: Letters and documents received (including instructions and placcaten), 1649-1662 Part II* (1899) 248.

³⁰ DB Bosman & HB Thom *Dagregister gehouden by den oppercoopman Jan Anthonisz van Riebeeck Deel III 1659-1662* (1957) 16; HCV Leibbrandt *Precis of the archives of the Cape of Good Hope January, 1659 May, 1662: Riebeeck's Journal, &c.* (1897) 8.

³¹ Guelke (n 17 above) 811. See the discussion in section 11.3.1 of Chapter 11 with regard to the process of dispossession in the Liesbeek Valley.

of their rights in land. The owner could erect a fence around the land and believed that he had the right to prevent an indigenous community from entering onto his land.

12.3.2.2 Official actions with regard to loan places

The 3 July 1714 control measure did not provide for the survey of loan places nor did it provide for the erection of any boundary beacons.³² When the Receiver-General of Revenue of the Cape Colony conducted his investigation into the loan place system in 1810, he could not find any legislation in terms of which loan places were surveyed or demarcated.³³ The only legal measure regulating the occupation of loan places in the Cape Colony at that time, except the 1714 resolutions, was that of 1805.

On 23 October 1805 the governor published extensive instructions regulating the conduct of Batavian colonial government officials in the Cape Colony. It appears that paragraph 267 of these instructions is the only official measure published with regard to the procedure to be followed when approving a request for a loan place by a non-indigenous settler. Paragraph 267 formed part of the instructions given to field-cornets. The relevant part of the paragraph provides as follows:³⁴

On inspecting the Land asked for as a Loan Place, the Field-Cornet begins (the Applicant having pointed out the Land) by fixing a middle point, and ascertains whether, in every direction from it, the extent of half an hour can be allowed without touching on the Freehold, Quitrent Land, or Loan Right, of others, or on any Government Land reserved for Uitspan Places, or other public uses.

From this instruction it is clear that the colonial governments never provided that the land given out as loan places had to be surveyed.³⁵ It also did not limit the extent of the loan place to a half-hour's walk in each direction from the central beacon. Although the land occupied by the non-indigenous settler on a loan place could be

³² The loan place control measure is discussed in section 9.3.2.2.2 of Chapter 9.

³³ The investigation of the Receiver-General of Revenue is discussed in section 6.3.1 of Chapter 6.

³⁴ W Harding *The Cape of Good Hope Government Proclamations, from 1806 to 1825, as now in force and unrepealed; and the ordinances passed in Council, from 1825 to 1838 Vol I* (1838) 81.

³⁵ JRL Milton 'Ownership' in R Zimmermann & D Visser (eds) *Southern Cross: Civil law and common law in South Africa* (1996) 662.

identified by the description given of the land by the field-cornet in the register that had to be kept the size and boundaries of such a loan place were not recorded.³⁶

The legal measures discussed in this section make it clear that the non-indigenous settlers who occupied the loaned land had certain rights in such land, but did not occupy a land unit.³⁷ I am therefore of the opinion that the legal measures concerned did not dispossess the indigenous communities of their rights in land.³⁸

12.3.2.3 Survey and demarcation of land leased in terms of the 1732 *erfpacht* system

From the discussion of the *erfpacht* system in section 10.3.2 of Chapter 10 it is clear that the Directors of the Company did not specifically provide that the land leased to the non-indigenous settlers had to be surveyed. However, in the first resolution of the colonial government dealing with a request to rent land in terms of the *erfpacht* system, dated 6 March 1732, the Governor presented a diagram of the requested land to the colonial government. The resolution states that the diagram had been drawn by a surveyor. The request states the size of the requested land. The colonial government resolved to accede to the request.³⁹ Although this first resolution dealing with the *erfpacht* system did not mention the rent that had to be paid for the land, the second such resolution, dated 13 March 1732, provides that rent of two rixdollars per morgen had to be paid.

³⁶ Harding (n 34 above) 81-82. See the remarks in section 10.5.2.1 of Chapter 10 with regard to the details that had to be recorded in the colonial government's registers.

³⁷ See the remarks in section 5.5.2 of Chapter 5 with regard to the use of the phrase 'land unit' in this thesis.

³⁸ See the discussion in section 10.2.2.2.2 of Chapter 10 with regard to the rights of the non-indigenous settlers in loan places. It must be borne in mind that in this section I only discuss the giving out of loan places as an official act of government in terms of the 1714 control measures. The rights conferred in terms of the 1714 control measures definitely did not authorise non-indigenous settlers to displace indigenous persons. The conduct of the non-indigenous settlers with regard to any sub-group that they found on their loan places is discussed in section 12.4. In section 10.5.4 of Chapter 10 I conclude that non-indigenous settlers could rely on Roman-Dutch law principles to contend that they were the legal possessors of the land on which their homesteads were built. This means that, in terms of Roman-Dutch law principles, the indigenous communities would have had to prove that they had a better title in the land to dislodge the non-indigenous settler. As the indigenous communities would not have been able to do so and because homesteads were often built at or near water resources, it is possible that indigenous communities were dispossessed of their rights in land in the vicinity of such homesteads. Such cases also fall within the category of displacement of indigenous communities by the actions of non-indigenous settlers, as such a result could not have been foreseen when the 1714 control measures were instituted.

³⁹ *Resolutions of the Council of Policy of Cape of Good Hope* C. 89, pp. 67-69.

In the period from March 1732 to August 1740 the colonial government dealt with requests from non-indigenous settlers to rent land in terms of the *erfpacht* system in several resolutions.⁴⁰ From these resolutions it is clear that the land requested by the non-indigenous settlers was situated next to existing gardens or land given to them in terms of ownership transactions and was used for agricultural purposes, as was intended by the Directors of the Company when they instituted the *erfpacht* system.⁴¹ The fact that the precise size of each plot of land leased to the non-indigenous settlers is mentioned in the resolutions makes it highly likely that the land so leased was surveyed and demarcated.⁴² It is certain, however, that in the nineteenth century the land leased in terms of the *erfpacht* system had to be surveyed and that the boundaries had to be clearly indicated.⁴³ Although limited tracts of land were leased in terms of the *erfpacht* system, the system must be regarded as a legal measure that led to the dispossession of the land of indigenous communities in the Cape and Stellenbosch and Drakenstein districts.⁴⁴

⁴⁰ There are many colonial government resolutions after 1740 that also deal with the lease of land in terms of the *erfpacht* system. The resolutions in the period referred to in the text above are discussed because they provide a clear indication of the manner in which requests to rent land were dealt with by the colonial government. *Resolutions of the Council of Policy of Cape of Good Hope* C. 89, pp. 70–71; C. 89, pp. 99–119; C. 90, pp. 73–74; C. 90, pp. 88–91; C. 90, pp. 114–120; C. 91, pp. 12–26; C. 91, pp. 108–117; C. 93, pp. 30–40; C. 109, pp. 33–50; C. 111, pp. 4–16; C. 115, pp. 54–58; C. 115, pp. 59–69.

⁴¹ All the resolutions referred to in note 40, except two, mention that the land is leased for gardens (*thuinland*) or fields for crops (*landerijen/bouwland*).

⁴² Duly is of the opinion that initially the land leased under the *erfpacht* system was not surveyed, but that the size of the land was estimated. LC Duly *British land policy at the Cape, 1795–1844: A study of administrative procedures in the Empire* (1968) 15. It must be borne in mind that the rent fixed for each plot of land was per morgen. Duly gives no indication who estimated the size of the land. It may be assumed that estimation by a non-indigenous settler would have tended to be less than the actual size of the leased land. A resolution of the colonial government dated 29 July 1732 deals with a request by two widows that the rent fixed per morgen for the requested leased land should be reduced. The colonial government acceded to their request and remarked that the requested land shall be *measured* and given to them at the reduced rent. *Resolutions of the Council of Policy of Cape of Good Hope* C. 90, pp. 75–81.

⁴³ A copy of a lease concluded on 1 January 1808 in terms of the *erfpacht* system forms part of the *Report of the Surveyor-General on the tenure of land, on the land laws and their results, and on the topography of the Colony Cape of Good Hope 1876* 17. From this copy of the lease contract it is clear that leased land had to be surveyed and demarcated.

⁴⁴ Duly remarks that in 1797 the leased land was situated only in the Cape and Stellenbosch and Drakenstein districts and that there were only 35 leased plots of land. Duly (n 42 above) 15.

12.3.2.4 Survey and demarcation of land converted in terms of the Van Imhoff control measure of 1743

Van Imhoff authorised the Governor to convert existing loan places 'into freehold farms' on application by an occupier of a loan place.⁴⁵ In the Dutch version of *The reports of Chavonnes and his council, and of Van Imhoff, on the Cape. With incidental correspondence* ('*The reports*') it is stated that the conversion could take place if the loan place had been surveyed to ensure that it did not exceed 60 morgen in size.⁴⁶ From these remarks in the instructions given by Van Imhoff it is clear that a conversion in terms of the Van Imhoff control measure could not take place without the land being surveyed. The instruction did not include provisions regarding the demarcation of the boundaries of the surveyed land. The requirement that the land that was to be converted had to be surveyed and must not exceed 60 morgen in size, renders the Van Imhoff control measure a legal measure that led to the dispossession of the indigenous communities in the interior of the Cape Colony.

12.3.2.5 Survey and demarcation of land after 1813

The Perpetual Quitrent Proclamation of 1813 introduced a new era in the Cape Colony with regard to the survey and demarcation of land. Where the previous colonial governments did not deem it necessary to adopt legislation to provide for the survey and demarcation of land, the legislation enacted by the British colonial government dealing with land provided extensively for the survey of land.⁴⁷ The system created by the said land legislation provided that land belonging to non-indigenous settlers had to be surveyed and demarcated.

From the time that the 1860 Crown Lands Act was enacted all land in the Cape Colony was regulated by legislation.⁴⁸ With the enactment of the 1860 Crown Lands Act, the British colonial government adopted a legal measure that confirmed

⁴⁵ *The reports of Chavonnes and his council, and of Van Imhoff, on the Cape. With incidental correspondence* (1918) 139. The Van Imhoff control measure is discussed in paragraph 9.5.2.1 of Chapter 9.

⁴⁶ The Dutch text reads as follows: '*mits deselve als gesegt is, gemeeten en op de bepaelde groote afgegeeven*'. *The reports* (n 46 above) 64.

⁴⁷ Sections 2, 8, 10 and 13 of the Perpetual Quitrent Proclamation deal with the role of surveyors in the implementation of the perpetual quitrent system in the Cape Colony. Section 3 of the Conditions and regulations (see section 7.3.1.1.3 of Chapter 7) provided for the survey of the 'unappropriated Crown lands' that were to be sold in freehold by public auction.

⁴⁸ Section 7.3.1.1.4 of Chapter 7 deals with the 1860 Crown Lands Act and its successors.

that they regarded all land occupied by indigenous communities on a communal basis to be Crown land. This meant that in the cases where the British colonial government had Crown land surveyed and sold or leased, the indigenous communities were dispossessed of their customary law rights in such land.⁴⁹

12.3.3 Dispossession of the land of new communities at the Reserves

In view of the conclusion reached in section 11.5.2.1 of Chapter 11 the discussion in this section is limited to the mission stations Ebenhaeser, Leliefontein, Komaggas, Steinkopf and Richtersveld ('the Reserves'). The establishment of the Reserves and the nature of the new communities that developed are discussed in Chapter 11. Before the dispossession of land at the Reserves is discussed, the extent of the land that was occupied by residents of the Reserves⁵⁰ is discussed.

12.3.3.1 Extent of the land occupied at Ebenhaeser

Scholtz remarks that Doringkraal, the name of the land at Ebenhaeser occupied by the sub-group referred to in section 12.3.3.5.1, was surveyed in 1831. The size of the land used by the sub-group was 17000 morgen.⁵¹ The Surplus People Project states that there is 'a strong oral tradition' that land occupied by the sub-group or by its parent community stretched from the mouth of the Groen River, far to the north of the Olifants River, south along the coast to a place called Donkin's Bay.⁵² It is clear that the land occupied by the sub-group in 1831 was much smaller than the land referred to by the Surplus People Project. It must therefore be accepted that earlier the sub-group had probably formed part of an indigenous community that had occupied the relevant land.

⁴⁹ See my conclusion in section 7.3.2.6 of Chapter 7. The Tickets of Occupation discussed in section 12.3.4.2 did however give some protection to the rights in land of the residents of mission stations.

⁵⁰ As some of the mission stations discussed in this chapter were classified as communal reserves under the Mission Stations and Communal Reserves Act 29 of 1909 (Cape of Good Hope) ('Mission Stations Act') and as the distinction between mission stations and communal reserves was abolished with the repeal of the Mission Stations Act, I deem it appropriate for the sake of brevity to refer collectively to the institutions concerned as the Reserves in the remaining chapters. In line with this approach 'residents of the Reserves' means indigenous persons who lived in the mission village, where the church and school of the missionary society were, and persons living anywhere else in the territory occupied by the new community of the mission station.

⁵¹ PL Scholtz 'Die historiese ontwikkeling van die Onder-Olifantsrivier 1660-1902' in *Argief-jaarboek vir Suid-Afrikaanse geskiedenis Deel II* (1966) 122.

⁵² Surplus People Project *Land claims in Namaqualand* (1995) 81. A map obtained from the Internet shows Donkin's Bay south of the mouth of the Olifants River. http://za.geoview.info/donkins_bay,3368543 (accessed 30 March 2018).

12.3.3.2 Extent of the land occupied at Leliefontein

An indication of the extent of the land occupied by the sub-group that lived at Leliefontein can be obtained from a description of the nomadic orbit they used. Kelso remarks that their summer grazing area was in the Kamiesberg where the mission village was also situated. From this central point, residents migrated in winter to Bushmanland to the east of the Kamiesberg. In unusual drought conditions, some of the residents travelled west to the coast where fishing was used to obtain the necessary food.⁵³

12.3.3.3 Extent of the land occupied at Komaggas

The land occupied by the residents of Komaggas was surveyed in 1831 and a diagram of the surveyed land was prepared by the surveyor.⁵⁴ Between the western boundary of the land occupied by the residents and the coast there remained open land that was designated by the surveyor as waste Crown land with good summer grazing.⁵⁵ Sharp contends that this land was used by the residents of Komaggas as grazing for their livestock, as there was nothing that prevented them from doing so. He points out that there was no fence erected on the western boundary of the surveyed land and that the land was not occupied by non-indigenous settlers. He submits that the residents over time accepted that the land belonged to them.⁵⁶

12.3.3.4 Extent of the land occupied at Steinkopf and Richtersveld

Prior to 1847, the residents of the areas that were associated with Steinkopf and Richtersveld were under the exclusive jurisdiction of Namaqua sub-chiefs, that each ruled a part of the territory between the Buffels and Gariiep Rivers from the Atlantic

⁵³ CJ Kelso 'On the edge of the desert - A Namaqualand story: 1800-1909 Climatic and socio-economic drivers of decline' unpublished Doctoral dissertation, University of the Witwatersrand, 2010 140, 142. The winter migration away from the Kamiesberg was done in small groups.

⁵⁴ NG Penn 'Land rights, missionaries and surveyors: Khoisan identity and the Komaggas community' in R Fisher (ed) *History of surveying and land tenure. Collected papers Volume Two. Surveying and land tenure at the Cape 1813-1912* (2004) 157; J Sharp 'Land Claims in Namaqualand: The Komaggas Reserve' (1994) 21 *Review of African Political Economy* 404.

⁵⁵ Penn (n 54 above) 157; Sharp (n 54 above) 404.

⁵⁶ Sharp (n 54 above) 404. It is not clear, however, why the residents who pointed out the water resources and grazing used by them to the surveyor did not include the land used as grazing stretching to the coast. (See section 12.3.3.5.3.) It may be that the residents only started to use the land stretching to the coast after the land had been surveyed.

coast to Bushmanland in the east.⁵⁷ The establishment of Steinkopf and Richtersveld did not alter the extent of the territory occupied by the subjects of each of these sub-chiefs. Therefore, the extent of the said territory was determined by the nomadic orbits of the residents which existed in the abovementioned territory.⁵⁸

12.3.3.5 The effect of Tickets of Occupation on the extent of the land occupied at the Reserves

Tickets of Occupation ('ToO's') were certificates issued by the governor of the Cape Colony to missionary institutions or to the communities living at the Reserves, that certified that the residents of the Reserves had the right to occupy the extent of land that was indicated on a diagram that accompanied the ToO.⁵⁹ Sharp remarks that ToO's were requested by missionaries to protect the residents of Reserves from encroachment on their lands by non-indigenous persons.⁶⁰ They also remark that 'the land granted was much smaller than the original zone of occupation'.⁶¹ It is clear that the land demarcated on the diagrams was regarded as reserved for the residents of the Reserves. However, the issuing of ToO's also meant that the residents' customary law rights in land outside the demarcated areas were not recognised or protected. In the period from 1837 to 1930 ToO's were issued to all the Reserves.⁶²

⁵⁷ See section 11.5.1.3.3 of Chapter 11.

⁵⁸ The Surplus People Project refers to reports and correspondence of British colonial government officials who inspected the territory in the period from 1847 to 1899. Reference is made to a report published in 1855, in which the nomadic orbit of the Richtersveld people is described. Surplus People Project (n 52 above) 35. With regard to Steinkopf, reference is made to a letter of the Surveyor-General, written in 1865, in which he remarks that the land is the 'undisputed possession' of the Namaqua indigenous community. Surplus People Project (n 52 above) 49-50.

⁵⁹ This definition of ToO's is partly derived from the description of ToO's (which were also referred to as certificates or tickets of reservation) in *Williston Municipality v Binnenlandsche Zending Commissie* 1908 25 SC 273 275 (*Williston*) and *Rex v Diamond* 1911 CPD 737 741 (*Diamond*). *Williston* dealt with a ToO issued for Amandelboom, a mission station falling outside of the study area and *Diamond* dealt with the ToO issued for Komaggas. In these cases, the fact that the residents were to be governed by regulations drawn up by them is also mentioned. The courts did not refer to the diagrams that accompanied the ToO's.

⁶⁰ J Sharp & M West 'Controls and constraints: Land, labour and mobility in Namaqualand' Carnegie Conference Paper No. 71 (1984) 4.

⁶¹ Sharp (n 60 above) 4. With regard to the effect of the reduction in the size of the original zone of occupation, Sharp remarks that the 'loss of land began to reduce large numbers of mission inhabitants to increasing poverty'.

⁶² The ToO of Richtersveld, which was issued in 1930, is not considered in this section as it was issued after the colonial period came to an end. The ToO that was issued to the mission station Pacaltsdorp in 1813 (see section 11.4.2 of Chapter 11) is not discussed, as the mission station is not discussed in this chapter.

12.3.3.5.1 *ToO for Ebenhaeser*

In the period between 1809 and 1815 the chief of the sub-group living at Ebenhaeser travelled to Cape Town to receive an official staff of office from the governor and to receive documents confirming the sub-group's rights in the land at Doringkraal.⁶³ However, the Rhenish Missionary Society ('RMS') was concerned to obtain a more secure title in the land where Ebenhaeser was established. Their efforts in this regard were rewarded when a portion of Doringkraal was given to the RMS to hold in trust for the indigenous community in terms of a ToO. The ToO was issued by Governor D'Urban on 6 July 1837.⁶⁴ The main provision of the Ebenhaeser ToO was that the British colonial government granted the resident missionary of the RMS a portion of land, indicated on a diagram attached to the ToO, to hold in trust for and on behalf of the RMS.⁶⁵ Possession of the land was made subject to the following stipulations:⁶⁶

- (a) The land and buildings thereon had to be used only for the purposes of missionary work at Ebenhaeser and would revert to the British colonial government if no longer used for that purpose;
- (b) the remaining extent of Doringkraal, which was also shown on the diagram accompanying the ToO, had to be used only for the purposes of indigenous persons and the indigenous community that had been living on the land;
- (c) the grazing on the land granted to the RMS and the portion of the land contemplated in paragraph (b) were for the communal use of the livestock of the RMS and the indigenous persons and no other persons had access to such grazing;
- (d) the RMS had the right to construct aqueducts and watercourses for irrigation purposes on the land reserved for the exclusive use of the indigenous persons; and
- (e) if the land granted to the RMS reverted to the British colonial government, the government had to hold the land for the indigenous persons living there and could not give it to any other persons.

⁶³ Surplus People Project (n 52 above) 80-81. See section 12.4 for more information on official staffs of office.

⁶⁴ Scholtz (n 51 above) 122, 185.

⁶⁵ Scholtz (n 51 above) 184.

⁶⁶ Scholtz (n 51 above) 184-185.

Ebenhaeser did not have sufficient land that could be used as grazing for the livestock of the indigenous community.⁶⁷ Scholtz remarks that in 1844 the British colonial government, in terms of another ToO, allocated a large piece of unsurveyed Crown land, called Elsie Erasmuskloof, to the indigenous community as grazing. When issuing the ToO, the British colonial government reserved the right to cancel it if circumstances should demand it.⁶⁸ In 1871 Elsie Erasmuskloof was surveyed and the non-indigenous settlers in the vicinity made representations to the British colonial government that the ToO for Elsie Erasmuskloof should be withdrawn. The government decided that, in view of the great demand for land and the negative report on the residents of Ebenhaeser submitted by the civil commissioner of Clanwilliam, the ToO had to be withdrawn.⁶⁹

The effect of the Ebenhaeser ToO was that the residents were dispossessed of their rights outside the boundaries of the land shown on the diagram as being for their exclusive use.

Their rights inside the area shown on the diagram were also infringed.⁷⁰ It is accepted that the indigenous community had regulated the use of the grazing on the land occupied by them in terms of their customary law system. This right was infringed as the RMS was authorised to also make use of the communal grazing.

Scholtz remarks that the residents of Ebenhaeser had been using the grazing at Elsie Erasmuskloof before the ToO for the land was issued to them.⁷¹ Notwithstanding the condition in the ToO that the British colonial government could withdraw it if circumstances demanded it, the residents had already obtained rights in the land when the ToO was issued. The withdrawal of this ToO clearly dispossessed the residents of their rights in the land.

⁶⁷ In 1862 the total livestock owned by the indigenous persons at Ebenhaeser was 1229 cattle, horses and sheep. Scholtz (n 51 above) 125 footnote 53. The nature and number of the livestock kept by the RMS at Ebenhaeser are not known, but from the description of the agricultural endeavours of the missionaries (Scholtz (n 51 above) 124-125), it must be accepted that they had working animals that would have needed grazing.

⁶⁸ Scholtz (n 51 above) 126.

⁶⁹ As above.

⁷⁰ See paragraph (c) above. It must be borne in mind that the diagram attached to the ToO showed an area that was for the use of the missionaries and an area that was for the exclusive use of the residents.

⁷¹ Scholtz (n 51 above) 126.

12.3.3.5.2 *ToO for Leliefontein*

The ToO for Leliefontein was issued on 22 May 1854. It authorised the occupation of the land by the indigenous persons residing there and guaranteed that the land would for the present not be alienated.⁷² Although the ToO was accompanied by a sketch of the area made by a land surveyor the land was not surveyed.⁷³ According to Kelso the land that was indicated on the diagram accompanying the ToO was much smaller than the land covered by the nomadic orbit that was normally occupied by the residents.⁷⁴ The residents of Leliefontein were consequently dispossessed of the water resources and grazing that they had used outside of the boundaries of Leliefontein as indicated on the diagram accompanying the ToO.

12.3.3.5.3 *ToO for Komaggas*

The ToO for Komaggas was issued on 9 November 1843, 12 years after the land had been surveyed.⁷⁵ The first lines of the ToO identify the precise location and approximate size of the land called Komaggas. It is stated that the diagram annexed to the ToO had been framed by a sworn land surveyor. The identified land is not granted to the RMS, but the ToO provides that the land shall not be alienated and shall be held for the indigenous persons⁷⁶ who resided on the land on 1 January 1843.⁷⁷ In the evidence presented to the ‘Select Committee of the Legislative Council on the Lands in Namaqualand set apart, for the occupation of natives and others’ (‘Select Committee’), it is remarked that the occupation was in perpetuity and that the ToO was therefore similar to a title in the land.⁷⁸

⁷² *Report of the Select Committee of the Legislative Council on the Lands in Namaqualand set apart, for the occupation of natives and others* 1888 Appendix ii.

⁷³ *Report* (n 72 above) 2-3, 4.

⁷⁴ Kelso (n 53 above) 179-180.

⁷⁵ *Report* (n 72 above) Appendix i.

⁷⁶ It must be noted that the ToO, when dealing with the indigenous persons residing at Komaggas, differentiates between ‘aboriginal’ residents and Basters. Nineteenth century publications frequently make reference to ‘Basters’ or ‘Bastaards’ who were persons with a mixed heritage. See Marais (n 5 above) 10; Penn (n 9 above) 20. D Nell “‘Treating People as Men’: Bastaard land ownership and occupancy in the Clanwilliam district of the Cape Colony in the nineteenth century’ (2005) 53 *South African Historical Journal* 123. In the northern Cape Colony these persons occupied their land in terms of a customary land law system and are therefore defined, for the purposes of this thesis, as indigenous persons or indigenous communities.

⁷⁷ *Report* (n 72 above) Appendix i.

⁷⁸ *Report* (n 72 above) 2.

It is accepted that it was the intention of the governor, when issuing the ToO, that the British colonial government would hold the land in trust for the indigenous persons. The RMS's rights in the land at Komaggas were limited to the land occupied by the buildings it erected and the land that was cultivated for 'horticultural purposes'.⁷⁹ In the case of Komaggas, the question is whether the ToO in fact deprived the residents of their rights in the land between the western boundary of the surveyed land and the coast.⁸⁰ According to Sharp, it was only the land near the Swartlinter River and Buffels River that was granted to non-indigenous settlers after 1843. The land between the two rivers, the western boundary of Komaggas and the coast remained vacant. The process of granting the land around the boundaries of Komaggas to non-indigenous settlers was only completed in 1915.⁸¹ It is submitted that until 1915, when the residents were physically prevented from using the land in the area concerned, they were not dispossessed of their rights in land. In other words, although the ToO made it possible for the British colonial government to grant the land concerned to non-indigenous settlers, ostensibly without dispossessing the residents of their rights in land, such dispossession only took place when actual grants were made.

12.3.3.5.4 *ToO for a portion of Steinkopf*

The ToO that was issued for Steinkopf on 9 December 1874 reflects the different circumstances that prevailed with regard to the mission stations that fell within the Cape Colony before December 1847 and Steinkopf and Richtersveld that were incorporated into the Cape Colony after December 1847. When the Cape Colony's border was extended, the indigenous communities that lived at the various mission stations north of the previous border had already established areas which they regarded as their territory. Klinghardt remarks that the British colonial government made it clear that encroachment by non-indigenous settlers on the land occupied by the residents of these mission stations would not be allowed. However, the onus rested on the indigenous persons concerned to assert their rights to the territory that they claimed. The RMS was instrumental in safeguarding the rights of the residents

⁷⁹ *Report* (n 72 above) Appendix i. When the ToO was granted the RMS had already taken over the missionary activities at Komaggas from the LMS.

⁸⁰ See section 12.3.3.3.

⁸¹ Sharp (n 54 above) 404.

of the Reserves by making representations with regard to ToO's to the British colonial government on their behalf.⁸²

Prior to 1874 the RMS had a mission station at Pella in Bushmanland that had to be abandoned during the First Koranna War in 1868.⁸³ However, the disaster at Pella presented an opportunity to the RMS to obtain a ToO for a part of the land used by the residents of Steinkopf. The RMS, by relinquishing its claim to the mission station and associated land at Pella, was granted the 1874 ToO for a portion of land at Steinkopf to be used for the refugees of the Pella mission station.⁸⁴ The boundaries of the portion of land are described in the ToO. The ToO provides that the land concerned would for the time being not be alienated or leased and was to be held in trust by the Civil Commissioner of the division of Namaqualand for the residents of Steinkopf and the former residents of Pella.⁸⁵ From the proceedings of the Select Committee it is clear that, notwithstanding the fact that the ToO was only granted for a portion of the land occupied by the residents of Steinkopf, the Committee acknowledged that they had, prior to 1847, occupied a much larger territory and were entitled to use the occupied land.⁸⁶ A condition not included in other ToO's was that the British colonial government reserved to itself the right of 'searching and mining for ores, metals, minerals, or precious stones' on the portion of land concerned.⁸⁷

The effect of the ToO of 1874 was that the residents of Steinkopf were certain that the land within the described portion of land would not be alienated or leased to non-indigenous persons. The ToO did not limit them to exercising their rights in land only within the described portion of land. However, the undertaking of the British colonial government that non-indigenous persons and other non-residents would not be allowed to encroach on the land used by the residents of Steinkopf was their only

⁸² GP Klinghardt 'Structure and process in the local government of Pella, 1874-1980' (2003) 109 *Annals of the South African Museum* 25-26.

⁸³ Klinghardt remarks that raiders attacked the settlements around Pella, killed the inhabitants, drove off their livestock and poisoned the wells. Eventually Pella itself was attacked and destroyed and the residents were dispersed to places like Steinkopf and settlements in the present-day Namibia. Klinghardt (n 82 above) 28.

⁸⁴ Klinghardt (n 82 above) 28-29.

⁸⁵ *Report* (n 72 above) Appendix iv-v.

⁸⁶ *Report* (n 72 above) 6.

⁸⁷ *Report* (n 72 above) Appendix v.

protection for the land falling outside the described portion of land. Without an official ToO with a diagram that showed the boundaries of the land occupied by the residents, it was possible that land the residents regarded as part of the territory legally occupied by them could be surveyed and alienated.⁸⁸

Notwithstanding the granting of the ToO, the RMS continued its efforts to secure the rights of the residents to the whole area occupied by them. These efforts were eventually rewarded when a ToO was granted for the remaining area of Steinkopf in 1905.⁸⁹ The Surplus People Project remarks that the 1905 ToO was issued without the authority of the Cape Colony Parliament. Subsequently, large portions of the land were surveyed and granted to non-indigenous settlers.⁹⁰ It therefore appears that it was not the issuing of ToO's that led to the dispossession of the residents of Steinkopf, but the surveying of parcels of land that should have been protected by the ToO.

12.3.3.6 Land in the Richtersveld

When the British colonial government investigated the land situation in the Richtersveld in 1890, the residents identified a large area that they had been occupying to the official of the Office of the Surveyor-General. He was of the opinion that the identified land was far in excess of what was needed by the said residents. No ToO was issued by the British colonial government for the land occupied by the residents of Richtersveld during the colonial period.⁹¹ The residents of the Richtersveld therefore had the same protection for their rights in land within the identified territory⁹² that the Steinkopf residents had in the land they used outside of the portion of land described in the 1874 ToO. This protection proved to be

⁸⁸ This in fact happened in 1906 as is discussed in the next paragraph.

⁸⁹ Klinghardt (n 82 above) 30; R Oakley 'Empowering knowledge and practices of Namaqualand elders' in JE Graham & PH Stephenson (eds) *Contesting aging & loss* (2010) 50; *Rex v Kamp* 1908 25 SC 195 196. I was not able to obtain the text of the 1905 ToO for Steinkopf.

⁹⁰ Surplus People Project (n 52 above) 51-52.

⁹¹ Surplus People Project (n 52 above) 37, 41; *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 3 SA 1293 (LCC) 1307-1308 ('RichtersveldLCC').

⁹² From the remarks of the Surveyor-General in a letter addressed to the chairman of the Raad of the Richtersveld residents in 1909, it appears that when the official of the Office of the Surveyor-General compiled his report in 1890 he attached a diagram on which the extent of the land identified to him by the residents of Richtersveld was indicated. It is this area that is referred to as the 'identified territory'. (RichtersveldLCC (n 91 above) 1311 footnote 56.

insufficient, as land claimed by the residents of Richtersveld in the coastal area of their nomadic orbit was surveyed and leased to non-indigenous settlers in 1904.⁹³

12.3.4 Mining in the northern Cape Colony

The first commercially viable copper mine in the northern Cape Colony was established on land bought by Phillips and King, a Cape Town mercantile company. The mine was established on Springbokfontein where the present-day town of Springbok is situated. The company bought a portion of the farm, 10 morgen in size, from the Cloete family to whom the farm had shortly before been granted.⁹⁴ According to the deed of sale for this piece of land, the new owners were granted the right to sufficient grazing for the working animals of the mine and water for the animals and the mine. The remainder of the farm was acquired from the various members of the Cloete family between 1850 and 1853.⁹⁵ The Cape of Good Hope Mining Company was established to conduct the mining operations on the land acquired by Phillips and King.⁹⁶

Although the first mining operation in the northern Cape Colony did not have an impact on the land rights of the indigenous residents of Steinkopf, the question of prospecting and mining on Crown land in the vicinity soon arose.⁹⁷ The Namaqualand Mining Company ('NMC'), the first established in competition with the Cape of Good Hope Mining Company,⁹⁸ was established in 1853 when the British colonial government had published legislation regulating the lease of Crown land for the purposes of prospecting and mining in Namaqualand.⁹⁹

⁹³ Surplus People Project (n 52 above) 37.

⁹⁴ JM Smalberger 'Aspects of the history of copper mining in Namaqualand' unpublished Masters dissertation, University of Cape Town, 1969 31-32.

⁹⁵ Smalberger (n 94 above) 32-33, 163-164.

⁹⁶ J Davenport 'Colonial mining policy of the Cape of Good Hope: An examination of the evolution of mining legislation in the Cape Colony 1853-1910' unpublished Masters dissertation, University of Cape Town, 2009 5.

⁹⁷ Smalberger (n 94 above) 33. Although the residents of Steinkopf were ostensibly secure in their occupation of the land, it remained Crown land. The British colonial government, in contradistinction to non-indigenous settlers and non-residents, could on reasonable grounds encroach on the rights of the residents.

⁹⁸ D Fleminger *Richtersveld cultural and botanical landscape including Namaqualand* (2008) 90.

⁹⁹ Smalberger (n 94 above) 66.

The regulations were published on 13 September 1853. The leases were to be concluded for a period of 15 years.¹⁰⁰ It is clear that the British colonial government did not consider the rights in land of the indigenous communities of Namaqualand when the regulations were drafted. An applicant for a lease was not limited to applying for a lease of Crown land in areas falling outside of the land occupied by the residents of mission stations. The application could be for a portion of land ranging in size from 10 to 40 morgen anywhere in Namaqualand. The application had to be accompanied by a diagram indicating the portion of land that was applied for.¹⁰¹ The leases concluded in terms of the regulations provided that the lessee had the right to use the grazing in the vicinity for his working animals as long as it was on Crown land that had not already been granted or leased. The greater the size of the leased land, the bigger was the radius around the central beacon of the leased land that the lessee could use as grazing.¹⁰²

The NMC was granted a lease in terms of the regulations and its representatives were sent to commence mining activities on the leased land. On their arrival, they were informed by the Reverend Brecher, the missionary at Steinkopf, that their leased land formed part of the land occupied by the residents of Steinkopf. He informed them that the land was secured by the British colonial government against encroachment by 'farmers or others'. He also requested that the NMC should vacate the land.¹⁰³ On receiving this letter, the NMC decided to enter into a lease agreement with the RMS, representing the residents of Steinkopf, in terms of which it was given the exclusive right to conduct mining on the land occupied by the residents of Steinkopf for 10 years.¹⁰⁴

The NMC, accepting that the Steinkopf community had the right to eject them from the land leased from the British colonial government, enquired whether they could be refunded for the rent that had been paid to the government by them.¹⁰⁵ The

¹⁰⁰ Smalberger (n 94 above) 65; Davenport (n 97 above) 8.

¹⁰¹ As above.

¹⁰² Smalberger (n 94 above) 65-66. A lease for 10 morgen of land had grazing rights of a one-mile radius around the central point of the leased land attached to it, while a lease for 40 morgen had grazing rights of 2 miles attached to it.

¹⁰³ Smalberger (n 94 above) 66-67.

¹⁰⁴ Smalberger (n 94 above) 67-68.

¹⁰⁵ Smalberger (n 94 above) 69.

British colonial government was not amenable to acceding to this request. The straightforward argument was advanced that the request made previously by the RMS for a ToO confirmed that the Crown was the owner of the land concerned. Consequently, the lease concluded between the NMC and the British colonial government was valid and enforceable. It was conceded, however, that the NMC could enter into a lease agreement with the RMS at Steinkopf if it wished to do so.¹⁰⁶ Smalberger interprets this response of the British colonial government as a denial on its part that the RMS had any right to lease mining rights in the land occupied by the residents of Steinkopf to the NMC. He remarks that the power of the RMS to lease land was limited to the surface of the land and not to the minerals underneath the surface of the land.¹⁰⁷ On further representations made by the NMC, the British colonial government remarked that until such time that the rights of indigenous persons in the minerals underneath their land had been decided, leases such as those concluded by the NMC and RMS must be regarded as invalid.¹⁰⁸ Consequently, the NMC entered into a contract with the RMS to provide the necessary grazing for their animals.¹⁰⁹ This means that the provisions in the regulations relating to grazing were not sufficient to guarantee the NMC's rights in this regard. The NMC had to enter into a similar agreement with the RMS who was the occupier of the land concerned. Smalberger remarks that, although the rights of the residents of mission stations in the minerals under their land were generally not acknowledged,¹¹⁰ the question was only finally settled against them by the Mission Stations Act.¹¹¹

The residents of Steinkopf's rights in the land that they occupied were to a certain extent safeguarded by the actions of Reverend Brecher. However, apart from the fact that the indigenous residents of mission stations were dispossessed of their rights in minerals on the land that they occupied, the lease system imposed by the

¹⁰⁶ As above.

¹⁰⁷ Smalberger (n 94 above) 69-70.

¹⁰⁸ Smalberger (n 94 above) 70-71.

¹⁰⁹ Smalberger (n 94 above) 71.

¹¹⁰ See the reference made to the opinion of the Surveyor-General in this regard. Smalberger (n 94 above) 75.

¹¹¹ See note 50.

legislation definitely also encroached on their rights in land.¹¹² The root cause of this type of dispossession must be sought in the doctrine of tenures which was imported into the domestic law of the Cape Colony during the nineteenth century.¹¹³

12.4 Displacement of indigenous communities by non-indigenous settlers

In Chapter 3 it is shown that the occupation of territory by non-indigenous settlers in the interior of the Cape Colony was not done on behalf of the Company and such territory was therefore not acquired by the Company in terms of international law rules.¹¹⁴ It is shown that, where territory was abandoned by indigenous communities due to the actions of non-indigenous settler commandos, such territory was not annexed by the Company and was therefore not acquired by conquest in terms of international law rules. However, there is no doubt that the actions of non-indigenous settlers and commandos did displace indigenous communities from the land that they had been occupying. In this section, the question whether the indigenous communities were dispossessed of their rights in land by the actions of non-indigenous persons is discussed.¹¹⁵

The indigenous communities that are dealt with are those who were still nominally independent at the start of the eighteenth century and kept livestock to sustain their independence.¹¹⁶ Many of these sub-groups were in practice subject to the authority of the Company. To signify that the chiefs of these sub-groups were appointed by the colonial government and were subject to its authority, they received

¹¹² The leasing regulations were withdrawn in 1855. According to Davenport, approximately 30 applications for mining leases in Namaqualand were made between 1855 and 1864. On 10 October 1864 new mining regulations were introduced that in essence contained the same provisions as the 1853 regulations. Davenport (n 96 above) 14, 17, 24. The long title and preamble of the Mining Leases Act 12 of 1865 make it clear that the Act applies to land which was 'the Property of the Crown'. It extended the lease period from 15 to 31 years and did away with the system of providing for grazing for the working animals of the lessees. EM Jackson *Statutes of the Cape of Good Hope 1652-1905 Vol I, 1652-1879* (1906) 1012-1015. It must be borne in mind that after the enactment of the 1860 Crown Lands Act, the waste land in the Cape Colony, which included land occupied on a communal basis, was Crown land and any rights in such land were subject to the will of the Crown.

¹¹³ See Chapter 7.

¹¹⁴ See section 3.3.3.1 of Chapter 3.

¹¹⁵ In section 2.3.2 of Chapter 2 the reasons why nomadic hunter-gatherer indigenous communities are excluded from this thesis are discussed. Although many of the expeditions of the commandos in the interior of the Cape Colony were aimed at punishing these indigenous communities, it is only the possible dispossession of independent pastoral indigenous communities that is discussed in this section.

¹¹⁶ These independent indigenous communities are referred to as 'sub-groups' in Chapter 11. In order to ensure terminological consistency, the same phrase will be used in this section. See section 11.2.2.2 of Chapter 11 for the meaning of 'sub-group'.

a copper-headed staff of office.¹¹⁷ In the early eighteenth century it was accepted that the colonial government would protect these subordinate indigenous communities.¹¹⁸ The displacement of sub-groups in the northern part of the South-Western Cape,¹¹⁹ the Southern Cape and the Northern Cape is discussed in separate sections.

12.4.1 Displacement of indigenous communities in the northern part of the South-Western Cape

The movement of non-indigenous settlers into the Land van Waveren in 1700 led to active resistance by hunter-gatherer indigenous communities and a sub-group, called the Grigriqua, that regarded the area as their territory. This resistance mostly took the form of raids on the Company's livestock kept at Company outposts and the livestock of non-indigenous settlers and loyal sub-groups.¹²⁰

At this stage the colonial government took the lead in defending the non-indigenous settlers and the loyal sub-groups against the depredations of the raiding indigenous communities. It strengthened the garrisons of the outposts situated in the Land van Waveren and another named *Over de Bergrivier* and resolved to erect another outpost between the said outposts.¹²¹ The willingness of the soldiers stationed at the outposts to assist the loyal sub-groups to retrieve their stolen

¹¹⁷ Marks (n 21 above) 76. MC Legassick *The politics of a South African frontier: The Griqua, the Sotho-Tswana and the missionaries, 1780-1840* (2010) 48; Penn (n 9 above) 38; Elphick (n 5 above) 188, 191.

¹¹⁸ Marais (n 5 above) 111. Elphick (n 5 above) 181, 188. The word 'independence' in the context of this section means that the indigenous communities were authorised to live in encampments on land that was not occupied by non-indigenous persons. 'Independence' therefore does not mean political independence.

¹¹⁹ Elphick gives a detailed description of the many splinter groups of the major indigenous communities that remained in the South-Western Cape prior to 1713. From his discussion of the expedition to obtain livestock conducted by the landdrost of Stellenbosch in 1705, it is evident that most of these splinter groups lived north of Cape Town. It is accepted that most of the unoccupied land where sub-groups could live was north of Cape Town and especially north of the Berg River. For the purposes of this section, the northern part of the South-Western Cape means the area north of the Berg River towards the Olifants River. Elphick (n 5 above) 229-230. See also the fold-out map of the landdrost's journey at the back of EH Raidt (ed) *François Valentyn Description of the Cape of Good Hope with the matters concerning it Amsterdam 1726 Part II* (1973). Elphick also remarks that due mainly to the smallpox epidemic of 1713, he could find no evidence of sub-groups living south of the Olifants River or east of the Company outpost Riet Valleij in the Overberg after 1721. Elphick (n 5 above) 234.

¹²⁰ Elphick (n 5 above) 226-227; Penn (n 9 above) 32-34; D Sleight *Die buiteposte: VOC-buiteposte onder Kaapse bestuur 1652-1795* (2007) 523-525.

¹²¹ Sleight (n 120 above) 524.

livestock is evidenced by the fact that even when it was only their livestock that was stolen, the soldiers pursued the perpetrators.¹²²

The harmonious relationship between the colonial government, loyal sub-groups and non-indigenous settlers quickly deteriorated after the common enemy in the Land van Waveren-Berg River region had been subdued. The major cause of this deterioration was the unlawful livestock raids that were conducted by non-indigenous settlers on indigenous communities.¹²³ Although the raids were initially aimed at indigenous communities living far away from the Company outposts, these raids gradually moved nearer.¹²⁴ As these crimes became known to the colonial government, investigations into the matter were instituted and the trade in livestock between non-indigenous settlers and indigenous communities was again prohibited.¹²⁵

The report of the landdrost of Stellenbosch on the conditions he encountered in the northern part of the South-Western Cape during an expedition to obtain cattle for the Company in 1705, casts some light on how the Grigriqua indigenous community was displaced. This community informed the landdrost that they had so little livestock left, because a band of non-indigenous settlers had attacked them without provocation or warning and had taken all their livestock and destroyed all their belongings. The livestock they did have with them was what they had stolen from non-indigenous settlers or other sub-groups.¹²⁶ Penn is of the opinion that it was such conduct of the non-indigenous settlers, of which there were many more instances, that led to an independent indigenous community like the Grigriqua 'ceasing to exist'.¹²⁷ He remarks as follows in this regard:¹²⁸

¹²² Sleight (n 120 above) 525-526; Penn (n 9 above) 35-38.

¹²³ Penn (n 9 above) 38-39; Elphick (n 5 above) 226-227.

¹²⁴ As above.

¹²⁵ Penn (n 9 above) 39; Elphick (n 5 above) 227-228.

¹²⁶ Penn (n 9 above) 40; Elphick (n 5 above) 226; Raidt (n 119 above) 25. It must be noted that in the diary of the landdrost, which is reproduced in Raidt's work, reference is made to the chief '*Hannibal's kraal*'. According to Elphick, 'Hanibal' was the successor to the Cochoqua chief Oedasoa. Elphick (n 5 above) 133. However, Elphick advances the theory that 'Hanibal' was at that stage a 'supraclan' chief that ruled over six other clans ('sub-groups') living in one encampment, each with its own chief. Elphick (n 5 above) 230. It is therefore possible that the Grigriqua may have been one of these sub-groups.

¹²⁷ Penn (n 9 above) 40.

¹²⁸ Penn (n 9 above) 40-41.

Remnants of them had probably already started the process of evasive migration which would eventually take them to the banks of the Orange River. Some of them began to attach themselves to the stronger pastoralist societies about them. Others, no doubt, did become hunters or brigands in the mountains.

The displacement of the sub-groups from the northern part of the South-Western Cape took place because the colonial government was unable to protect the said communities against the criminal conduct of the non-indigenous settlers. In the cases where these communities were living in close proximity to Company outposts, the type of outrages reported by the landdrost did not take place.¹²⁹ However, the area to police was far too large and the colonial government did not have the resources to maintain the personnel and outposts that were established during the initial raids.¹³⁰ Therefore, although the conduct of certain non-indigenous settlers played an important role in the decision of the sub-groups to move away from the land that they had occupied, these settlers did not dispossess them of such land. There is no record of an orchestrated campaign by non-indigenous settler criminals colluding with the colonial government to force sub-groups from their land.

12.4.2 Displacement of indigenous communities in the Southern Cape

Very little is known about the fate of the sub-groups that remained when the principal indigenous communities of the Overberg and Southern Cape, the Chainouqua, Hessequa and Gouriqua, started to break up. By making use of Sleigh's description of the various trading expeditions into the Southern Cape, it is possible to get an idea of the disintegration of these communities.

Sleigh remarks that from 1680 the Chainouqua and Hessequa, who were important trade partners providing livestock to the colonial government, were being subjected to increased attacks from hunter-gatherer indigenous communities.¹³¹ The smallpox epidemic of 1713 also had a devastating effect on the indigenous communities in the Overberg. Where an expedition in 1712 found 10 or 12 encampments with more than enough livestock, in 1725 they found only six

¹²⁹ Penn (n 9 above) 41.

¹³⁰ Sleigh (n 120 above) 527.

¹³¹ Sleigh (n 120 above) 65-67.

encampments which had been reduced to extreme poverty by the epidemic, sickness among the livestock and raids by even more desperate indigenous communities.¹³²

In 1752, when an expedition travelled through the Southern Cape on its way to the Xhosa indigenous communities' territory, it found the situation of the sub-groups to be much the same as it was in 1725.¹³³ The already dire situation of the Southern Cape sub-groups became worse when in 1755 they were the victims of a disease affecting the gall bladder, which again decimated their numbers.¹³⁴

An encounter between the Swedish traveller and naturalist, Anders Sparrman, and the chief of an independent indigenous community provides some insight into the relationship between the non-indigenous settlers and the sub-groups in the Southern Cape. This encounter took place in September 1775, when Sparrman was travelling from the Company outpost at Rietvalleij aan de Buffeljagtsrivier to Mossel Bay.¹³⁵ During their conversation the chief, Rundganger, remarked that he regarded the non-indigenous settlers as 'unjust invaders of the Hottentot territories'.¹³⁶ He remarked that not a day went by that one or other indigenous person or community was not ordered by a non-indigenous settler to vacate the land that he was occupying for his encampment and grazing.¹³⁷ What was more, while he as chief had previously been treated with deference and was not obliged to move around, he had lately been forced to use inferior grazing near the sea where his livestock was exposed to predators.¹³⁸

Although the actions of the non-indigenous settlers in the sketched circumstances were unacceptable, and probably illegal, they did not constitute dispossession of the indigenous communities' rights in land. If the indigenous communities had been forced to relocate to another area where they did not have

¹³² Sleigh (n 120 above) 71.

¹³³ Marais (n 5 above) 110; Sleigh (n 120 above) 73.

¹³⁴ Sleigh (n 120 above) 73.

¹³⁵ Sleigh (n 120 above) 581.

¹³⁶ VS Forbes (ed) *Anders Sparrman: A voyage to the Cape of Good Hope towards the Antarctic polar circle round the world and to the country of the Hottentots and the Caffres from the year 1772-1776 Volume I* (1975) 230; Elphick (n 5 above) 24.

¹³⁷ Forbes (n 136 above) 230.

¹³⁸ As above.

land to use as grazing or had to move to a mission station, they would have been dispossessed of their rights in land. However, the manner in which land was occupied by the non-indigenous settlers and indigenous communities during the eighteenth century allowed for a system where, as long as there was enough land available, a stronger party could compel a weaker party to make do with the available grazing.¹³⁹

It is quite possible that the colonial officials had, through a lack of interest or general incompetence, granted loan places to non-indigenous settlers where land was occupied by indigenous communities. Although the colonial government may have been to blame for the type of situation of which Rundganger complained, it often rectified the situation when it became aware of it.¹⁴⁰ In a case where a non-indigenous settler was granted a loan place on land that an indigenous person and his family had been occupying for more than 30 years, the settler was prevented from forcing them to leave. The landdrost had to ensure that an agreement was concluded between the parties regarding the use of the land.¹⁴¹

12.4.3 Displacement of indigenous communities in the Northern Cape

Without referring to specific sub-groups, Mitchell remarks that from the time of 'sustained colonial occupation' of the Olifants River Valley in 1725, hunter-gatherer and pastoral indigenous communities found that they were being pushed into increasingly marginal lands.¹⁴² This displacement led to resistance by both sets of indigenous communities and was one of the reasons for the outbreak of the 1739 war.¹⁴³

The commando consisting of non-indigenous settlers called up to finally end the 1739 war in the northern frontier region of the Cape Colony campaigned to the

¹³⁹ See sections 2.4.1.2.2, 2.4.2.3 and 2.5.2 of Chapter 2 with regard to the manner in which non-indigenous settlers and indigenous communities occupied land used as grazing and overlapping occupation of land in the Southern Cape. It must be borne in mind that, when the Company had just arrived at the Cape, they often had to make do with the second best grazing when the livestock-rich indigenous communities from Saldanha Bay came to the Cape. In this regard see section 8.2.1.2 of Chapter 8.

¹⁴⁰ Sleigh (n 120 above) 76.

¹⁴¹ As above.

¹⁴² LJ Mitchell 'Traces in the landscape: Hunters, herders and farmers on the Cedarberg frontier, South Africa, 1725-95' (2002) 43 *The Journal of African History* 437, 438.

¹⁴³ Mitchell (n 142 above) 439.

north of the Olifants River in the Bokkeveld. The encampments of a number of sub-groups were attacked.¹⁴⁴ At the end of this campaign the commando returned to Stellenbosch where the confiscated livestock was redistributed. Some of the livestock was returned to the original non-indigenous settler owners, others were given to the indigenous persons who were members of the commando, while the rest was retained by the Company. The Company soldiers who had been stationed at the Olifants River for security reasons during the war were recalled.¹⁴⁵

Penn remarks that after the 1739 war the non-indigenous settlers were 'in complete control of all suitable pastoral land south of Namaqualand and west of the Bokkeveld'.¹⁴⁶ Only isolated sub-groups remained in the Bokkeveld, Piketberg, Sandveld, Olifants and Doorn River areas. These communities' chiefs were obliged to signify their subjugation to the colonial government by accepting a copper-headed staff of office from the governor. The conclusion of the 1739 war made it possible for the non-indigenous settlers to enter the abovementioned areas and occupy land that had been occupied by the defeated and dispersed indigenous communities.¹⁴⁷

In the South-Western and Southern Cape the sub-groups had to share their grazing land and yield to the will of the non-indigenous settlers due to a wide range of circumstances that had gradually weakened their position. In the part of the Northern Cape under discussion, the military victory of a non-indigenous commando caused the change in fortune of the indigenous communities. These circumstances enabled the non-indigenous settlers to claim and occupy land that they would not have been able to do under normal circumstances. Although there were still isolated sub-groups living in the areas concerned those who had been driven from the area were dispossessed of their rights in land.¹⁴⁸

¹⁴⁴ Penn (n 9 above) 72. Penn remarks that in the case of two of the encampments that were attacked, the indigenous communities were granted peace and in one case some of the community's livestock was not confiscated. It is not clear whether the encampments were destroyed in the other cases.

¹⁴⁵ Penn (n 9 above) 73; Sleigh (n 120 above) 535-536.

¹⁴⁶ Penn (n 9 above) 77.

¹⁴⁷ As above.

¹⁴⁸ As above.

Guelke remarks that non-indigenous settlers dispossessed sub-groups in arid areas by taking control of the available water resources.¹⁴⁹ The Northern Cape is an arid area where such dispossession could have taken place. If an independent indigenous community was forced to move away from the land that it had occupied, because it was denied access to a water resource that it had always used, it was dispossessed of rights in land.

12.4.4 Conclusion regarding the displacement of indigenous communities

In sections 2.5.1 to 2.5.3 of Chapter 2 the overlapping occupation of land in the South-Western, Southern and Northern Cape is set out. It is remarked that in all these regions the incursions of non-indigenous settlers into the territories of indigenous communities were to the detriment of the latter. In sections 12.4.1 to 12.4.3 this statement is discussed in more detail.

From this discussion it emerges that the main reason why the incursions of non-indigenous settlers into the territories of indigenous communities cannot, as such, be regarded as dispossession of their rights in land, is that in most cases such incursions were only one of many reasons why indigenous communities were losing their control over land. However, in cases where the non-indigenous settlers—

- (a) by armed force seized land occupied by indigenous communities to utilise for their own purposes; or
- (b) used essential resources such as water in a manner that made it impossible for the indigenous community to retain the land they occupied,

they were dispossessing the indigenous communities of their rights in land.

12.5 Conclusion

The purpose of this chapter is to consider the circumstances in which the rights in land of the indigenous communities in the study area were limited or extinguished. The discussion reveals that in the South-Western Cape, the surveying of land that was allocated or leased to non-indigenous settlers was an act of colonial governments that led to the dispossession of indigenous communities' rights in land.

¹⁴⁹ Guelke (n 17 above) 817, 819, 820.

In the interior of the Cape Colony it was the indigenous residents of mission stations and independent sub-groups whose rights in land were affected.

In the Northern Cape the mission stations were established at places where indigenous communities already occupied large territories. The rights in land in terms of customary law systems of the residents of these mission stations had existed before the mission stations were established. The missionaries at these stations deemed it necessary to secure the rights in land that the residents of the mission stations had in terms of the domestic law of the Cape Colony. To this end the missionaries applied to the British colonial government for ToO's. These proved to be two-edged swords. In the case of Ebenhaeser, Leliefontein and Komaggas, the ToO's restricted the residents from exercising their rights where they had previously been able to do so. It therefore caused the dispossession of the rights in land of these residents. In the case of Steinkopf and Richtersveld, the failure of the ToO's to determine the limits of the land that was covered by the nomadic orbits of the residents had the effect that the land was regarded as waste land and was surveyed and sold or leased to non-indigenous persons. The activities of the mining companies discussed in section 12.3.4 also had the effect that the residents of Steinkopf and Richtersveld were dispossessed of their rights in land.

13 Survival of customary law systems in the Northern Cape in the twenty-first century

13.1 Introduction

The study area as defined in section 1.2 of Chapter 1 and 2.6 of Chapter 2 covers the Southern Cape, South-Western Cape and the Northern Cape. In section 11.5.2.1 of Chapter 11 I conclude that the new communities that came into existence at mission stations in the Southern and South-Western Cape were no longer able to conduct livestock farming in terms of customary law rules on the land of the mission stations. This chapter is therefore only concerned with Ebenhaeser and the mission stations in the Northern Cape.¹

For the purposes of this thesis it is important to determine whether livestock farming is still conducted on the communal land² in the Northern Cape. If so, it must be determined whether such farming on communal land is done in accordance with customary law rules.

From 1909 the government of the Cape Colony and the governments of the Union and Republic of South Africa regulated the occupation of land by the indigenous communities of South Africa through a wide variety of legislation. The different Acts that governed the occupation of land on the Reserves are discussed in this chapter. From the discussion it is clear that the policy of these governments was to try to phase out the system of communal land use on the Reserves. The residents of the Reserves where this policy was applied prevented its successful implementation by launching court proceedings against the government.

In order to determine to what extent the residents of the Reserves are still making use of customary law rules for livestock farming on the Reserves, the

¹ In this chapter Ebenhaeser, Leliefontein, Komaggas, Steinkopf and Richtersveld are collectively referred to as the Reserves. In this and subsequent chapters the part of the study area where the Reserves are is referred to as the 'Northern Cape'.

² The discussion regarding the land on the Reserves in this chapter makes it clear that each of the Reserves has communal areas. Each of the Reserves also has communal areas that are reserved for livestock farming. It is this type of communal land that this chapter is mainly concerned with. I use the phrase commonage as it is used in the legislation that is discussed in this chapter. It must be borne in mind that in this legislation communal land near the settlements which is used as grazing, but also for other purposes, is also referred to as commonage.

manner in which land is at present used in the Northern Cape is researched. However, the majority of the available resources dealing with occupation of communal land in the Northern Cape are concerned with Leliefontein. Consequently, I deem it appropriate to limit my remarks in section 13.3 to the manner in which communal land is used in Leliefontein.³

The use of stock posts for the purposes of herding livestock on Leliefontein is discussed in section 13.3. The principles underlying the use of stock posts are in essence the same as the principles that governed the establishment of communal land use units,⁴ although on a much smaller scale. For the purposes of this thesis, the use of stock posts to regulate the grazing of the various flocks on Leliefontein is regarded as sufficient evidence that the customary law rules of occupation of land have, on Leliefontein, survived to the present day.

13.2 Legislation regulating the use of land on the Reserves

At various stages during the twentieth century legislation was enacted that had an impact on the manner in which the residents of the Reserves used communal land or commonage. In the following sections this legislation is discussed.

13.2.1 The Mission Stations and Communal Reserves Act

The Mission Stations and Communal Reserves Act⁵ ('Mission Stations Act') was enacted during the last parliamentary session of the Parliament of the Cape Colony before the establishment of the Union of South Africa. The long title of the Mission Stations Act states that 'the granting of titles to the Inhabitants of such Stations and Reserves' is one of the purposes of the Act.⁶ This shows that it was the intention of the legislature that the landholding of the residents of the mission stations and communal reserves should be placed on a formal footing. This thesis is primarily concerned with the use of land as pasture and grazing. Consequently, it is the

³ Time and financial constraints made it impossible to personally visit the other Reserves in the Northern Cape to conduct research on how communal land is used there.

⁴ See the discussion of communal land use units in section 11.2.2.5 of Chapter 11.

⁵ 29 of 1909 (Cape of Good Hope).

⁶ *Colony of the Cape of Good Hope Acts of Parliament Sessions of 1908, being the first and second sessions of the twelfth Parliament* (1908) 5544.

provisions of the Mission Stations Act that deal with the commonage at mission stations and communal reserves that are considered in the following sections.

13.2.1.1 Preliminary matters: Definition section and bringing the Reserves within the ambit of the Mission Stations Act

Before the provisions of the Mission Stations Act dealing with commonage can be considered, the applicability of the said Act to the Reserves must be determined. For the purposes of this section, the definitions of 'communal reserve' and 'mission station' in section 1 of the Mission Stations Act must be considered:⁷

"Communal reserve" shall mean any Crown land in the Division of Namaqualand reserved or set apart otherwise than by formal grant for the occupation of native or other communities;

"Mission station" shall mean any land held by a missionary society or religious body as a grant in trust for the natives or coloured persons in occupation of such land.

In the following two sections, the connection is established between the land identified in the Tickets of Occupation ('ToO's') that were granted to the mission station Ebenhaeser and the communal reserves Leliefontein, Komaggas and Steinkopf⁸ and the land administered in terms of the Mission Stations Act.

13.2.1.1.1 *Application of the Mission Stations Act to the land at Ebenhaeser*

The diagram attached to the ToO granted for Ebenhaeser in 1837 identified, in addition to land granted in trust to the Rhenish Missionary Society ('RMS'), an area for the exclusive use of the indigenous community that had been living on the farm Doringkraal before the RMS was invited to establish a mission station.⁹ The ToO did not specifically state that the RMS held Doringkraal in trust for the indigenous community. In 1890 the RMS decided that it could not continue the missionary work at Ebenhaeser and approached the commission of the Dutch Reformed Church charged with missionary activity, the *Binnenlandsche Zending Commissie*, to take

⁷ *Acts of Parliament* (n 6 above) 5545.

⁸ Discussed in sections 12.3.3.5.1 to 12.3.3.5.4 of Chapter 12. Although mission stations were also established at Leliefontein, Komaggas and Steinkopf, these institutions were designated as communal reserves in terms of the Mission Stations Act.

⁹ PL Scholtz 'Die historiese ontwikkeling van die Onder-Olifantsrivier 1660-1902' in *Argief-jaarboek vir Suid-Afrikaanse geskiedenis Deel II* (1966) 184-185. A diagram attached to a deed of transfer dated 21 September 1926 shows the land granted to the RMS and the land that was for the exclusive use of the indigenous community. See ST Cronje 'Ebenezer: 'n Sosiaal-historiese studie van 'n landelike Kleurlinggemeenskap' unpublished Masters dissertation, 1979 University of Stellenbosch Annexure I ('Bylaag I').

over the administration of the mission station. The land granted to the RMS and the land reserved for the exclusive use of the indigenous community (Doringkraal) was transferred to the commission on 14 April 1890.¹⁰ The effect of this transfer was that all the land at Ebenhaeser was held in trust for the residents of the mission station.¹¹

In the 1920's an irrigation scheme was launched in the Lower Olifants River region. As part of this scheme, it was decided that the residents of Ebenhaeser would be relocated to land next to the land they had been occupying in terms of the Ebenhaeser ToO.¹² To this end the Union Parliament enacted the Ebenezer (Van Rhynsdorp) Exchange of Land Act¹³ ('Exchange of Land Act'). The Mission Stations Act was made applicable to the residents of Ebenhaeser in terms of section 5(1) of the Exchange of Land Act. This section provided that the new land that was allocated to the residents of Ebenhaeser would be regarded as a mission station and would be subject to the Mission Stations Act.

13.2.1.1.2 *Application of the Mission Stations Act to the land at Leliefontein, Komaggas and Steinkopf*

In terms of Proclamation 53 of 1912¹⁴ ('Proclamation 53'), which was made under section 20 of the Mission Stations Act, the land at Leliefontein, Komaggas and Steinkopf was classified as communal reserves under the Act. Proclamation 53 made the provisions of Part II of the Mission Stations Act applicable to the residents of the abovementioned mission stations. As the land on a communal reserve is defined in section 1 of the Mission Stations Act as reserved or set apart otherwise than by formal grant, it is clear that the legislature did not regard the relevant ToO's as formal grants of land. However, in the Schedule to Proclamation 53, specific reference is made to the land that was reserved for the use of the indigenous residents of Leliefontein, Komaggas and Steinkopf. It is therefore clear that the

¹⁰ Cronje (n 9 above) 30.

¹¹ This statement is made in view of the following remarks in the preamble of the Ebenezer (Van Rhynsdorp) Exchange of Land Act 14 of 1925:

...under a deed of transfer dated the 14th April, 1890, the Home Mission Committee of the Dutch Reformed Church in the Colony of the Cape of Good Hope with the consent of the inhabitants of the said Ebenezer Station accepted transfer of the aforesaid land known as the Ebenezer Station in trust for the Black occupants of such land, subject to certain conditions and with all the privileges and duties set forth in the aforesaid Grant.

¹² Cronje (n 9 above) 88-89.

¹³ 14 of 1925.

¹⁴ *Government Gazette* No. 218 of 29 March 1912.

boundaries of the land formally described in the Schedule to Proclamation 53 conformed to the boundaries of the land identified in the ToO's.

13.2.1.1.3 *Application of the Mission Stations Act to the land at Richtersveld*

The provisions of Part II of the Mission Stations Act were made applicable to the land at Richtersveld in terms of Proclamation 182 of 1957¹⁵ ('Proclamation 182'). The Schedule to Proclamation 182 did not refer to the ToO issued to the residents of Richtersveld. The land that was subject to the Mission Stations Act was identified in the Schedule to Proclamation 182, by making reference to Diagram No. B.707/ 1927 on which the boundaries of the land were set out.

13.2.1.2 Provisions of the Mission Stations Act dealing with commonage

Part I of the Mission Stations Act deals, amongst other things, with all the land at mission stations, while Part II deals, amongst other things, with all land on communal reserves. Part I of the Mission Stations Act provided for only one type of commonage. This commonage was the land that remained¹⁶ at the mission station after—

- (a) land had been allotted to a missionary society in terms of section 4(1) of the Mission Stations Act;
- (b) the remaining land had been divided and surveyed in terms of section 8(1)(a) of the Mission Stations Act;
- (c) land had been—
 - (ii) allotted to the residents of the mission station in terms of section 8(1)(b) of the Mission Stations Act; and
 - (iii) set aside for public buildings and to be used for public purposes in terms of section 8(1)(c) of the Mission Stations Act.

In terms of section 12 of the Mission Stations Act, it was lawful for the governor of the Cape Colony, subject to certain conditions, to sell portions of the commonage that were not required for the purposes of the community.¹⁷ The board of management of a mission station had the power to make regulations with regard to

¹⁵ *Government Gazette* No. 5895 of 28 June 1957.

¹⁶ See section 8(1)(d) of the Mission Stations Act. *Acts of Parliament* (n 6 above) 5548.

¹⁷ *Acts of Parliament* (n 6 above) 5551.

the numbers of livestock each resident could keep on the commonage and the charges that had to be paid if the resident exceeded this quantity.¹⁸

Part II of the Mission Stations Act provided for two types of commonage on communal reserves. In terms of Section 24(1) of the Act a sufficient area had to be set aside for use as commonage around the residential areas within a communal reserve.¹⁹ In addition, if a board of management adopted a resolution to have the remaining land around the commonage defined and demarcated and the resolution was approved by the residents of the communal reserve, the governor had the power to define and demarcate such land as the outer or reserve commonage.²⁰ The governor was also authorised to determine the claims of the residents of the communal reserve who were exercising rights in the outer commonage. It must be accepted that the rights that the residents could exercise in the outer commonage were the right to cultivate land and to use the land as grazing.²¹

In terms of section 24(2) of the Mission Stations Act, each resident of the communal reserve could, with the concurrence of both Houses of Parliament, be granted title to the part of the outer commonage where he exercised the right to cultivate land or graze his livestock. Such titles were subject to the same conditions under which land was granted on perpetual quitrent, but the residents of the communal reserves were not liable to pay quitrent. The governor had the power to sell the remaining land in the outer commonage at a public auction after title had been granted to the residents of the communal reserve in terms of section 24(2) of the Mission Stations Act.²²

¹⁸ Section 17 of the Mission Stations Act. *Acts of Parliament* (n 6 above) 5553.

¹⁹ From the context it appears that the meaning of the phrase 'common lands or commonage' in section 24(1) of the Mission Stations Act is the same as the meaning of commonage in section 8(1)(d) of the Mission Stations Act. *Acts of Parliament* (n 6 above) 5555.

²⁰ *Acts of Parliament* (n 6 above) 5555.

²¹ The residents could not have had the right to use the outer commonage for residential purposes, as the section already refers to residential areas and commonage is by definition not used for individual purposes like building houses.

²² *Acts of Parliament* (n 6 above) 5555

13.2.2 The Rural Coloured Areas Act

Section 56 of the Rural Coloured Areas Act²³ ('RCA Act') repealed the whole of the Mission Stations Act insofar as it related to existing areas.²⁴ For the purposes of this thesis it is necessary to determine whether the Reserves were existing areas as defined in section 1 of the RCA Act.

13.2.2.1 Applicability of the RCA Act to the Reserves

The definition of 'existing area' provided as follows:²⁵

"existing area" means any area consisting of one or more pieces of land (whether contiguous or not) to which the provisions of the Act of 1909 are applicable at the commencement of this Act...²⁶

The 'Act of 1909' referred to in this definition is the Mission Stations Act. From the remarks in sections 13.2.1.1.1 to 13.2.1.1.3 it is clear that the provisions of the Mission Stations Act were applicable to the Reserves. As the Exchange of Land Act and Proclamations 53 and 182 were still in force when the RCA Act entered into force, the Reserves were existing areas.

In terms of section 3(1) of the RCA Act the Act was made applicable to all existing areas except where such areas were expressly excluded.²⁷ Section 3(2) of the RCA Act ensured that, for example, boards of management established in terms of the Mission Stations Act would be regarded as boards of management established in terms of the RCA Act. In other words, section 3(2) of the RCA Act provided that all the existing arrangements made under the Mission Stations Act would remain in force if the RCA Act provided for similar arrangements. The RCA Act was also applicable to another type of land referred to as 'incorporated areas'. This type of land was in a rural area proclaimed by the State President in terms of section 4 of the RCA Act to be land 'reserved for occupation and ownership of Coloured persons'.²⁸

²³ 24 of 1963.

²⁴ *Statutes of the Republic of South Africa 1963 Part I* 266, 268.

²⁵ *Statutes* (n 24 above) 208.

²⁶ The definition excludes two mission stations in the eastern part of the Cape Province which fall outside the study area and are not relevant for the purposes of this thesis.

²⁷ *Statutes* (n 24 above) 210.

²⁸ As above.

13.2.2.2 Provisions of the RCA Act dealing with commonage

Section 21 of the RCA Act dealt with commonage and outer commonage on land proclaimed as incorporated areas in terms of section 4 of the RCA Act. Section 21(d) of the RCA Act authorised the Minister of Coloured Affairs ('Minister') to classify the land on incorporated areas to provide for, amongst other things, town commonage and for an outer commonage. From section 21(d)(ii) it appears that the town commonage would only be available as grazing insofar as it was not used for the expansion of the residential areas and matters connected with the residential areas.²⁹

The land that remained at an incorporated area after the Minister had identified the areas that had to be used for residential purposes, town commonage, cemeteries, afforestation and agricultural purposes, was regarded as the outer commonage. In terms of section 21(4)(d)(v) the outer commonage was reserved for the exclusive use of *bona fide* farmers.³⁰ It is clear that it was livestock farmers that were referred to as *bona fide* farmers, as the agricultural areas on reserves³¹ are distinguished from the outer commonage.³²

One of the purposes of the RCA Act, as is reflected in the provisions of section 21, was to ensure proper planning with regard to the land on incorporated areas.³³ In terms of section 49 of the RCA Act the Minister was authorised to apply section 21(d) to land at existing areas such as the Reserves. The Minister obtained this power in the cases where planning had not been done to his satisfaction on existing areas.³⁴

²⁹ Statutes (n 24 above) 226.

³⁰ RF Rohde et al 'Land Reform in Namaqualand: poverty alleviation, stepping stones and "economic units"' in *Land reform and agrarian change in southern Africa: An occasional paper series No 16* (2001) 9.

³¹ In this and the following sections 'incorporated areas' and 'existing areas' are collectively referred to as 'reserves'. The distinction made in the Mission Stations Act between mission stations and communal reserves is not continued in the RCA Act.

³² *Bona fide* farmers could also occupy agricultural lots on the incorporated area. However, to be a *bona fide* farmer a person had to have livestock grazing on the outer commonage.

³³ I Boonzaaier 'Die invloed van 'n historiese ontwikkelingspatroon op hedendaagse wetgewing en grondhervorming: Die Wet op Landelike Gebiede (Wet 9 van 1987) en sy historiese probleme' unpublished Masters dissertation, University of Stellenbosch, 2001 32-33.

³⁴ Statutes (n 24 above) 258.

13.2.3 Rural Coloured Areas Law

The whole of the RCA Act, except section 4, was repealed by the Rural Coloured Areas Amendment Act³⁵ which entered into force on 21 March 1980.³⁶ The Rural Coloured Areas Law³⁷ ('1979 Law') came into force on the same date.³⁸ The 1979 Law contained the same definition of 'existing area' and virtually the same section 3 as the RCA Act, which means that it was applicable to the Reserves. Sections 14 and 41 of the 1979 Law were virtually the same as sections 21 and 49 of the RCA Act. The rules governing the commonage on the Reserves therefore remained the same under the 1979 Law.

Section 1 of the Rural Coloured Areas Amendment Act³⁹ inserted two new provisions in the 1979 Law that related to the commonages on reserves. In addition to the requirement in section 14(d)(v) of the 1979 Law that the outer commonage was for the exclusive use of *bona fide* farmers, a new provision was inserted that authorised the subdivision of the outer commonage into farms. Furthermore, section 14 was amended by the insertion of the following paragraph:

(eA) after an outer commonage has been subdivided into farms under paragraph (d)(v), grant each such farm at the request of the board of management concerned to a *bona fide* farmer, and upon payment of the ascertained costs of survey and the purchase price issue to him a deed of grant or deed of transfer in respect of the farm in accordance with such conditions as may be determined by the State President, which shall be incorporated in every subsequent title deed.

The new provisions in the 1979 Law made it possible for the boards of management of reserves to grant the outer commonage on incorporated areas to individuals as private farms. The introduction of these new provisions presented the residents of reserves who were *bona fide* farmers, with the choice whether they wanted to continue farming on a communal basis or whether they wanted to farm on land granted to them in private individual title in terms of section 14(eA) of the 1979 Law.

³⁵ 31 of 1978.

³⁶ See Proclamation 68 of 1980 published in *Government Gazette* No. 6916 of 28 March 1980.

³⁷ 1 of 1979.

³⁸ See Proclamation 67 of 1980 published in *Government Gazette* No. 6916 of 28 March 1980.

³⁹ 46 of 1983.

13.2.3.1 Application of the new section 14(d)(v) of the 1979 Law in Leliefontein
 In 1985 the designated member contemplated in section 14 of the 1979 Law was the Minister of Local Government, Housing and Agriculture in the Ministers' Council of the House of Representatives.⁴⁰ He decided that he was not satisfied with the planning that had been done at Leliefontein, an existing area, and that the provisions of section 41, read with section 14(d)(v) and (eA) of the 1979 Law had to be implemented.⁴¹ To this end, the outer commonage at Leliefontein was surveyed and divided into 47 units that ranged in size from 1725 to 4850 hectares.⁴² Thirty of the surveyed units were leased to individuals and groups of individuals, while the remaining 17 surveyed units were used as communal grazing by the remaining 203 communal farmers at Leliefontein.⁴³

Robins remarks that the introduction of private farms on the outer commonage of Leliefontein led to an 'intense conflict' between the farmers, who were also the lessees of the surveyed units, and those who had to use the reduced-in-size communal land.⁴⁴ After the remaining communal farmers were unsuccessful with petitions to the relevant authorities, an application was launched in the Cape Provincial Division of the Supreme Court for the setting aside of the decisions that had led to the establishment of the units at Leliefontein.⁴⁵

In *Bekeur en Andere v Minister van Plaaslike Bestuur, Behuising en Landbou en Andere*⁴⁶ (*Bekeur*), the Court set aside the decisions of the defendants as they did not comply with the procedural requirements that were necessary to implement the relevant sections of the 1979 Law.⁴⁷ For the purposes of this thesis, the

⁴⁰ The members of the Ministers' Council were the political heads of the state departments charged with administering 'own affairs' in terms of sections 19(1)(a) and 21(1)(a) of the Republic of South Africa Constitution Act 110 of 1983.

⁴¹ *Bekeur en Andere v Minister van Plaaslike Bestuur, Behuising en Landbou en Andere* 1990 1 SA 335 (C) 336, 340-341 ('*Bekeur*').

⁴² *Bekeur* (n 41 above) 341; S Robins 'Transgressing the borderlands of tradition and modernity: Identity, cultural hybridity and land struggles in Namaqualand (1980-94)' (1997) 15 *Journal of Contemporary African Studies* 27-28.

⁴³ R Hill et al 'Conflict over change in land tenure in the reserves of Namaqualand, South Africa: A role for integrated environmental management' (1990) 8 *Impact Assessment* 201.

⁴⁴ Robins (n 42 above) 28; RF Rohde & MT Hoffman 'One hundred years of separation: The historical ecology of a South African 'Coloured Reserve'' (2008) 78 *Africa* 205.

⁴⁵ Hill (n 43 above) 204.

⁴⁶ See note 41.

⁴⁷ *Bekeur* (n 41 above) 344-346.

importance of *Bekeur* lies in the reasons why the applicants launched the application. The initial complaints that the communal farmers directed to the officials of the government department charged with the implementation of the unit system were based on historical grounds. The communal farmers contended that during the nineteenth century the British crown guaranteed them continued possession of their communal land on Leliefontein.⁴⁸ The applicants also referred to the negative impact that the erection of fences, pursuant to the surveying of the units, had on the use of communal land. It was argued that the presence of fences was detrimental to the practice of seasonal movement of livestock on Leliefontein.⁴⁹

Although the court in *Bekeur* did not base its decision on the abovementioned arguments to grant the order sought by the applicants, its decision ensured the survival of the outer commonage at Leliefontein for the use of communal farmers. The launch of court applications to ensure the survival of outer commonages at Leliefontein, Steinkopf and Richtersveld indicates that, at the beginning of the 1990's, a significant number of the residents of these reserves still placed a high premium on continuing to farm on communal land.⁵⁰

13.2.4 Rural Areas Act (House of Representatives)

From the affidavits submitted to the court on behalf of the first defendant in *Bekeur*, it appears that in the early part of the 1980's the government was convinced that communal farming on reserves in Namaqualand was not economically sustainable.⁵¹ The Rural Areas Act (House of Representatives)⁵² ('RA Act'), which repealed the 1979 Law, reflected this conviction of government by providing for the establishment of private farms on the commonages of reserves.

Whereas the earlier legislation discussed above preserved the outer commonages on reserves for the communal use of *bona fide* farmers, section

⁴⁸ Robins (n 42 above) 29. In this regard the media coverage given to *Bekeur* in 1987 referred to the issuing of the ToO to Leliefontein in 1854. Robins (n 42 above) 29-30.

⁴⁹ Robins (n 42 above) 31-32; Hill (n 43 above) 202.

⁵⁰ With regard to the court applications at Steinkopf and Richtersveld, see H Smith 'Namaqualand and challenges to the law: Community resource management and legal frameworks' Conference paper delivered at the Voices from the Commons, the Sixth Biennial Conference of the International Association for the Study of Common Property (1996) 9 footnote 16.

⁵¹ *Bekeur* (n 41 above) 340-341. See also Hill (n 43 above) 201; Smith (n 50 above) 6.

⁵² 9 of 1987.

20(2)(a)(iv) and (c) of the RA Act reserved the outer commonage for subdivision into farms. The requirement that the use of the outer commonage was for *bona fide* farmers was changed to farmers who would carry on farming to the satisfaction of the Minister of Local Government, Housing and Agriculture. Section 49 of the RA Act provided that if the Minister of Local Government, Housing and Agriculture was not satisfied with the planning at existing areas, the provisions of section 20(2)(a)(iv) and (c) could be made applicable to such areas and therefore also to outer commonages on the Reserves.

13.2.5 Transformation of Certain Rural Areas Act

When the President publishes a Proclamation in terms of section 10(2)(a) of the Transformation of Certain Rural Areas Act⁵³ ('Transformation Act'), the RA Act will be repealed and the legislative system that vested the ownership of the land on reserves in the state will be disestablished. Although the RA Act is still in force, the processes provided for in the Transformation Act are taking place at the reserves.⁵⁴ It is accepted that when all these processes have been completed and everything is in place for the successful transfer of land in terms of the Transformation Act, the RA Act will be repealed.

In section 1 of the Transformation Act the 'remainder' is defined as land situated in a board area other than township land, including land which has been planned, classified and subdivided as an agricultural area or outer commonage in terms of section 20(2) of the Rural Areas Act, 1987.

Section 1 of the Transformation Act defines 'board area' as

an area, or part of an area, consisting of one or more pieces of land, whether they are contiguous or not, to which the provisions of the Rural Areas Act, 1987, applied immediately before the commencement of this Act.

From these definitions it is clear that the land on the outer commonages of reserves, with which this section of this thesis is concerned, falls in the remainder.

⁵³ 94 of 1998. Section 10(2)(a) of the Transformation Act provides that the 'repeal of the laws listed in the Schedule comes into operation on a date determined by the President by proclamation in the *Gazette*'.

⁵⁴ JM Pienaar 'Lessons from the Cape: Beyond South Africa's Transformation Act' in L Godden & M Tehan (eds) *Comparative perspectives on communal lands and individual ownership* (2010) 188, 189-192.

At the commencement of the Transformation Act the land in existing areas was, like land in incorporated areas, held in trust in terms of section 7 of the RA Act by the then Minister for Agriculture and Land Affairs ('responsible Minister').⁵⁵ In terms of section 3(1)(a) of the Transformation Act, the responsible Minister is authorised to transfer the land that he holds in trust to an entity which is defined in section 1 of the Transformation Act as—

- (a) a municipality;
- (b) a communal property association registered in terms of section 8 of the Communal Property Associations Act;⁵⁶ or
- (c) another body or person approved by the said Minister in general or in a particular case.

Whereas the predecessors of the responsible Minister, as representative of the state and as trustee, had wide powers under the legislation discussed in sections 13.2.1 to 13.2.4, the entities contemplated in section 3(1)(a) of the Transformation Act will in future have to decide how the outer commonage on the Reserves should be used. Section 3(2) of the Transformation Act provides that the land may only be transferred if the responsible Minister is satisfied that the municipality, communal property association or other body can make suitable provision for a balance of security of tenure rights and protection of rights of use for the residents.

As part of the implementation of the Transformation Act in the Northern Cape, referenda were held at Leliefontein, Steinkopf and Richtersveld regarding the type of entity the trust land should be transferred to.⁵⁷ Leliefontein voted for transfer of the trust land to the municipality, while Steinkopf and Richtersveld voted in favour of transfer of the trust land to a communal property association.⁵⁸ However, at present it is impossible to predict what the future holds in store with regard to the regulation of the use of the outer commonage on the Reserves. The responsible Minister, in his written reply to a question put to him in Parliament (dated 2 March 2018), remarked that

⁵⁵ Pienaar (n 54 above) 188. Currently the responsible Minister is the Minister for Rural Development and Land Reform.

⁵⁶ 28 of 1996.

⁵⁷ P Wisborg & R Rohde 'Contested land tenure reform in South Africa: Experiences from Namaqualand' (2005) 22 *Development Southern Africa* 413-414.

⁵⁸ Wisborg (n 57 above) 413-414.

[p]roperties held in trust by the Minister in terms of the Transformation of Certain Rural Areas Act 98 of 1998 (TRANCRAA) are still to be transferred pending the establishment of legal entities as communities have opted. ... The land rights enquiry is planned to be completed in the 2018/2019 financial year. Thereafter communities will be engaged to establish the legal entities.⁵⁹

The question related specifically to communal property situated in Namaqualand. From these remarks, it appears that the land at Leliefontein, Komaggas, Steinkopf and Richtersveld has not yet been transferred in terms of section 3 of the Transformation Act. At Ebenhaeser the community formed a communal property association under the Communal Property Associations Act⁶⁰ to which the land held in trust by the responsible Minister may be transferred. According to a case study entitled 'Putting justice into practice: Communal land tenure in Ebenhaeser, South Africa, 2012 – 2017', the relevant communal property association developed a land use management plan that will be applicable to all land transferred to the association in terms of the Transformation Act.⁶¹ However, it is not known whether the land has in fact been transferred to the community property association of Ebenhaeser.⁶²

13.3 Customary law rights in land in the twenty-first century

The discussion in the previous sections emphasises two considerations. The first is that during the twentieth century, the policy of successive governments has been to subject the communal land on reserves to development plans initiated by a political functionary like a government minister. This policy was implemented by enacting various pieces of legislation that made it possible for the political functionaries concerned to determine how land on the outer commonages of reserves had to be used. The second is that, as *Bekeur* shows, notwithstanding the high degree of government regulation of outer commonages, the residents of Leliefontein were able to maintain the system of communal use of the commonages as grazing for livestock. In the following sections the question whether the livestock farmers in the Northern Cape are still exercising the customary law rights in land that their

⁵⁹ <https://pmg.org.za/committee-question/8475/> (accessed 29 April 2018).

⁶⁰ See note 56.

⁶¹ https://successfultsities.princeton.edu/sites/successfultsities/files/LS_Land_Ebenhaeser.pdf (accessed 29 April 2018).

⁶² The case study did not indicate whether the land use management plan has entered into force. I have also not been able to obtain any information on whether the land has been transferred to the community property association.

ancestors had at the end of the nineteenth century, is considered against this background. To answer the question, it must be determined whether—

- (a) the measures imposed by various political functionaries prevented the livestock farmers from exercising their customary law rights; and
- (b) the livestock farmers still had the collective will to exercise their rights on the available land for grazing in terms of customary law rules.

13.3.1 Overview of the status of customary law rights in land on the Reserves at the end of the nineteenth century

The discussion in Chapter 11 of the customary law systems of indigenous communities in the relevant areas prior to April 1652 postulates that these communities obtained rights in land by possessing livestock and occupying communal land use units.⁶³ Notwithstanding the encroachment of non-indigenous persons on the land of indigenous communities during the seventeenth and eighteenth centuries, indigenous communities succeeded in preserving their customary law system of occupation of land with certain modifications.⁶⁴ During the nineteenth century independent indigenous communities in the study area were to a large extent incorporated into new communities that were formed at mission stations.⁶⁵ These new communities were in some cases able to keep on exercising customary law rights in land at the mission stations.⁶⁶

From the remarks in section 12.3.3.5.2 of Chapter 12 it is clear that the residents of Leliefontein were exercising customary law rights in land when the ToO was issued on 22 May 1854. The extent of the territory where the residents of Leliefontein could exercise their customary law rights was limited by the ToO.⁶⁷ This meant that where the residents of Leliefontein were able to exercise their customary law rights in an unrestricted area before the issuing of the ToO, after the issuing of

⁶³ See sections 11.2.2.3 and 11.2.2.5 of Chapter 11.

⁶⁴ See section 11.5.2 of Chapter 11.

⁶⁵ The development of new communities at mission stations is discussed in section 11.5.1 of Chapter 11.

⁶⁶ The new communities that were not able to keep on exercising their customary law rights at the mission stations are discussed in section 11.5.2.1 of Chapter 11, while the new communities that were able to keep on exercising their customary law rights at mission stations are discussed in section 11.5.2.2 of Chapter 11.

⁶⁷ The effect of ToO's on the extent of the land used by the residents of the Reserves is discussed in section 12.3.3.5 of Chapter 12.

the ToO they were limited to the area defined in the ToO. However, within this area the grazing and water resources were utilised in accordance with the customary law rules of the residents and they could prevent others from using their resources.⁶⁸

13.3.2 Exercise of customary law rights in land during the twenty-first century

The discussion in this section is aimed at showing that the individual residents of Leliefontein are still able to maintain their flocks of livestock on the outer commonages of the Reserves. It is also aimed at showing that the flocks of livestock use grazing in the vicinity of water resources and are moved between water resources in a migration pattern that mimics the migration of the residents of the Reserves during the nineteenth century.⁶⁹ It is not denied that the boundaries established on the Reserves and enforced in terms of the abovementioned twentieth century legislation imposed a significant limitation on the ability of the residents to occupy communal land use units. However, it is argued in the following sections that the manner in which the residents of Leliefontein occupy the outer commonage has elements in common with the manner in which their ancestors occupied the commonage in the nineteenth century.

13.3.2.1 Stock posts on Leliefontein: Modern day communal land use units

In the early 1980's the majority of the residents of Leliefontein were still maintaining flocks of sheep and goats on the communal land on the Reserve.⁷⁰ Webley remarks that, although the boundaries of Leliefontein limited the range within which transhumance could take place, it still played an important role in livestock farming.⁷¹ The Kamiesberg mountain range, which forms part of the escarpment, provided enough water resources and grazing for the various flocks kept on the Reserve

⁶⁸ The ToO's issued by the governor guaranteed that the indigenous residents of Leliefontein had the exclusive rights to the land demarcated on the diagram attached to the ToO's. See the discussion of the ToO in section 12.3.3.5.2 of Chapter 12.

⁶⁹ L Webley 'Pastoralist Ethnoarchaeology in Namaqualand' (1986) 5 *Goodwin Series* 57-58. Webley remarks as follows with regard to the livestock farming practices of the nineteenth century and the livestock farming practices that were still practised in the 1980's:

The descendants of the Little Namaquas are scattered today throughout most of Namaqualand. Many work on farms, in the mines or in towns in the area. However isolated pockets of people, living in the five reserves which were established in the 19th century, still retain many of their earlier customs and lifestyles.

⁷⁰ Webley (n 69 above) 57.

⁷¹ From Rohde and Hoffman's article (published in 2008) it appears that transhumance was still a feature of stock farming on Leliefontein in the early twenty first century, although it is mostly individuals or in some instances couples that accompany the flocks of livestock. Rohde (n 44 above) 193.

during the summer months. When the water resources dried up in the Kamiesberg region of the Reserve, individual herders moved with the flocks that were entrusted to their care by the residents to the places with sufficient water and grazing during the winter.⁷² The availability of water resources during the summer in one region had the effect that the residents gathered in relatively large settlements, called stations, during that season. Over time these stations developed into permanent settlements.⁷³

The stock posts of Leliefontein are small encampments where herders establish themselves during winter. These encampments are usually situated near a water resource.⁷⁴ Marinus remarks that stock posts serve as the central points of loosely defined grazing areas for specific flocks using the outer commonages of Leliefontein. He is of the opinion that, although this is an informal system employed by the residents of Leliefontein, the livestock owners and herders are bound by the norms created by the residents with regard to grazing around stock posts.⁷⁵ Marinus is therefore of the opinion that certain Leliefontein families or groups have 'preferential access' to the grazing and water resource at a specific stock post.⁷⁶

Combrink emphasises the informal manner in which different herders and owners of livestock occupy the available grazing on the outer commonages of Leliefontein.⁷⁷ He contends that it is generally accepted by the livestock owners on Leliefontein that they will not encroach on each other's grazing situated at or near a

⁷² Webley (n 69 above) 57.

⁷³ Webley (n 69 above) 57-58.

⁷⁴ Webley (n 69 above) 58.

⁷⁵ TW Marinus 'Reforming "Structures of Governance" and "Institutions for Governance" – Learnings for tenure reform which can be drawn from Namaqualand' in M Barry (ed) *Proceedings of the international conference on land tenure in the developing world with a focus on Southern Africa* (1998) 597.

⁷⁶ Marinus (n 75 above) 598. The informal manner in which this system of preferential access areas developed on Leliefontein is described as follows by Marinus:

Informal resource entitlement constitute (sic) small groups of up to five stock owners (usually with strong kinship links between them) migrating with their herds within loosely defined tracts of land adjacent to the settlements where they live (Boonzaier 1987:481, Archer 1995:32). Thus specific families or groups have preferential access to certain areas, which are established informally and through long association. Some tracts of land, waterholes and springs have always been regarded as "belonging" to certain lineages. (The claim to these areas has never been one of exclusive ownership as fellow community members are granted usufruct to springs, waterholes as well as agricultural lands).

The practice of 'preferential access' described by Marinus has the same characteristics as the practice of 'primary users' described in sections 11.2.2.4 and 11.2.4 of Chapter 11.

⁷⁷ AP Combrink 'Weidingsbestuur in 'n semi-ariede omgewing met GIS: Paulshoek gevallestudie' unpublished Masters dissertation, University of Stellenbosch, 2004 54.

stock post acknowledged as being used exclusively by the herder of a specific flock.⁷⁸ This contention is in line with the observation of Marinus that certain livestock owners have ‘preferential access’ to the grazing and the water resource at specific stock posts.⁷⁹ In his discussion of the government’s policy to divide the outer commonages on some of the Reserves into private farms,⁸⁰ Smith also refers to the detrimental effect the fencing of private farms on the Reserves had on the informal system of occupation of land at stock posts. He describes this informal system as one where the stock owners negotiated between themselves to decide on their usage rights on the outer commonage for their livestock.⁸¹ In a more recent study in which the herding practices on Leliefontein were observed and interviews were conducted with livestock owners, herders and agricultural advisers, the following was observed with regard to the occupation of stock posts:⁸²

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

In this study the practice with regard to the use of water resources in the stock posts is described as follows:⁸³

Water points are usually regarded as being accessible by all. Where these are very closely associated with a stockpost or cropping lands, other herders will establish rights of access with the person regarded as having “ownership” of the area. Access to water is seldom the cause of dispute but may involve a cost paid in the form of a

⁷⁸ Combrink (n 77 above) 54.

⁷⁹ According to Salomon there are 600 stock posts and 169 water points at Leliefontein, which means that several stock posts make use of the same water point. M Salomon et al ‘The good shepherd: Remedying the fencing syndrome’ (2013) 30 *African Journal of Range & Forage Science* 72.

⁸⁰ Discussed in section 13.2.3.1.

⁸¹ Smith (n 50 above) 7.

⁸² N Allsopp et al ‘Environmental perceptions and practices of livestock keepers on the Namaqualand Commons challenge conventional rangeland management’ (2007) 17 *Journal of Arid Environments* 746.

⁸³ Allsopp (n 82 above) 746.

sheep or goat for slaughter. Many dug wells are developed and maintained through cooperative action among herders, whilst wind or solar pumps are established by local authorities but frequently neglected thereafter.

It must be borne in mind that the descriptions in the literature referred to above of the occupation of land on the outer commonage of Leliefontein by way of stock posts, are in the majority of cases not given with customary law rights in land in mind. However, I am of the opinion that the informal system of demarcating and occupying grazing at and around stock posts that is described by the various authors is in fact a manifestation of the customary law system that is still in place at Leliefontein. The exclusive use of an area of land as grazing at or near a water resource by the flock or flocks of a specific group of residents of Leliefontein, is a characteristic shared with the communal land use units that were occupied by indigenous communities during the seventeenth and eighteenth centuries. The stock post system at Leliefontein is therefore a modified version of the communal land use units that were occupied by indigenous communities.

13.4 Conclusion

Livestock farming on the commonages of the Reserves is still today part of the activities of the residents of the Reserves. Although most of the livestock farmers do not depend on livestock farming as their main source of income, it augments the income received from other sources and serves as a source of food.⁸⁴

In sections 12.3.3.5 of Chapter 12 where the ToO's issued to Ebenhaeser, Leliefontein, Komaggas and Steinkopf are discussed and section 12.3.3.6 of Chapter 12 where the land at Richtersveld is discussed, it is made clear that the residents of the Reserves were dispossessed of the rights in the land that they were using as grazing. Due to the fact that the cut-off date in the Restitution of Land Rights Act⁸⁵ is 19 June 1913, the residents of the Reserves cannot institute a land claim for the restitution of the dispossessed land.

⁸⁴ Rohde (n 44 above) 193; Webley (n 69 above) 57.

⁸⁵ 22 of 1994.

In this chapter I have shown that the majority of the livestock farmers of Leliefontein have to cope with having too little communal land to use as grazing. I have also shown that the system that is used to herd livestock on Leliefontein is based on customary law. In Chapter 14 I consider the manner in which customary law systems can play a meaningful role in helping these farmers obtain an equitable share of the land used as grazing in the Northern Cape.

In *Alexkor Ltd and Another v The Richtersveld Community and Others* (*Alexkor*), the Constitutional Court states that customary law ‘feeds into, nourishes, fuses with and becomes part of the amalgam of South African law’.⁸⁶ Nhlapo conducted a review of the operation of customary law in the South African legal system since 1994 in order to ‘discover whether customary law has been integrated into the mainstream of the legal system.’⁸⁷ In his conclusion he remarks as follows:⁸⁸

We have seen that despite valiant efforts on the part of the courts and the legislature, there is still a long way to go before we can be satisfied that the project of integrating African values into the South African legal system is on track. The Courts appear to have little appetite for trying to preserve deep indigenous values... and thus attempting to work within that paradigm to fashion a workable solution.... Law reform efforts on the other hand have simply been guilty of careless introduction of ‘western’ processes (e.g. RCMA) or heavy-handed political support for authority (e.g. TCB).

From these remarks it appears that customary law has yet to fully achieve the status that was ascribed to it in *Alexkor*.

⁸⁶ 2004 5 SA 460 (CC) 479.

⁸⁷ T Nhlapo ‘Customary law in post-apartheid South Africa: Constitutional confrontations in culture, gender and ‘living law’’ (2017) 33 *South African Journal on Human Rights* 1.

⁸⁸ Nhlapo (n 85 above) 20-21. The acronym RCMA refers to the Recognition of Customary Marriages Act 120 of 1998 and the acronym TCB stands for the Traditional Courts Bill.

Part 5

Preserving the customary law rights in land of pastoral communities

14 Comparing the constitutional land reform programme with the realities of customary law rights in land in the Northern Cape

14.1 Introduction

The value of the discussion in the preceding chapters regarding the rights in land used as grazing by indigenous communities and non-indigenous persons in the Cape Colony, lies in its relevance to the ongoing process of land reform in South Africa today. However, land reform is a difficult concept to define¹ and in South Africa it is approached within a constitutional framework that provides for more than one form of land reform.² In this thesis, the scope of the discussion of land reform is

¹ Pienaar remarks that 'land reform' is a flexible and adaptable term that is largely influenced by the particular background of a specific jurisdiction or country that employs it. To a large extent, the meaning of the term 'land reform' reverts back to the reasons that gave rise to it. Accordingly, aims and goals, usually linked to the reasons for employing land reform in the first place, would inevitably impact on the definition, scope and mechanisms of the particular land reform programme.

JM Pienaar 'Land reform embedded in the Constitution: Legal contextualisation' (2015) 114 *Scriptura* 2-3.

² The constitutional framework for land reform is provided for in section 25 of the Constitution of the Republic of South Africa, 1996, ('Constitution') and specifically section 25(5) to (9) which provides as follows:

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

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

(9) Parliament must enact the legislation referred to in subsection (6).

The three forms of land reform provided for in these subsections are redistribution of land (subsection (5)), strengthening of tenure (subsection (6)) and restitution of land (subsection (7)). See AJ van der Walt *Constitutional property law* (2011) ch2-p21-ch2-p22. Van der Walt remarks that the inclusion of these subsections in the Constitution indicates the anxiety of the constitutional assembly 'about land reform and the importance of reform and transformation as an inherent part of the property clause'. Van der Walt (above) ch2-p22. Van der Walt remarks that when it comes to the constitutional land reform programme, section 26 of the Constitution also forms a part thereof. In this regard he remarks as follows:

This balancing approach finds support in the structure of section 25 of the Constitution of the Republic of South Africa 1996, which both guarantees some form of protection of extant rights and (together with section 26) authorises and requires a range of land reform measures.

limited by certain parameters. These parameters are provided by the history of the occupation of land in the Cape Colony by pastoral indigenous communities and the dispossession of their rights in the land they occupied. I contend that the study of this history provides compelling reasons for reconsidering the process of land reform in the Northern Cape³ where the descendants of the pastoral indigenous communities still live.

This chapter is divided into three parts. The first part concerns the purpose of the investigation into the rights in land of colonial governments, indigenous communities and non-indigenous persons. I deal with the development of land law systems in the study area in order to illustrate that it did not only consist of the Roman-Dutch law, but included the customary law systems of pastoral indigenous communities⁴ and land law principles that were unique to the Cape Colony. The second part deals with the reasons why the residents of the Reserves have in many cases not benefitted from the constitutional land reform programme developed within the framework provided for in section 25(5), (6) and (7) of the Constitution. In the third part I discuss the reasons why it is necessary to rectify this situation. In Chapter 15, I offer some suggestions and recommendations in this regard.

AJ van der Walt *Property and Constitution* (2012) 5-6. Section 26(3) of the Constitution is relevant for the purposes of the constitutional land reform programme and provides as follows:

No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

³ Although I indicated in section 13.1 of Chapter 13 that the research with regard to the manner in which customary law occupation of land still takes place on the Reserves is limited to Leliefontein, I do not limit my remarks in this chapter to Leliefontein only, but extend them to the Northern Cape as referred to in note 1 of Chapter 13. I make the assumption that residents of Ebenhaeser, Komaggas, Steinkopf and Richtersveld who are farming with livestock still do so on communal land in line with the stock post system used on Leliefontein. I also assume that at some stage they were dispossessed of their customary law rights in the land they occupied outside the boundaries of the Reserves, as was the case with Leliefontein.

⁴ The contention that the land law system of the Cape Colony included the customary law of pastoral indigenous communities is based on the approach of the Constitutional Court ('CC') in *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 5 SA 460 (CC) ('*Alexkor*'). Its approach was that the customary law rights in land that pastoral indigenous communities had in the nineteenth century must be taken into account when considering such communities' rights under the Constitution. I do not contend that the Company or the British colonial government acknowledged the existence of the customary law systems of pastoral indigenous communities during the colonial period.

14.2 The development of the land law system of the Cape Colony

It must be accepted that, although the officials who established the refreshment station for the Company at the Cape did not recognise the rights in land of indigenous communities,⁵ the history of land law in the Cape Colony commenced long before 6 April 1652.⁶ In the following sections the simultaneous existence in the study area of customary land law and the domestic law of property of the Cape Colony is discussed.⁷ From the discussion it appears that customary law rights in land were negatively affected in areas where Roman-Dutch law principles of ownership in land were applied. However, in the areas where statutory domestic law principles relating to loan places applied, the same detrimental effect on customary law rights in land did not occur. The development of a system of overlapping occupation of land in the last-mentioned areas is also discussed.

14.2.1 Conflict between customary law systems and Roman-Dutch law

The conflict between the customary law systems of pastoral indigenous communities and Roman-Dutch property law is considered against the background of the fundamental differences between these systems.⁸ The customary law systems of the indigenous communities living in the study area in the pre-colonial period had nothing in common with the Roman-Dutch property law system that was implemented at the Cape after 1652.⁹

This is so, because in terms of customary law systems indigenous communities' rights in land flowed from the fact that individual members of the

⁵ See section 8.2.1.1 of Chapter 8.

⁶ In *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 6 SA 104 (SCA) 114 ('*RichtersveldSCA*') the Supreme Court of Appeal ('SCA') refers to the presence of original pastoralist inhabitants of the Richtersveld from long before the arrival of the Dutch at the Cape. As the SCA takes cognisance of this fact to determine the rights in land of the Richtersveld community, it is accepted that the indigenous communities living at the Cape also had an established customary law system long before 1652. This approach is in line with the remarks of the CC in *Alexkor* (n 4 above) 479 that the Constitution 'acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system'.

⁷ Van Niekerk remarks that '[t]hus, within a single territory, controlled by a central authority the law of the DEIC as well as the laws of the Khoi were observed.' G van Niekerk 'State initiatives to incorporate non-state laws into the official legal order: A denial of legal pluralism?' (2001) 34 *Comparative and International Law Journal of Southern Africa* 353.

⁸ As the thesis deals primarily with rights in land it is only the conflict between the principles of the respective legal systems relating to rights in land that are discussed in this section.

⁹ See the discussion of the customary law systems of the indigenous communities at the Cape in section 11.2 of Chapter 11.

communities owned livestock that needed grazing and water.¹⁰ In Chapter 11, in order to describe the spaces within which the indigenous communities exercised their rights, I used the concept of a communal land use unit.¹¹ I contend that the characteristics of a communal land use unit were that—

- (a) its size was determined by the amount of grazing needed by the combined livestock belonging to the individual members of a community;
- (b) the boundaries of the land used as grazing were not fixed; and
- (c) the community occupying it had to be acknowledged as the primary user of the grazing and water resources in the area.

From the last characteristic of land use units listed above it is clear that in terms of customary law systems such units could only exist subject to some sort of agreement about the use of the resources concerned.¹²

In contrast to customary law systems, where rights in land were obtained by means not directly related to the land, an identifiable and demarcated land unit had to exist before a non-indigenous person could obtain rights therein in terms of Roman-Dutch law.¹³ Furthermore, in terms of Roman-Dutch law, once ownership of a land unit had been obtained, the existence of the right did not depend on the acquiescence of any other person.¹⁴

The Roman-Dutch law principle that land had to be demarcated, led to the implementation of the system of survey and demarcation of land which caused the

¹⁰ See section 11.2.2.3 of Chapter 11.

¹¹ See section 11.2.2.5 of Chapter 11. I use the concept of a communal land use unit to describe the spaces occupied by indigenous communities to avoid using South African property law terms to describe customary law principles. See in this regard the remarks of the CC in *Alexkor* (n 4 above) 480-481.

¹² In Chapter 11 I deduce from the resources listed in notes 24 and 39 of that chapter that in regions where the nomadic orbits of indigenous communities overlapped, the strongest community was the primary user of the water resource in the region. In such a case the weaker community was probably compelled to ask for permission to use the water resource, hence the reference to 'some sort of agreement'. However, where nomadic orbits did not overlap, the indigenous communities agreed amongst each other that the water resources and grazing falling within each nomadic orbit were for the exclusive use of the community concerned. See section 11.2.4 of Chapter 11.

¹³ See section 5.4.3 of Chapter 5.

¹⁴ See the resources referred to in note 14 of Chapter 10 with regard to the entitlements of owners of land. See specifically Van der Merwe's comment that the distinguishing characteristic of ownership is that it is not dependent on any other right. CG van der Merwe *Sakereg* (1989) 176.

gradual dispossession of pastoral indigenous communities, as discussed in sections 12.3.2.1 and 12.3.2.3 to 12.3.2.5 of Chapter 12.¹⁵

14.2.2 Incorporation of unique land law principles into the domestic law of the Cape Colony

Du Bois remarks that in the constitutional era in South Africa there is the following hierarchy of binding sources of law:¹⁶

...there is a hierarchy of binding sources that determines which rule will prevail in the event of a conflict. At the top of the hierarchy is the Constitution, which proclaims in section 2 that it is 'the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'. Legislation is second in line, since the various bodies in which the Constitution vests legislative authority are free to make and unmake law as they see fit, subject only to the Constitution itself. The common law and customary law jointly constitute the next tier as they are equal in status if not in range of application, and are both subject to legislative reform. Finally customs bind the Courts only if they do not conflict with any of the other sources of law.

Van der Merwe remarks that the main source of South African property law is the Roman Dutch law, with only limited English law influence.¹⁷ If the control measures discussed in Chapter 9 fall within the sources of law listed by Du Bois it can be contended that they formed part of the domestic law of the Cape Colony until it was superseded by the Cape Colony legislation of the nineteenth century.

¹⁵ I contend that the dispossession of pastoral indigenous communities in the study area was a gradual process for the following reasons. In the early years of the settlement of the Company at the Cape, the effect of the dispossession of the rights in land of the indigenous communities caused by the survey and demarcation of land was lessened by the flexibility of the boundaries of communal land use units. Although non-indigenous persons tended to occupy the most fertile land for agricultural purposes and the colonial government reserved the best grazing for its and non-indigenous settlers' livestock, indigenous communities could still exercise their customary law rights in land. My argument is that, although pastoral indigenous communities were dispossessed of the land where a farm for agricultural purposes was surveyed and demarcated, they could still exercise their customary law rights in the vicinity of the demarcated land. In other words, whereas a person can no longer exercise his right of ownership in land in terms of Roman-Dutch law when he is dispossessed, an indigenous community could keep on exercising customary law rights. See section 2.5 and 2.5.1 of Chapter 2, section 8.2.1.1 of Chapter 8 and section 11.3.1 of Chapter 11 for examples of how the indigenous communities living in the South-Western Cape continued to exercise their customary law rights in land notwithstanding the dispossession of land and encroachment on land used as grazing by non-indigenous persons.

¹⁶ F du Bois 'Introduction: History, system and sources' in CG van der Merwe & JE du Plessis (eds) *Introduction to the law of South Africa* (2004) 36-37.

¹⁷ CG van der Merwe 'Law of property' in CG van der Merwe & JE du Plessis (eds) *Introduction to the law of South Africa* (2004) 201-202.

For the purposes of this section it is therefore necessary to determine whether the colonial government resolution that introduced the loan place system in the Cape Colony and was published in the form of a *plakaat*,¹⁸ was a source of law in the Cape Colony. At the beginning of the twentieth century Roos expressed the opinion that the legislation enacted by the colonial government prior to 1795 and that had not been repealed, was still valid law in the Cape Colony.¹⁹ Roos was also of the opinion that this legislation must be regarded, together with other legislation that he referred to, as a source of law for the courts of the Cape Colony.²⁰

The *plakaat* of 3 July 1714 provided that non-indigenous settlers who used land as grazing in the interior of the Cape Colony would in future have to loan the land from the colonial government and pay a recognition fee for the privilege.²¹ However, the *plakaat* did not provide for the manner in which the land used as grazing had to be identified and demarcated. Therefore, although the *plakaat* provided for the fiscal conditions that had to be met by a non-indigenous settler to occupy a loan place, it did not provide for the substantive rights that the occupier of the loan place had in the land he used as grazing.²² The *plakaat* merely provided that the non-indigenous person who had paid the recognition fee would be authorised to use the land in the interior as grazing and cultivate land subject to the 17 April 1714 control measure.²³ It must therefore be determined whether the

¹⁸ MK Jeffreys et al *Kaapse argiefstukke: Kaapse plakkaatboek Deel II (1707-1753)* (1948) 31.

¹⁹ JdeV Roos 'The statute law of the Cape in pre-British days, and some judicial decisions in relation thereto' (1906) 23 *South African Law Journal* 242-243.

²⁰ JdeV Roos 'The Plakaat Books of the Cape' (1897) 14 *Cape Law Journal* 10. Wessels endorses the views expressed by Roos. JW Wessels *History of the Roman-Dutch law* (1908) 358-359. Van Zyl is of the opinion that Roos was mistaken in his opinion. He wrote a series of articles in the *South African Law Journal* in which he motivates why the legislation enacted by the colonial government prior to 1795 cannot be regarded as a source of law for the Cape Colony. CH van Zyl 'The Batavian and the Cape plakaten. An historical narrative' (1907) 24 *South African Law Journal* 132-133. Botha discusses the divergent views relating to the legislation enacted by the colonial government before 1795 under the subtitle, 'The common and statute law at the Cape of Good Hope during the 17th and 18th centuries', in an article in the *South African Law Journal* entitled 'Notes on some controverted points of law'. He refers to several cases heard by the Council of Justice in the Cape Colony before 1795 in which reference is made to *plakaten* enacted by the colonial government. He therefore concludes that legislation enacted by the colonial government before 1795 was regarded as a source of law by the highest court in the Cape Colony. CG Botha 'Notes on some controverted points of law' (1913) 30 *South African Law Journal* 298-299. From these remarks it appears that the views expressed by Roos and Wessels must be preferred to that of Van Zyl.

²¹ See section 9.3.2.2.2 of Chapter 9.

²² The substantive rights of non-indigenous settlers in the land used as grazing on loan places are discussed in section 10.5.2.1 of Chapter 10.

²³ See section 9.3.1.3.1 of Chapter 9.

substantive right to use a specific part of the land as grazing was established by custom.

Hahlo remarks that

[t]he party who relies on the alleged custom must convince the court that it is long established, reasonable and certain and that it has been uniformly observed over a long time.²⁴

In the investigation of the British colonial government into the land tenure systems of the Cape Colony under the Company (discussed in Chapter 6), only the author of the Receiver-General of Revenue's report was of the opinion that non-indigenous settlers had obtained rights in the land through custom. The alleged custom that he refers to is that each occupier of a loan place had an area of half an hour's walk in each direction from the central point of a loan place to use as his exclusive grazing.²⁵ In his report on the matter, the Fiscal JA Truter discounted these contentions in the Receiver-General's report in the following terms:²⁶

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

In view of Truter's remarks, it cannot be contended that the custom developed that the size of loan places was determined by half an hour's walk in each direction from the central point of a loan place.²⁷

²⁴ HR Hahlo 'The genesis of South African law' in HR Hahlo & E Kahn (eds) *South Africa: The development of its law and constitution* (1960) 35.

²⁵ See section 6.4.3.1 of Chapter 6.

²⁶ GM Theal *Records of the Cape Colony from March 1811 to October 1812* (1901) 99.

²⁷ In *Van Breda and Others v Jacobs and Others* 1921 AD 330 334 it is remarked that one of the requirements that must be met for a custom to be proved is that it 'must have been uniformly observed'. Truter's remarks show that the size of loan places was determined by more factors than the half-hour principle. (See in this regard the discussion in section 10.5.2.1 of Chapter 10.) Consequently, Truter is correct that the half-hour principle had not been uniformly observed to determine disputes between non-indigenous occupiers of neighbouring loan places. The half-hour

I am of the opinion that the loan place system was a unique feature of the land law system of the Cape Colony that was introduced into the domestic law of the Cape Colony by the *plakaat* of 3 July 1714. The loan place system was therefore a creature of statute and was not based on Roman-Dutch law. Consequently, occupation of a loan place did not confer any rights similar to the Roman-Dutch law right of ownership on the occupier. The *plakaat* was silent on the rights of occupiers, and it cannot be contended that rights in the land were created by custom. Therefore, it is contended that in essence the occupiers, on payment of the required recognition, only had the right to be protected by the colonial government against unfair deprivation of the grazing at or near their homesteads.²⁸

14.2.3 The significance of the existence of clientships between indigenous communities and non-indigenous settlers

In section 2.5.2 of Chapter 2 I refer to the existence of clientships between indigenous communities and non-indigenous settlers in the Southern Cape in connection with the overlapping occupation of land in the region.

Clientships existed in the study area in the pre-colonial period. Smith remarks that the indigenous communities that owned livestock were 'in control of the means of production' and that hunter-gatherer indigenous communities that did not own livestock entered into clientships with the livestock owners.²⁹ The motivation for becoming a client was, in the short term to receive food and, in the longer term to gain livestock as payment for services rendered to the livestock owner.³⁰ Viljoen remarks that during the eighteenth century indigenous communities in the Swellendam district had to enter into clientships with non-indigenous settlers who were livestock owners in order to survive as independent communities. The non-indigenous settlers benefitted from entering into clientships as their loan places were large and, as a rule, they did not own many slaves. The indigenous communities

principle can therefore not be regarded as custom that determined the size of the land used as grazing on loan places.

²⁸ See section 10.5.2.1 of Chapter 10.

²⁹ AB Smith 'Competition, conflict and clientship: Khoi and San relationships in the Western Cape' (1986) 5 *Goodwin Series* 40; R Viljoen 'Aboriginal Khoikhoi servants and their masters in colonial Swellendam, South Africa, 1745-1795' (2001) 75 *Agricultural History* 31.

³⁰ Viljoen (n 29 above) 31.

provided a convenient source of cheap labour.³¹ Viljoen remarks that the non-indigenous settlers entrusted their livestock to the indigenous herders to tend to them together with their own livestock.³² In return, the indigenous communities were given access to grazing and water resources that would otherwise have been highly contested with the non-indigenous settlers.³³ From these remarks I deduce that the livestock of the indigenous communities and the non-indigenous settlers shared the grazing and water resources on the loan places of the non-indigenous settlers.

Of greater importance for the purposes of this thesis is that clientships between pastoral indigenous communities and non-indigenous settlers were also entered into in the Northern Cape region. Penn discusses the clientships between indigenous communities in the Northern Cape region and then remarks as follows with regard to clientships between indigenous communities and non-indigenous settlers in the said region:³⁴

It was thus logical and consistent for those Khoikhoi who had lost their land and livestock to become the labourers of the trekboers. They brought with them their unrivalled knowledge of the local environment and their remarkable skills with livestock. Some of them even brought their own livestock, if they had managed to retain any, for they realised that they would benefit from the protection which an armed and mounted trekboer could provide against the many thieves and predators of the frontier zone. ... By caring for the flocks and herds of their protectors, frequently alongside the remnants of their own, the Khoikhoi did much to prolong their existence. In exchange for this protection, or as a condition of their continued access to water and grazing, the Khoikhoi began to work for the Dutch.

These remarks also show that in the cases where the pastoral indigenous communities retained their livestock, they used the grazing and water resources on the loan places of the non-indigenous settlers.

I am of the opinion that the existence of clientships between indigenous communities and non-indigenous settlers is a clear indication that the use of grazing and water resources on loan places is inconsistent with the Roman-Dutch law

³¹ Viljoen (n 29 above) 30-31.

³² Viljoen (n 29 above) 31.

³³ Viljoen (n 29 above) 32.

³⁴ N Penn *The forgotten frontier: Colonist and Khoisan on the Cape's northern frontier in the 18th century* (2005) 45.

principles of ownership of land. Furthermore, clientships cannot be reconciled with any of the conventional theories regarding the rights in land used as grazing in the interior of the Cape Colony which are discussed in sections 10.6.1 and 10.6.2 of Chapter 10. However, the use of clientships is consistent with the system created by the *plakaat* of 3 July 1714. Therefore, I contend that the rights that the non-indigenous settlers had in the land used as grazing on the loan places did not conflict with the rights that the indigenous communities exercised in terms of customary law on the same land.

14.2.4 Characteristics of the domestic land law system of the Cape Colony at the beginning of the nineteenth century

The purpose of the discussion in sections 14.2.1 to 14.2.3 is to illustrate that, looking back from the present to the beginning of the nineteenth century, it will be too simplistic to state that at that stage the land law of the Cape Colony was based only on Roman-Dutch law.

For the purposes of this thesis, the most important characteristic of the domestic land law system of the Cape Colony at the beginning of the nineteenth century, was that the source of the legal rules that regulated land used for agricultural and residential purposes differed from the source of the legal rules that regulated land used as grazing. The conclusion reached in section 14.2.2 means that land used as grazing on loan places was distinguished by legislation from any other type of land in the Cape Colony. The fact that the legislation establishing loan places did not provide for substantive rights in the land used as grazing on loan places made it possible that overlapping occupation of such land could take place.

In section 5.3.2.4 of Chapter 5 I conclude that neither the States-General nor the Company was the private law owner of land not held in terms of ownership transactions in the Cape Colony.³⁵ This means that pastoral indigenous communities simply continued exercising their rights in land in terms of their customary law

³⁵ In contradistinction to the British colonial government that could claim ownership of all waste land in the Cape Colony for the British Crown in terms of the doctrine of tenures, the States-General and the Company had no legal grounds on which they could claim ownership of such land. This is notwithstanding the fact that the Company asserted that it had such rights. See section 10.1 of Chapter 10 for the meaning of the phrase 'ownership transaction' in this thesis.

systems when using water resources and grazing on loan places, as the land had never been the private law property of the Company or non-indigenous settlers.³⁶

14.2.5 The British colonial government's motivation for transforming the domestic land law of the Cape Colony

The measures adopted by the British colonial government from 1813 to reform the land law of the Cape Colony are discussed in section 6.5.6 of Chapter 6 and sections 7.2.3, 7.3.1.1.2 and 7.3.1.1.3 of Chapter 7. In this section the policy that motivated these changes is discussed.

The new policy adopted by the British colonial government was aimed at encouraging the non-indigenous settlers to make their land more productive. The origin of this policy was the changes in productivity brought about by the enclosure Acts³⁷ that transformed the British rural economy.³⁸ The introduction of the perpetual

³⁶ In terms of the doctrine of tenures the British colonial government was the owner of all waste land in the Cape Colony. Therefore, the rights in land of the indigenous communities immediately became more precarious when the British conquered the Cape Colony. See in this regard the case study discussed in section 7.3.2 of Chapter 7. The rights in land of the States-General, the Company and non-indigenous settlers did not have such an effect on the customary law rights of the indigenous communities.

³⁷ The enclosure Acts were a series of British Parliamentary Acts passed between 1750 and 1850. E Rosenman 'On Enclosure Acts and the Commons' BRANCH: Britain, representation and nineteenth-Century history http://www.branchcollective.org/?ps_articles=ellen-rosenman-on-enclosure-acts-and-the-commons (accessed 11 June 2018). Enclosure was the abolition of the open field system of agriculture. The ownership of, and rights over, every strip of land in the open fields and meadows, over the commons and wastes, was (sic) taken from the Lord and the villagers and abolished.

The purpose of enclosure was to 'increase the efficiency of farming, to increase the agricultural productivity of land and thus to increase profits'. FA Sharman 'An introduction to the enclosure acts' (1989) 10 *The Journal of Legal History* 46. Magdoff describes the enclosure movement in England and how it served as an instrument of dispossession of land in that country in the eighteenth and nineteenth centuries as follows:

The greater agricultural productivity and change in attitudes toward the land—now a source of greater and sustained income to landowners—became the impetus that began the long and continuing process of the development of industrial capitalism. Ellen Meiksins Woods described the early connection between agriculture and the development of capitalism in Britain:

From the standpoint of improving landlords and capitalist farmers, land had to be liberated from any...obstruction to their productive and profitable use of property. Between the 16th and 18th centuries, there was growing pressure to extinguish customary rights that interfered with capitalist accumulation. This could mean various things: it might mean disputing the communal ownership of common lands and claiming private ownership; it might mean eliminating various use-rights on private land; or it might mean challenging the customary tenures which gave many smallholders rights of possession without unambiguous legal title. In all these cases, traditional conceptions of property had to be replaced by new, capitalist conceptions of property—property as not only "private" but also exclusive, literally excluding other individuals and the community, by eliminating village regulation and restrictions on land use, by extinguishing customary use-rights, and so on.

As enclosures and dispossessions occurred, the dispossessed found work in small factories in rural areas and later in the cities; migrated to colonies in North America, Australia, and Africa; or became paupers, as the homeless and destitute were referred to at the time.

quitrent tenure system by the Perpetual Quitrent Proclamation abolished the loan place system that was regarded as wasteful by progressive British colonial officials. Weaver remarks as follows in this regard:³⁹

... it is essential to realise that leading administrators - especially Governors Caledon (Alexander du Pré, Second Earl of Caledon, 1807-11) and Cradock (General Sir John Cradock, 1811-13), Deputy Colonial Secretary Colonel Christopher Bird, Fiscal (Attorney General) Johannes Andreas Truter, and Inspector of Lands and Woods Charles D'Escury (especially the latter two) - envisaged a community of rational land holders who would react predictably to material incentives and penalties. To repeat, there was a purposeful drive to eliminate alleged idleness by means of land reform. This drive was an aspect of a pervasive doctrine of improvement which animated some features of British imperialism.

Section 2 read with section 7 of the Perpetual Quitrent Proclamation provided that loan places that are converted to perpetual quitrent places will have a fixed size of not more than 3000 morgen and had to be surveyed in accordance with the prescribed procedure.⁴⁰ These provisions had the effect that land that had been used as grazing on loan places would be subject to survey and demarcation. Consequently, from 1813 all land that was suitable for occupation in the Cape Colony was subject to the same legal rules. As was the case with survey and demarcation under Roman-Dutch law, as discussed in section 14.2.1, the introduction of the system of survey and demarcation for land used as grazing had a detrimental effect on the customary law rights in land of indigenous communities.

14.3 Land reform in the Northern Cape under the Constitution

By the end of the nineteenth century the Northern Cape region was the only part of the study area where pastoral indigenous communities were still occupying land in

F Magdoff 'Twenty-first-century land grabs: Accumulation by agricultural dispossession' (2013) *Global Research* <http://www.globalresearch.ca/twenty-first-century-land-grabs-accumulation-by-agricultural-dispossession/5356768> (accessed 24 September 2018).

³⁸ JC Weaver 'Exploitation by design: The dismal science, land reform, and the Cape Boers, 1805-22' (2001) 29 *The Journal of Imperial and Commonwealth History* 7.

³⁹ Weaver (n 38 above) 7-8.

⁴⁰ Section 2 of the Perpetual Quitrent Proclamation provided as follows:

No loan place shall exceed three thousand morgen; every addition to that quantity of land must be particularly mentioned to the surveyor and commission, and appear upon the face of the application, for His Excellency's consideration.

terms of customary law systems.⁴¹ Although the indigenous communities living in the Northern Cape region can no longer be regarded as being exclusively pastoral indigenous communities, they are still occupying land as grazing in terms of their customary law systems.⁴² In section 13.2.5 of Chapter 13 the relatively little progress that has been made in transferring the ownership of the land in the Northern Cape region to residents of the Reserves in terms of the Transformation of Certain Rural Areas Act⁴³ ('Transformation Act') is discussed. In the following sections the effectiveness of other aspects of the constitutional land reform programme in the Northern Cape is considered.

14.3.1 Problems encountered with the redistribution of land at Leliefontein

The redistribution of land in the Northern Cape is made possible by using the municipal commonage programme to purchase privately owned farms next to the Reserves.⁴⁴ The land acquired by this method is owned by the municipalities of the region, who manage the land for the benefit of the disadvantaged people living under their jurisdiction.⁴⁵

Leliefontein is one of the Reserves that benefitted from the acquisition of land through the municipal commonage programme. The acquisition of farms on the eastern side of the Reserve made new commonage available for the residents of Leliefontein. However, the method by which the new commonage is occupied differs greatly from the ordinary way in which the outer commonage is occupied on Leliefontein.⁴⁶

The new commonage has not been incorporated into the existing outer commonage on Leliefontein. Instead, it has been divided into camps which are

⁴¹ The manner in which this situation came about is discussed in Chapters 11 and 12.

⁴² See section 13.3.2.1 of Chapter 13.

⁴³ 94 of 1998.

⁴⁴ H May & E Lahiff 'Land reform in Namaqualand, 1994-2005: A review' (2007) 70 *Journal of Arid Environments* 787 and footnote 7; T Lebert & R Rohde 'Land reform and the new elite: Exclusion of the poor from communal land in Namaqualand, South Africa' (2007) 70 *Journal of Arid Environments* 819. Lebert remarks that municipalities obtain land by making use of the 'Municipal Commonage Grant of the national land reform programme'.

⁴⁵ Lebert (n 44 above) 819; May (n 44 above) 787 footnote 7.

⁴⁶ Lebert (n 44 above) 823. The commonage management plan that was developed for the old and the new commonage is, according to Lebert, only applied to the new commonage by the commonage committee. Lebert (n 44 above) 826.

leased for a year to individuals residing on Leliefontein. The number of livestock that may be kept on the new commonage is regulated by the commonage management plan and municipal grazing regulations.⁴⁷ The lessees are not allowed to keep stock posts on the new commonage as fenced camps render such posts unnecessary.⁴⁸ Notwithstanding the establishment of a commonage committee⁴⁹ for Leliefontein, the residents who have 50 or fewer head of livestock and do not serve on the commonage committee, in spite of constituting 42% of the livestock owners, are to a large extent excluded from the benefits brought about by the acquisition of the new commonage.⁵⁰

The persons who served on the commonage committee that compiled the commonage management plan were all livestock owners owning between 27 and 270 head of livestock. They were also prominent residents of the various settlements on Leliefontein.⁵¹ Lebert contends that the members of the commonage committee were driven by self-interest when making decisions regarding the manner in which the new commonage was to be utilised by the residents of Leliefontein.⁵² The members of the commonage committee who live on the western side of Leliefontein and can therefore not gain easy access to the new commonage, did not receive land on the new commonage. However, they used their positions on the commonage committee to advocate the introduction on the outer commonage of the measures applied to the new commonage.⁵³ Lebert contends that the benefits of the acquisition of the farms next to Leliefontein have not been extended to the persons who needed it the most, namely the livestock owners who own less than 50 head of livestock.⁵⁴ This view is confirmed by Samuels, who remarks that in 2013 the policy of the Department of Agriculture, Forestry and Fisheries was that only full-time farmers

⁴⁷ The commonage management plan and municipal grazing regulations contain a fixed upper stocking rate. Lebert (n 44 above) 823.

⁴⁸ As above. See section 13.3.2.1 of Chapter 13 with regard to stock posts on Leliefontein.

⁴⁹ Commonage committees had to be established for the new commonage in accordance with the municipal commonage policy. Residents of the Reserve must be represented on these committees. Lebert (n 44 above) 825.

⁵⁰ Lebert (n 44 above) 824.

⁵¹ These prominent members of the settlements are not only livestock owners but are also entrepreneurs owning shops or running other enterprises in the local settlements. Lebert (n 44 above) 825-826.

⁵² Lebert (n 44 above) 830.

⁵³ As above.

⁵⁴ Lebert (n 44 above) 830-831.

were allowed to use the new commonage at Leliefontein.⁵⁵ Kleinbooi considers the use of new commonage at Leliefontein and Komaggas by women and remarks that the general inaccessibility of the new commonage and the cost of grazing thereon render it of little value to women.⁵⁶

From the events described regarding the management of the new commonage on Leliefontein it appears that constitutional land reform in the form of redistribution of land through the municipal commonage programme has not been a success.⁵⁷ It therefore appears that the following assessment of the general effectiveness of redistribution of land is also applicable to the Northern Cape:⁵⁸

While there was initially a focus on the poorest of the poor, especially with regard to small-scale farming in the light of improving livelihoods and eradicating poverty, the system as a whole was not ideally suited to this particular approach. Although the marginalised and women were indentified, in particular, as potential beneficiaries, the demand-led approach as well as the structure of the grant system meant, in practice,

⁵⁵ I Samuels et al 'How could herd mobility be used to manage resources and livestock grazing in semi-arid rangeland commons?' (2013) 30 *African Journal of Range & Forage Science* 87.

⁵⁶ K Kleinbooi 'Farming and familial relations: Women's fragile land rights under communal tenure in Namaqualand' (2009) 23 *Agenda* 44.

⁵⁷ With regard to problems experienced in the management of land redistributed in terms of the constitutional land reform programme, the case of the Soebatsfontein community falling under the jurisdiction of the Kamiesberg local municipality and Namakwa district municipality is also of interest. The Soebatsfontein community never formed part of a mission station and prior to 2000 did not have access to farm land. As part of the constitutional land reform programme De Beers mining company transferred 15,069 hectares of land in ownership to the Kamiesberg local municipality for the use of the Soebatsfontein community. U Schmiedel et al 'Environmental and socio-economic patterns and processes in the Succulent Karoo—frame conditions for the management of this biodiversity hotspot' in MT Hoffman et al (eds) *Biodiversity in southern Africa 3: Implications for land use and management* (2010) 133. With regard to the management of this land, which is referred to as 'new-commons' Schmiedel remarks as follows:

The key problem with commonage management at Soebatsfontein is that neither the municipality nor the commonage committee effectively regulate and coordinate resource use. Sophisticated rules regarding stocking rates, water rights, payment of grazing fees, maintenance of infrastructure, and firewood collection are ignored because they are not enforced ... Some farmers started to repair the infrastructure themselves. This increased their feelings of ownership of the commonage but undermined formal regulations. The farmers increasingly perceived that they owned their camps privately and were not willing to comply with any externally derived rules. The commonage committee as an alternative management body is hardly accepted within the community and is considered to be functioning poorly. On the one hand, this is the result of the monopolisation of management authority by the municipality and the de-facto privatisation of portions of the commonage, which decreases the sense of ownership by the community.

Schmiedel (above) 137-138. Although stock posts are used on the communal land, it is not as a result of the implementation of customary law systems. The communal land is divided into camps and therefore there is no seasonal migration of flocks as is the case on the Reserves. For the use of stock posts on the Soebatsfontein communal land, see Schmiedel (above) 139.

⁵⁸ JM Pienaar *Land reform* (2014) 375. Notwithstanding the problems experienced in the implementation of the redistribution of land, Pienaar remarks that a 'compelling argument' can be made to continue redistribution of land in a different improved format. Pienaar (above) 376.

that these vulnerable groups were the least likely to access the system. ... Accordingly, the ideals and aims of the South African redistribution programme did not correlate with the existing legal framework or the reality at ground level. ... Despite tweaking and continuous adjustments, progress is still tempered by extreme red tape, continued statism and a lack of capacity - especially at local government level - all of which translate to poor redistribution progress and dismal performance statistics.

14.3.2 Tenure reform in the Northern Cape

The first step in providing more secure tenure for residents of Reserves in the Northern Cape is provided for in sections 2 and 3 of the Transformation Act. These sections provide that land that is held in trust⁵⁹ must be transferred to municipalities or an entity as defined in section 1 of the Transformation Act.⁶⁰

For the purposes of this section, the important question that must be addressed is whether section 3(2)(b)(iii) of the Transformation Act provides adequate protection for the customary law rights of livestock farmers once trust land has been transferred to an entity. Section 3(2) of the Transformation Act provides as follows:

No transfer of land referred to in subsection (1) must take place unless the Minister is satisfied that, in the event of a transfer to-

- (a) a municipality, the legislation applicable to such a municipality; or
- (b) a communal property association or other body approved by the Minister, the rules of such association or body,

make suitable provision for a balance of security of tenure rights and protection of rights of use of-

- (i) the residents mutually;
- (ii) individual members of such a communal property association or other body;

⁵⁹ In terms of section 1 of the Transformation Act 'trust land' means 'land situated in a board area that vests in the Minister in terms of section 7 of the Rural Areas Act, 1987', while 'board area' is defined in section 1 of the Transformation Act as

an area, or part of an area, consisting of one or more pieces of land, whether they are contiguous or not, to which the provisions of the Rural Areas Act, 1987, applied immediately before the commencement of this Act;

With regard to the applicability of the Rural Areas Act 9 of 1987 to the Reserves in the Northern Cape, see section 13.2.4 of Chapter 13.

⁶⁰ An 'entity' is defined in section 1 of the Transformation Act as

- (a) a municipality;
- (b) a communal property association registered in terms of section 8 of the Communal Property Associations Act 28 of 1996; or
- (c) another body or person approved by the Minister in general or in a particular case.

- (iii) *present and future users or occupiers of land, and the public interest of access to land on the remainder and the continued existence or termination of any existing right or interest of a person in such land.* (Emphasis added.)

The Transformation Act does not define the phrases ‘rights of use’, ‘public interest of access to land’ and ‘existing right or interest of a person’. I am of the opinion that as far as residents of the Reserves who are owners of livestock are concerned, ‘rights of use’ must include their customary law rights, as discussed in section 13.3.2.1 of Chapter 13. In other words, as ‘rights of use’ are not defined in the Transformation Act to include ‘customary law rights’, the protection offered by section 3(2)(b)(iii) may be illusory. Furthermore, the transfer of land from the state in terms of the Transformation Act will not restore the customary law rights in land that was used as grazing outside the boundaries of the Reserves.

14.3.3 The *Richtersveld* cases and the prospects for restitution of land rights in the Northern Cape

To date the *Richtersveld* cases⁶¹ are the only reported South African court cases in which the customary land law system of a pastoral indigenous community has been discussed. The Richtersveld community’s claim to the land that they used as grazing before they were dispossessed was granted in terms of the Restitution of Land Rights Act⁶² (‘Restitution Act’).⁶³ In terms of section 35(1)(a) of the Restitution Act a court is authorised to order that a claimant be granted a right in the land that is restored.⁶⁴ In view of the definition of ‘right in land’ in section 1 of the Restitution Act, a right in land includes the right to ownership.⁶⁵ In *Alexkor* the CC granted the

⁶¹ See note 113 in Chapter 7.

⁶² 22 of 1994.

⁶³ Although the claimants also based their claim on the existence of aboriginal title in land, the courts did not deem it necessary to decide the case on that ground. See the courts’ discussion of aboriginal title in *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 3 SA 1293 (LCC) 1315-1321 (‘*Richtersveld*LCC’); *Richtersveld*SCA (n 6 above) 120-123.

⁶⁴ Section 35(1)(a) of the Restitution Act provides as follows, as far as it is relevant to the facts under discussion:

(1) The Court may order-

(a) the restoration of land, a portion of land or any right in land in respect of which the claim or any other claim is made to the claimant or award any land, a portion of or a right in land to the claimant in full or in partial settlement of the claim and, where necessary, the prior acquisition or expropriation of the land, portion of land or right in land:

⁶⁵ A ‘right in land’ is defined as follows in section 1 of the Restitution Act:

any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.

Richtersveld community the right of ownership in the land that was restored to the community.⁶⁶ The CC remarked as follows with regard to the nature of the Richtersveld community's right in the claimed land:⁶⁷

In the light of the evidence and of the findings by the SCA and the LCC, we are of the view that the real character of the title that the Richtersveld Community possessed in the subject land was a *right of communal ownership* under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld Community had a *right of ownership* in the subject land under indigenous law. (Emphasis added.)

If the residents of the other Reserves should be successful in proving that their ancestors had been dispossessed of their customary law rights in land, they may be able to contend that they are also entitled to the right of communal ownership⁶⁸ in the dispossessed land.⁶⁹ However, before the residents can lodge a claim in terms of the Restitution Act to try and obtain the benefits of the precedent set by the

⁶⁶ *Alexkor* (n 4 above) 493.

⁶⁷ *Alexkor* (n 4 above) 482.

⁶⁸ It is accepted that the CC, when referring to a 'right of ownership', had in mind a 'right of communal ownership' as described in the quoted passage from *Alexkor*. The assumption is based on the fact that—

- (a) the land claimed by the Richtersveld community does not comply with the requirements of a thing; and
- (b) the right of communal ownership as described in the quoted passage does not coincide with the entitlements conferred on the owner of land,

in terms of the domestic law of the Cape Colony or the common law of South Africa. In order to be susceptible to ownership in terms of the domestic law of the Cape Colony and the common law of South Africa, the subject of the ownership relationship must be a thing. With regard to the entitlements of an owner of land in terms of the domestic law of the Cape Colony and the common law of South Africa, see notes 13 and 14 of Chapter 10.

⁶⁹ See the discussion in section 14.4.1 for the reasons why it may be difficult for the residents of the Reserves to meet this requirement. Mostert comments as follows on the limited value that *Alexkor* has as a precedent for communities in similar circumstances who wish to institute a claim for restitution of their land:

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

H Mostert & P Fitzpatrick "Living in the margins of history on the edge of the country" — Legal foundation and the Richtersveld community's title to land (part 1)' (2004) *Tydskrif vir die Suid-Afrikaanse Reg* 321.

Richtersveld cases, they will have to be able to show that their claim complies with the requirements of section 2 of that Act.⁷⁰

14.4 The need for rectification of dispossession of land in the colonial period

The dispossession of the land used as grazing by the residents of the Reserves was an almost invisible process. In the following section I discuss the process of fencing of private land in the twentieth century that made visible the dispossession that took place during the nineteenth century.

14.4.1 Dispossession of rights in land by the fencing of private land

In his description of the district of Namaqualand, Noble remarks that ‘there are upwards of one hundred and thirty measured farms and one or two mission stations in the southern part, the produce and stock on which are valued at £180000’.⁷¹ This means that in 1875 there were already 130 farms held under perpetual quitrent tenure in the Northern Cape region of the study area. Denoon remarks that the cadastral survey of land means the

measuring of land in private ownership, or intended for private ownership, and making a picture or diagram of such piece of land, representing it as projected on to a plane surface.⁷²

Part of the surveyor’s function is to divide the measured land from the surrounding land. This is done by placing beacons on the corners of the measured land and depicting the demarcated land on the diagram accompanying a title deed.⁷³

However, the beacons placed by the surveyor were not a physical barrier to movement of man and livestock across the measured land.⁷⁴ It was only when

⁷⁰ The effect of section 2 of the Restitution Act is discussed in sections 14.4.1.1 and 14.4.4.1.

⁷¹ J Noble *Descriptive handbook of the Cape Colony: Its condition and resources* (1875) 86.

⁷² G Denoon ‘Diagrams and remainders (I) (1947) 64 *South African Law Journal* 178.

⁷³ Denoon (n 72 above) 178.

⁷⁴ Hill describes the manner in which land was occupied in the Northern Cape during the nineteenth century as follows:

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

fences were erected between these beacons that access to the measured land was restricted. Fences were not a feature on the surveyed farms in the interior of the Cape Colony. Regensberg deals with pastoralism in the Roggeveld in the eighteenth and nineteenth centuries and remarks that when fencing was introduced in the nineteenth century, it was to replace the practice of using herders and keeping livestock in enclosures at night. She states that although camps were made, farms were not enclosed with fences.⁷⁵ As proof of this statement, she refers to a map showing that in 1904 the area of farms in the north-western part of the Cape Colony enclosed with fences varied between none and 25%.⁷⁶ Commenting on the position at Pella, a mission station falling outside the study area, Wisborg remarks as follows about the situation before and after fencing of land took place:⁷⁷

However, Pella residents experienced land losses due to changed practices. All livestock herders, whether 'private' or 'communal', depended on scattered rains and grazing in an open landscape but the meaning and practice of private property changed under the impact of national policy. Many neighbours fenced their farms in the 1950s and 60s, which restricted the access of Pella farmers to surrounding land. The owner of a farm in the area explained that in his father's time (the 1940s) 'there were no fences. They took their stock, they went to Upington, they grazed there, and they grazed in Namaqualand. There were no boundaries so they grazed everywhere'.

As far as the study area is concerned, Rohde remarks that in the case of Leliefontein the boundaries of the Reserve and the neighbouring privately owned land were not fenced until after the Second World War.⁷⁸ This meant that the

(Emphasis added.) R Hill et al 'Conflict over change in land tenure in the reserves of Namaqualand, South Africa: A role for integrated environmental management' (1990) 8 *Impact Assessment* 199.

⁷⁵ RM Regensberg 'Pastoralist systems of the Roggeveld in the 18th and 19th centuries' unpublished Masters dissertation, University of Cape Town, 2016 33.

⁷⁶ Regensberg (n 76 above) 34.

⁷⁷ P Wisborg 'It is our land': Human rights and land tenure reform in Namaqualand, South Africa' unpublished Doctoral dissertation, Norwegian University of Life Sciences, 2006.

⁷⁸ RF Rohde & MT Hoffman 'One hundred years of separation: The historical ecology of a South African 'Coloured Reserve'' (2008) 78 *Africa* 197, 201, 211; E Hongslo et al 'Landscape change and ecological processes in relation to land-use in Namaqualand, South Africa, 1939 to 2005' (2009) 91 *South African Geographical Journal* 64. These remarks are corroborated by Samuels who remarks as follows in this regard:

In Namaqualand pastoralists were prevented from using white-owned land when privately white-owned farms were fenced off and a camp system was introduced under the Fencing Act, 1912 (Act No. 17 of 1912). Fencing also began to replace herding as a livestock management option in the Karoo at this time (Dean et al., 1995). Fencing of private farms adjacent to Leliefontein continued until the 1960s since several private farmers did not want to proceed with erecting fences until the Leliefontein management board paid half of the fencing costs (Leliefontein Management Board Unpublished

residents of Leliefontein had access to the land on the privately owned farms and used it as grazing.⁷⁹ Similarly, in the case of Komaggas, the residents were only barred from using 'seasonally important grazing areas' on a privately owned farm when fencing was erected in the 1970's.⁸⁰ Wisborg remarks that the erection of fences around private land during the twentieth century led to dispossession of the land on the Reserves by practical rather than legal changes.⁸¹ Samuels implies that the fencing of the privately owned land next to the Reserves was due to legislation passed by the Union Parliament between 1910 and 1947 that was aimed at segregation.⁸² If Samuels is correct in this contention, the residents of the Reserves where such dispossession took place may be able to lodge a claim for restitution of their land under the Restitution Act.

14.4.1.1 Restitution in terms of the Restitution Act for dispossession of land by fencing

The requirements that will have to be met by residents of a Reserve that wish to institute a claim for restitution of land of which they have been dispossessed by the fencing of private land, are contained in section 2 of the Restitution Act and more specifically subsection (1)(d), which provides as follows:

(1) A person shall be entitled to restitution of a right in land if-

(a)-(c) ...

(d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices ...

For the purposes of this section, it is accepted that the residents of the Reserve instituting a claim are a community as defined in section 1 of the Restitution Act. The question is therefore whether the dispossession of land by fencing of private land

minutes). Fencing was perceived to increase the carrying capacity of the veld and improved rangeland condition (Archer, 2002).

MI Samuels 'Pastoral mobility in a variable and spatially constrained South African environment' unpublished Doctoral dissertation, University of Cape Town, 2013 49-50.

⁷⁹ Rohde remarks that prior to the fencing of the land the boundaries were 'porous' and the livestock farmers on Leliefontein made use of the 'expanded commons'. As proof for these statements he refers to aerial photographs taken of the unfenced land in 1960 and aerial photos of the same land taken in 1997. Rohde (n 78 above) 211.

⁸⁰ P Wisborg 'Dead or alive? Human rights and land reform in Namaqualand commons, South Africa' Paper presented at the biennial conference of the International Association for the Study of Common Property, 'The commons in an age of globalisation', Victoria Falls, Zimbabwe, June 2002 <http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1589/wisborgp020402.pdf?sequence=1> . (accessed 15 June 2018) 10.

⁸¹ Wisborg (n 80 above) 10.

⁸² Samuels (n 78 above) 36, 49. The specific Act he refers to is the Fencing Act 17 of 1912.

was the result of 'past racially discriminatory laws or practices'. The concepts of 'racially discriminatory laws' and 'racially discriminatory practices' are defined as follows in section 1 of the Restitution Act:

'racially discriminatory laws' include laws made by any sphere of government and subordinate legislation;

'racially discriminatory practices' means racially discriminatory practices, acts or omissions, direct or indirect, by-

- (a) any department of state or administration in the national, provincial or local sphere of government;
- (b) any other functionary or institution which exercised a public power or performed a public function in terms of any legislation...

Pienaar points out that the definitions of these concepts in the Restitution Act do not make it clear what type of legislation or practices falls within the limits of racially discriminatory laws or practices.⁸³ She refers to two questions, pertinent to the discussion in this section, which are not resolved by the definitions in the Restitution Act. These questions are—

- (a) whether to fall within the purview of the Restitution Act the law or practice must be intended to have a racially discriminatory effect or whether it is sufficient if the law or practice had such an effect; and
- (b) whether a law or practice that does not deal with race at all can have a racially discriminatory effect.⁸⁴

If Samuels' contention is accepted, the law that caused the dispossession of the land of the residents of the Reserves was the Fencing Act.⁸⁵ As it is clear from the remarks in section 14.4.1 that fencing of private land next to Reserves was still occurring in the 1960's and 1970's, the Fencing Act⁸⁶ of 1963 ('1963 Act') must also be considered. Even if the Fencing Act and the 1963 Act cannot be regarded as laws that had a racially discriminatory effect, it must be determined whether the practice of private farmers to fence their land next to the Reserves, whether in terms of the Fencing Act or not, was a racially discriminatory practice.

⁸³ J Pienaar 'Die betekenis van 'n ontneming weens 'n rasdiskriminerende wet of praktyk vir doeleindes van die Wet op Herstel van Grondregte 22 van 1994: 'n Oorsig van ontwikkelings in regspraak' (2012) 9 *LitNet Akademies* 108.

⁸⁴ Pienaar (n 83 above) 111.

⁸⁵ See note 82.

⁸⁶ 31 of 1963.

For the purposes of this thesis, the most important feature of the Fencing Act is that it is only in cases where a fence had to be erected to prevent the spread of livestock diseases that the Department of Agriculture could compel the owner of a holding to erect a fence.⁸⁷ There is no other provision of the Fencing Act that could be used by the Department of Agriculture to encourage the erection of fences around private land next to the Reserves. The purpose of the Fencing Act was primarily to provide for the equitable division of the costs involved in erecting fences which divided the holdings of different owners. The secondary function of the Fencing Act was to provide for practical matters relating to the erection of such dividing fences. The 1963 Act does not include the provisions regarding the compulsory erection of fences and otherwise has exactly the same purposes as the Fencing Act.

Pienaar remarks that in *RichtersveldSCA* and *Alexkor*, the courts decided that the appropriate test to determine whether a law had a racially discriminatory effect was to consider the impact it had on the rights of the claimants and not whether the law was aimed at making distinctions between persons based on race.⁸⁸ The erection of fences had the effect of preventing the residents of Reserves to exercise their customary law rights in the land used as grazing and water resources on private land, but such rights were not recognised prior to 1994. Therefore, from a legal viewpoint, the residents of the Reserves were trespassers on privately owned land and the erection of fences did not have any effect on their existing rights.⁸⁹ As the Fencing Act and the 1963 Act did not create the opportunity for the owners of private land next to the Reserves to deprive the residents of the Reserves of their customary

⁸⁷ See section 9 of the Fencing Act. Holding is defined in section 1 of the Fencing Act and describes all the different types of land that may be subject to the provisions of the Fencing Act.

⁸⁸ Pienaar (n 83 above) 118. The SCA and CC rejected the LCC's application of the test in *Minister of Land Affairs and another v Slamdien and others* 1999 1 All SA 608 (LCC) that dispossession caused by a law that was not designed to bring about spatial apartheid cannot be regarded as dispossession in terms of a racially discriminatory law.

⁸⁹ The writers referring to the use made of privately owned land by residents of the Reserves do not give any explanation why the owners of the private land allowed such use. Consequently, it is impossible to determine from the resources that I have at my disposal whether the owners acknowledged the customary law rights of the residents of the Reserves or not. However, in view of the subordinate status of customary law prior to 1994, it is accepted that the owners of the land were not aware of any customary law rights in land of the residents of the Reserves or, if they were aware of such rights, these rights were probably just ignored. It is possible that encroachment on unfenced private land by the residents of the Reserves took place because the owners of such land were not sure where exactly the boundaries of their farms were.

law rights in land by erecting fences, the question whether their actions can be regarded as racially discriminatory practices must be answered in the negative.⁹⁰

In view of the discussion in this section, I am of the opinion that the residents of the Reserves who have been excluded from the private land next to Reserves by the erection of fences will not be able to institute a claim for restitution of rights in such land in terms of section 2(1)(d) of the Restitution Act. For the purposes of this thesis, it is presumed that the residents of the Reserves in the Northern Cape who were dispossessed of their land in terms of racially discriminatory laws or through racially discriminatory practices after 1913, have lodged their claims under the Restitution Act.⁹¹ In other words, it is accepted that the residents of the Reserves who were dispossessed of their customary law rights in land and have not instituted claims under the Restitution Act, are not able to prove that they were dispossessed of such rights after 19 June 1913.

14.4.2 Unequal application of the Restitution Act

In this section, I establish the basis for my argument that the residents of the Reserves are unfairly prevented by section 2 of the Restitution Act from claiming the land of which their ancestors were dispossessed when the British colonial government surveyed and sold the land in the vicinity of the Reserves. I discuss two cases in which the ancestors of the successful claimants were also dispossessed of their customary law rights in land by governments that granted the land they

⁹⁰ Pienaar remarks that in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) ('*Goedgelegen*') the CC decided that the practices of a private person that dispossess a claimant from rights in land will be racially discriminatory practices if the actions were made possible by a network of racially discriminatory law and practices put in place by the state. However, in this hypothetical case, the Fencing Act and the 1963 Act did not create such a network. Pienaar (n 83 above) 124.

⁹¹ This presumption is based on the long time that has been allowed for lodgement of claims as well as the success that the Richtersveld community had with regard to their claim, which would have served as encouragement for the lodging of new claims in the period from 1 July 2014 until 28 July 2016, when the Restitution of Land Rights Amendment Act 15 of 2014 was in force. The Amendment Act amended section 2 of the Restitution Act to extend the date for the lodging of claims to 30 June 2019. However, the Amendment Act has been declared invalid by the CC in *Land Access Movement of South Africa and Others v Chairperson, National Council of Provinces and Others* 2016 5 SA 635 (CC). Prior to the invalidation of the Amendment Act, 163 000 new land claims were submitted. 'New public participation process on land reform to begin' *Cape Times* 9 October 2017. <https://www.iol.co.za/capetimes/opinion/new-public-participation-process-on-land-reform-to-begin-11530209> (accessed 20 May 2018.) The Restitution of Land Rights Amendment Bill, 2017 that will replace the invalid Amendment Act provides that, instead of the 30 June 2019 cut-off date, claims may be lodged for five years after the entry into force of the Bill. This Bill has not yet been enacted.

occupied in ownership to non-indigenous persons. However, by using the fact that the ancestors of the claimants were allowed by the registered owners of the land to continue occupying the land, the SCA and CC were able to apply the Restitution Act to the claimants' cases.

14.4.2.1 The SCA's approach to pre-existing South African common law rights in land

In *Prinsloo and Another v Ndebele-Ndzundza Community and Others*⁹² ('*Prinsloo*'), the SCA found that the rights in land of the claimant community were able to exist notwithstanding the establishment of South African common law ownership rights over the same land. The SCA remarks as follows in this regard:⁹³

[36] Counsel contended also that the fact that the land was granted in registered white ownership before Madzidzi's arrival excluded the inference that the claimants' predecessors enjoyed rights in the land. I cannot accept this. First, the evidence of Dr Jansen van Vuuren offers support for continuous indigenous occupation predating the grant of registered ownership. But, in any event, the statute recognises rights of communal ownership under indigenous law. In my view, the fact that registered title exists neither necessarily extinguishes the rights in land that the statute contemplates, nor prevents them from arising.

[37] The subtlety and complexity and the inescapable contradictions of the position in which the farm's residents found themselves is [sic] reflected in the following exchange during the cross examination of Mbulawa Abraham Mahlangu:

'Do you agree that, in 1902, Mr Henwood became the owner of a portion of Kafferskraal? He was not the owner. He let the people pay because of his colour.'

[38] The Act recognises complexities of this kind and attempts to create practical solutions for them in its pursuit of equitable redress. The statute also recognises the significance of registered title. But it does not afford it unblemished primacy. I

⁹² 2005 6 SA 144 (SCA). The facts of *Prinsloo* are summarised as follows by the SCA:

[29] This evidence, in my view, warrants the following factual conclusions:

- (a) The claimants' predecessors constituted a group of people who lived on and worked the farm for a continuous period of nearly 50 years from before the end of the 19th century until their relocation in the late 1930s.
- (b) They lived under the authority of a chief designated by the traditional tribal hierarchy: In the late 19th century and first two decades of the 20th century, under Chief Madzidzi, and, for the next 20 years, under his son and successor, Chief Japtha Mahlangu.
- (c) They held the land as a group and in common with each other.
- (d) They occupied the farm exclusively and without immediate supervision or direct control from the white landowners.
- (e) They did so in accordance with the ancient customs and traditions of the Ndebele-Ndzundza people.

Prinsloo (above) 152.

⁹³ *Prinsloo* (n 92 above) 153-154.

consider that, in this case, the farm's residents established rights in the land that registered ownership neither extinguished nor precluded from arising.

These remarks make it clear that any registered owner of land whose predecessors in title—

- (a) had—
 - (i) found an indigenous community living on the land and allowed the community to remain on the land; or
 - (ii) allowed an indigenous community to establish themselves on the registered land; and
- (b) allowed such communities to live on that land in accordance with their customary law,

also allowed such communities to develop rights in the registered land. The SCA found that rights developed in these circumstances are not inferior to registered ownership.⁹⁴

The unequal treatment of the residents of Reserves in comparison with the claimants in *Prinsloo*, lies in the fact that the rights of the residents in the privately owned land next to the Reserves prior to its fencing and the rights of the claimants in *Prinsloo*, are based on their respective customary law systems. The question is therefore whether it is equitable and fair that the difference in the manner in which dispossession was effected in the two cases, makes it possible for the claimants to have their rights restored while the residents have no legal avenue to have their rights restored.⁹⁵

⁹⁴ *Prinsloo* (n 92 above) 154.

⁹⁵ The disruption that was caused by the removal from the land of some of the members of the community in terms of racially discriminating laws and practices, must have been more than the disruption caused by the fencing of the privately owned land next to the Reserves. However, as the aim of the land restitution programme is to return land to persons who have lost their rights in the land, I contend that it is the fact of dispossession and not necessarily the manner of dispossession that must play a role in determining whether land should be returned. In *Salem Party Club and Others v Salem Community and Others* 2018 3 SA 1 (CC) (*SalemCC*), the CC developed this trend further. Although there was a valid grant prior to 1913 of the Salem Village commonage in ownership to the community of Salem Village as a *universitas* (see *Ex Parte Gardner* 1940 EDL 175 178-179), the CC found that the claimants were able to establish the right to use the commonage for grazing, agricultural purposes, traditional rites and practices, residential purposes, gathering firewood and burial.

14.4.2.2 Double dispossession

Van der Walt refers to cases in which the courts found that there was 'double dispossession' of the land of indigenous communities. These were cases where the community was dispossessed of its rights in land before 19 June 1913, but

remained in physical occupation of the land after colonisation and were then again dispossessed under apartheid law, after the cut-off date, of the weak possessory rights they still had to the land.⁹⁶

In *Goedgelegen* the facts were that the ancestors of the claimants, prior to 19 June 1913, occupied and exercised their customary law rights in the claimed land. They were dispossessed of their customary law rights before 1913 when the government of the Zuid-Afrikaansche Republiek granted the land to a non-indigenous settler, and could no longer exercise their customary law rights on the land. The ancestors of the claimants remained on the land as labour tenants.⁹⁷

The CC found that the claimants in *Goedgelegen* were dispossessed of their right as labour tenants in the land concerned. From the CC's remarks it appears that the right in land of a labour tenant may include the right to occupy land for residential purposes and to use land for agricultural and grazing purposes.⁹⁸ For the purposes of restitution or redress, the claimants claimed their previous homesteads and an area of 800 square metres around the homesteads as well as the land that was used for ploughing and grazing.⁹⁹

It is accepted that Van der Walt's remark that *Goedgelegen* is an example of double dispossession is based on the following comment of the CC:¹⁰⁰

⁹⁶ Van der Walt (2012) (n 2 above) 106, 148 footnote 108.

⁹⁷ *Goedgelegen* (n 90 above) 205-206.

⁹⁸ Although the definition of 'labour tenant' in the Land Reform (Labour Tenants) Act 3 of 1996 is not applicable to a labour tenant as contemplated in the Restitution Act, it is interesting to note that the CC's description of the rights of a labour tenant is in line with paragraphs (a) and (b) of the said definition which provides as follows:

'labour tenant' means a person-

- (a) who is residing or has the right to reside on a farm;
- (b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee;

⁹⁹ The claimants did not claim that they were dispossessed of their customary law rights in land, but only that they were dispossessed of their rights as labour tenants. *Goedgelegen* (n 90 above) 209.

¹⁰⁰ *Goedgelegen* (n 90 above) 213.

Although they had lost indigenous ownership, they continued to exercise the right to occupy the land, to raise crops and to graze their livestock. Successive registered owners did not terminate these rights.

'Double dispossession' happens when a community had been dispossessed of their customary law rights in land, prior to 19 June 1913, by the granting of ownership of that land to a non-indigenous person. If by some fortuitous circumstances the dispossessed community or some members of the community were allowed to remain on the land by the new owner and the descendants of the members of that community were after 19 June 1913 dispossessed of their remaining rights in land, they are entitled to claim restitution of such rights.

I am of the opinion that the fact that the CC has provided for so-called 'double dispossession' is a further illustration of the prejudice caused to the residents of the Reserves by section 2 of the Restitution Act. Although they were dispossessed of their customary law rights in land by the survey and demarcation of private land next to the Reserves¹⁰¹ in the nineteenth century, in many cases they continued to exercise customary law rights on the privately owned land. However, because they did not reside permanently on the land they used as grazing on the privately owned land next to the Reserves, it was easy to exclude them from the land by fences. Since the fencing of the land was not done in terms of a racially discriminatory law and was not a racially discriminatory practice, the residents are left without any legal remedy.

¹⁰¹ The residents of the Reserves were dispossessed of their customary law rights in land because the continued existence of such rights was not compatible with South African common law principles relating to ownership of land as applied through the nineteenth and twentieth centuries up to 1994. In view of the definition of right in land in section 1 of the Restitution Act, the continued use of grazing and water resources on privately owned land cannot be regarded as one of the other rights in land apart from customary law rights. These rights are—

- (a) the interest of a labour tenant and sharecropper;
- (b) the interest of a beneficiary under a trust arrangement; and
- (c) beneficial occupation for a continuous period of not less than 10 years prior to the dispossession.

In other words, although I argue in this section that the residents of the Reserves are excluded from restitution by section 2 of the Restitution Act, I am also of the opinion that the manner in which they occupied the land after the dispossession of the customary law rights in land cannot be regarded as having a right in land as contemplated in section 1 of the Restitution Act. See also the remarks in note 36.

14.4.3 Dispossession of rights in land due to British colonialism

I have already remarked on the fact that the British colonial government introduced a totally new approach to the value of land in the Cape Colony.¹⁰² Moreover, its attitude towards rights in land was detrimental to the indigenous communities of the colony. Ramutsindela refers to Governor Cradock's remarks in section 17 of the Perpetual Quitrent Proclamation to illustrate that the British colonial government regarded an insecure form of occupation of land, such as loan farms, as untenable for a civilised society. He remarks as follows in this regard:¹⁰³

This view places land tenure systems squarely within the ambit of civilisation; suggesting that different forms of land tenure reflect different levels of civilisation. In this context, Cradock was eager to endorse a form of land tenure that reflected the level of civilisation of a people.

According to Ramutsindela, this attitude of the British colonial government led to 'the consolidation of a differentiated land tenure system in which blacks would own land as a common property'.¹⁰⁴ Although these remarks are not directed at the residents of the Reserves, I am of the opinion that the discussion of Tickets of Occupation ('ToO's') in Chapter 12 shows that they are equally applicable to the Reserves. Once the British colonial government had demarcated land at the mission stations which could be occupied by the residents, they believed that the obligation to safeguard the rights of indigenous communities had been fulfilled.¹⁰⁵ This indicates that the British colonial government disregarded the possibility that the residents had customary law rights outside of the land demarcated in the ToO's.

I am of the opinion that it is the attitude and actions of the British colonial government, discussed above, that must, for the purposes of this thesis and in the context of the dispossession of land from the residents of the Reserves in the Northern Cape, be regarded as colonialism.¹⁰⁶ In the following section I consider the

¹⁰² See section 14.2.5.

¹⁰³ M Ramutsindela 'Property rights, land tenure and the racial discourses' (2012) 77 *GeoJournal* 755.

¹⁰⁴ Ramutsindela (n 103 above) 756.

¹⁰⁵ The ToO's of Komaggas, Leliefontein and Steinkopf all provided that the identified land would not be alienated and would be for the exclusive use of the residents of the mission stations. *Report of the Select Committee of the Legislative Council on the Lands in Namaqualand set apart, for the occupation of natives and others* 1888 Appendix i, Appendix ii, Appendix iv.

¹⁰⁶ Khunou remarks that the rights of the indigenous communities at the Cape were ignored by the colonial powers, who forced them off their land by the process of conquest accompanied by land dispossession. This dispossession was caused by non-indigenous settlers that simply declared that

impediments to the application of the constitutional land reform programme to the dispossession of rights in land. These impediments were caused by land legislation and the unilateral actions of British colonial government officials who surveyed and sold land in which the residents of Reserves had customary law rights.

14.4.4 Non-restitution of land dispossessed due to colonialism

In section 14.4.1 I discuss the reasons why the residents of the Reserves will not be able to claim, on the basis of the Fencing Acts, that they have been dispossessed of their rights in land after 19 June 1913. In view of those reasons, it appears that the only manner in which they will be able to lodge a claim for restitution of the land that they lost through colonialism in terms of the Restitution Act, is if the Constitution and section 2 of the Restitution Act are amended to remove the cut-off date of 19 June 1913. The possible effect that such an amendment to the legislation concerned will have on the residents of the Reserves is discussed in the following section.

14.4.4.1 Reasons why amendment of the 19 June 1913 cut-off date in section 2 of the Restitution Act will not benefit the residents of the Reserves

In addition to Mostert's reasons (quoted in note 70) why *RichtersveldSCA* and *Alexkor* do not serve as a precedent for the residents to lodge claims in terms of the Restitution Act, it must be borne in mind that the laws dealing with registration of land in the Cape Colony were not racially discriminatory.¹⁰⁷ The question whether the

the land was theirs because they did not recognise indigenous land ownership. SF Khunou 'The legal crisis of land restitution in South Africa: A critical analysis' (2015) 18 *Recht in Afrika - Law in Africa - Droit en Afrique* 156. Although it is undoubtedly true that in many cases the effects of colonialism were as described by Khunou and that this type of dispossession also occurred in the Northern Cape, once ToO's were established for the residents of Reserves the residents no longer experienced this type of dispossession. However, the dispossession that occurred due to the survey and sale of land outside the guaranteed ToO land was equally the result of colonialism.

¹⁰⁷ Heyl provides a list of the resolutions and *plakaats* of the colonial government that relate to the registration of land. JWS Heyl *Grondregistrasie in Suid-Afrika* (1977) 426. The *plakaat* of 17 August 1672 addresses the '*vrijeluijden ofte inhabitanten*' (see Heyl (above) 334) while the resolution of 1 July 1686 refers to '*ingesetenen*'. *Resolutions of the Council of Policy of Cape of Good Hope C.* 18, pp. 41-44. Hattingh discusses the grant and sale of land in Cape Town to freed slaves. The first such grant that he refers to was made on 25 February 1667. He remarks that no special provision was made when granting land to freed slaves. JL Hattingh 'Grondbesit in die Tafelvallei Deel 1: Die eksperiment: vryswartes as grondeienaars, 1652-1710' (1985) 10 *Kronos* 34, 38-39. As the abovementioned *plakaat* and resolution refer to all the private land owners of the Cape Colony, it is clear that no distinction was made between owners on the grounds of race. The most telling evidence that the British colonial government, at least after 1828, did not discriminate between races as far as registration of ownership of land is concerned, is contained in section 3 of Ordinance 50 of 1828 which provides as follows:

fact that communal rights in land could not be registered in terms of the domestic law of the Cape Colony was a racially discriminatory practice must be answered in the negative. It cannot be argued that British colonial government officials applying legal rules relating to ownership and registration, which had their origins in Europe long before the so-called New World and its inhabitants were encountered, were engaged in a discriminatory practice.¹⁰⁸ Therefore, even if the Constitution and the Restitution Act are amended to provide for an earlier cut-off date than 19 June 1913, the residents of the Reserves will be excluded from the restitution process.

The 19 June 1913 cut-off and the fact that the laws that led to dispossession of their rights in land outside the boundaries of the Reserves, namely the laws dealing with registration of land and fencing, were not racially discriminatory laws have apparently left the residents of the Reserves without any remedy in terms of the constitutional land restitution programme. Cavanagh is of the same opinion as is evident from the following remarks:¹⁰⁹

And whereas doubts have arisen as to the competency of Hottentots and other free Persons of colour to purchase or possess Land in this Colony: Be it therefore enacted and declared, That all Grants, Purchases, and Transfers of Land or other Property whatsoever, heretofore made to, or by any Hottentot or other free Person of colour, are, and shall be, and the same are hereby declared to be, of full force and effect, and that it is, and shall, and may be, lawful for any Hottentot or other free Person of colour, born, or having obtained Deeds of Burghership, in this Colony, to obtain and possess by Grant, Purchase, or other lawful means, any Land or Property therein,—any Law, custom, or usage to the contrary notwithstanding.

W Harding *The Cape of Good Hope Government Proclamations, from 1806 to 1825, as now in force and unrepealed and the ordinances passed in Council, from 1825 to 1838* (1838) 463-464. It must be noted that the preceding remarks only apply to the study area as different circumstances applied in the eastern parts of the Cape Colony. In this regard, see L Changuion & B Steenkamp *Disputed land The historical development of the South African land issue, 1652-2011* (2012) 44-49.

¹⁰⁸ In *RichtersveldSCA* the SCA found that the British colonial government and the Union government disregarded the Richtersveld community's rights in the claimed land because they regarded the community as uncivilised. *RichtersveldSCA* (n 6 above) 139. Although I have a different opinion in this regard (see Chapter 7), the following contentions of the appellants in *RichtersveldSCA* must be regarded as a true reflection of the situation in the Cape Colony:

It was contended that the dispossession was the result of racial discrimination in that the State failed to recognise and protect their rights in the subject land in the same way that the land rights of the other inhabitants of the Cape were consistently recognised and protected. It was contended that the very essence of the discrimination against the Richtersveld community was the State's fundamental premise that they had no land rights in the subject land at all.

RichtersveldSCA (n 6 above) 137. In view of these contentions, I argue that because customary law rights in land were not acknowledged during the colonial period, the situation should be rectified in terms of the constitutionally mandated legislation suggested in Chapter 16.

¹⁰⁹ Cavanagh refers to the 'narrative of dispossession' (which is discussed in section 2.2 of Chapter 2) relating to the dispossession of land of indigenous communities during the colonial period. He is of the opinion that this narrative did not have the effect of broadening the process of restitution of land to actually include dispossession of land that took place during the colonial period. E Cavanagh *Settler colonialism and land rights in South Africa: Possession and dispossession on the Orange River* 2013 108-109.

The all-powerful 'master narrative' was never one with too great a temporal breadth, but rather one with parameters strangely restricted to a classic, twentieth-century confrontation generally between *white* and *black* (coloureds, 'Indians', and others of Asian descent, Khoe-San, former slaves and other mixed descent South Africans are often marginalised from it by default, unless involved in urban claims). This is nothing like a 350-year contest - the date of 1652 has no relevance whatsoever. This is a small 85-year window; a mostly modern, largely urban, and sadly racist version of history.

Oppression and dispossession, history tells us, however, occur before the date of 1913, as they occur after 1998. While scholars of land reform occasionally tip their hat towards such a history, state policy and jurisprudence remain ignorant of it.

14.4.4.2 Reasons for rectifying the non-restitution of land dispossessed due to colonialism in the Northern Cape

It appears that, in the case of the residents of certain Reserves, the colonial dispossession of land will not be addressed in the context of the constitutional land reform programme provided for in section 25(5) to (7) of the Constitution. Van der Walt describes the aims of the constitutional land reform programme as follows:¹¹⁰

In the South African cases, the relevant constitutional objectives for present purposes relate to land reform, and recognition and protection of the relevant property interests would be required as part of the process of eradicating the legacy of apartheid land law. In fact, the standard categories of land reform illustrate how the constitutional property reform objectives require different actions to ensure that all the desired features of the property system are promoted and all the unwanted effects are proscribed: restitution is necessary to rectify apartheid dispossessions; redistribution is necessary to promote wider and more equitable access to land and to redress the landholding and access imbalances brought about by apartheid land law; and tenure reform is necessary to reform the weaknesses of black property holdings brought about by apartheid private property law.

Van der Walt does not provide any reasons why it is only necessary to have a land reform programme that addresses the legacy of apartheid land law. It is therefore necessary to consider the reasons for the 19 June 1913 cut-off date as

¹¹⁰ Van der Walt (2012) (n 2 above) 149.

provided in the *White paper on South African land policy April 1997* ('*White paper*'):¹¹¹

However, although dispossession took place during the colonial era prior to 1913 through wars, conquest, treaty and treachery, the government believes these injustices cannot reasonably be dealt with by the Land Claims Court. The government believes it is not possible to address pre-1913 claims through a judicial process such as that laid out in the Restitution of Land Rights Act or Aboriginal Title Arguments that have been used in countries such as Canada and Australia. In South Africa, ancestral land claims could create a number of problems and legal-political complexities that would be impossible to unravel:

@ Most deep historical claims are justified on the basis of membership of a tribal kingdom or chiefdom. The entertainment of such claims would serve to awaken and/or prolong destructive ethnic and racial politics.

@ The members of ethnically defined communities and chiefdoms and their present descendants have increased more than eight times in this century alone and are scattered.

@ Large parts of South Africa could be subject to overlapping and competing claims where pieces of land have been occupied in succession by, for example, the San, Khoi, Xhosa, Mfengu, Trekkers and British.

The first two problems and legal-political complexities referred to in the *White Paper* cannot be applicable to the residents of the Reserves as they are not members of—

- (a) 'a tribal kingdom or chiefdom'; or
- (b) ethnically defined communities or chiefdoms.

As far as the last problem is concerned, in section 2.5 of Chapter 2 I discuss the reasons why the manner of occupation of land by indigenous communities and non-indigenous persons in the study area, and especially in the part of the study area in the interior of the Cape Colony, precludes the existence of competing claims.

I am of the opinion that as the residents of the Reserves are just as much disadvantaged by the dispossession of their land by colonialism as persons dispossessed after 19 June 1913 and as the reasons for the 1913 cut-off date do not apply to them, a special dispensation should be created for them to receive

¹¹¹ *White paper on South African land policy April 1997* 77-78.
<http://www.ruraldevelopment.gov.za/phocadownload/White-Papers/whitepaperlandreform.pdf>
 (accessed 24 June 2018).

substantive benefits from land reform measures tailored to their specific needs, in addition to the benefits provided by the constitutional land reform programme.

14.5 Conclusion

By the end of the eighteenth century the domestic law of the Cape Colony had undergone certain changes from what it was when the first non-indigenous persons settled at the Cape. These changes were made to provide for the unique manner in which land was occupied by non-indigenous settlers in the interior of the Cape Colony and the fact that their main activity was livestock farming. Although the domestic land law of the Cape Colony did not in any way provide for the customary law rights of indigenous communities, the two systems were in certain respects compatible with each other. I contend that due to the fact that both non-indigenous settlers and indigenous communities occupied land as grazing in the interior of the Cape Colony, their occupation of land overlapped. This meant that, especially in the Northern Cape, the indigenous communities had customary law rights in the land they occupied as grazing when the British conquered the Cape Colony, which they still had when the boundary of the Cape Colony was extended to the Gariep River in 1847.

The radical reform of the domestic land law of the Cape Colony which started in 1813 rendered it incompatible with the customary law systems of the indigenous communities. The introduction of the doctrine of tenures in the Cape Colony led to the systematic survey and sale of the land that the indigenous communities used as grazing for their livestock. The British colonial government was satisfied that the granting of ToO's to the residents of the Reserves was sufficient protection of their rights in land. I am of the opinion that this particular manifestation of colonialism led to dispossession of land in the Northern Cape and that this dispossession must be addressed by adopting new legislation in terms of section 25(8) of the Constitution as discussed in Chapter 16.

Even though it cannot be contended that the impact of colonial dispossession of land in the Northern Cape can be compared to the impact of dispossession of land that took place after 1913, the fact of dispossession remains. As all persons must be treated in an equitable and fair manner in terms of the Constitution, the ineffective

operation of the constitutional land reform programme in the Northern Cape needs to be addressed.

15 Changing the status of customary law rights in land in the Northern Cape

15.1 Introduction

South Africa is a large country that is faced with the challenge of rectifying the grossly uneven distribution of land between the indigenous communities and the non-indigenous persons who appropriated 87% of the land for themselves.¹ This land was formally appropriated and allocated in terms of legislation enacted by the Union and Republic governments before 1994 and had an impact over the whole of South Africa.² The reparation for the harm caused by racially discriminatory laws and practices is approached on a country-wide scale in terms of the constitutional land

¹ It must be borne in mind that the 87% and 13% division of land between Whites and Blacks is derived from proposed allocation of land in terms of the Natives Land Act 27 of 1913 ('Natives Land Act') and the Native Trust and Land Act 18 of 1936 ('Natives Trust Act'). It has been pointed out that these percentages are not necessarily a true reflection of the division of land in South Africa. For example, Letsoalo remarks as follows:

The 1936 Land Act was meant to release a further 5.7% (Union of South Africa 1936). By 1991, 55 years later, when the Land Acts were repealed, 1.25 million ha that had been earmarked for release was still in the hands of the government under the South African Development Trust (South Africa 1991). The significance of this arithmetic is that the land reserved for Africans by the Land Acts is not 13%, as commonly referred to: Africans were excluded from more than 87% of the land.

MJJ Letsoalao & MJJ Thupana 'The repeal of the land acts: The challenge of land reform policies in South Africa' (2013) 39 *Social Dynamics* 299. Similarly, in the same issue of *Social Dynamics* Walker remarks as follows:

Thus the oft repeated claim that in 1994, as a result of the workings of the Land Acts of 1913 and 1936, 87% of South Africa's land belonged to whites and just 13% to blacks is deeply misleading. As historically resonant as these spatial percentages undoubtedly are, they derive from the target that was set in 1936 by the Native Trust and Land Act, a target that had not yet been fully met by 1994.

C Walker 'Commemorating or celebrating? Reflections on the centenary of the Natives Land Act of 1913' (2013) 39 *Social Dynamics* 286. Changuion offers a contrary view regarding the occupation of land by the Black population of South Africa:

It is calculated that approximately 2 million ha was transferred from 2001 to 2006 which is approximately 3% of the country's area. On 5 July 2010, the minister said that he had bought 972472 ha in the preceding three years. It is assumed that the state owns approximately 25% of the 122 million ha of the country's area of which approximately 91 million ha is agricultural land. If land is purchased at the same rate, it would appear more realistic to assume that black occupation could now be at least 28%.

L Changuion & B Steenkamp *Disputed land The historical development of the South African land issue, 1652-2011* (2012) 299.

² See Changuion's discussion of the report of the commission appointed in terms of section 2 of the Natives Land Act (Beaumont Report) to 'report on the areas to be reserved for black settlement and also to investigate the possibility of more land for the black population'. Changuion (n 1 above) 140-148. He remarks as follows with regard to recommendations made in the report:

The report of 1916 should be regarded as one of the most important documents concerning policy on land tenure and segregation, even if only because it laid down guidelines. The report also pointed out that 'the segregation of lands for occupation by Natives is no new principle. It is in fact, a principle which, consciously, appears to have been aimed at in all provinces, from the earliest times, though only partially achieved or deliberately departed from.

Changuion (n 1 above) 147. Some of the other legislation which had the effect of allocating land to White people is the Natives Trust Act (see Changuion's discussion of this Act 166-174) and the Group Areas Act 41 of 1950 (see Changuion's discussion on 192).

reform programme.³ The discussion in section 14.3 of Chapter 14 shows that the constitutional land reform programme is also being applied in the Northern Cape. In this chapter, I contend that appropriate amendments to the Transformation of Certain Rural Areas Act⁴ ('Transformation Act') may lead to recognition of the role of customary law systems in the Northern Cape. This may in turn have an effect on the manner in which the constitutional land reform programme is implemented in the Northern Cape.

Pienaar remarks as follows with regard to some of the shortcomings of the Transformation Act;⁵

Although the *Transformation Act* is in line with the broad goals set out in the *Constitution* in general, and more particularly with those of the land reform programme, the Act itself does not specifically refer to the constitutional goal of *providing secure tenure* or to *creating a transformed society*.

I contend that the goal of creating a transformed society in terms of the Transformation Act may, as far as the Northern Cape is concerned, be achieved by providing in the Act that communities may choose to continue exercising their

³ The constitutional land reform programme is described in note 2 of Chapter 14. The Constitutional Court ('CC') emphasises the importance of section 25 of the Constitution of the Republic of South Africa, 1996 ('Constitution') as part of nation-building in South Africa. In *AGRI SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) 19-20 the CC remarks as follows:

The approach to be adopted in interpreting s 25, with particular reference to expropriation, is to have regard to the special role that this section has to play in facilitating the fulfilment of our country's nation-building and reconciliation responsibilities, by recognising the need to open up economic opportunities to all South Africans. This section thus sits at the heart of an inevitable tension between the interests of the wealthy and the previously disadvantaged. And that tension is likely to occupy South Africans for many years to come, in the process of undertaking the difficult task of seeking to achieve the equitable distribution of land and wealth to all.

Tables on pages 18 and 24 of a research report published by the Programme for Land and Agrarian Studies show that in 2006 programmes dealing with restitution and redistribution of land were being conducted in all nine provinces of South Africa. E Lahiff *Land reform in South Africa: A status report 2008* (2008) 18, 24. It is therefore clear that, at least as far as restitution and redistribution of land are concerned, the constitutional land reform programme is conducted on a national scale. With regard to the redistribution of land, the following remarks in the 'Report of the high level panel on the assessment of key legislation and the acceleration of fundamental change' November 2017 indicate that the redistribution sub-programme is applied in all provinces:

The provincial breakdown of land redistribution shows the general trend of the Northern Cape being the province in which most land is redistributed, and also shows increases in delivery in KwaZulu-Natal and the Eastern Cape in the past decade. Delivery of hectares by different project type shows strong provincial variations: in the early years of the SLAG projects (1994-2000 exclusively, and partially thereafter), more land was redistributed in the Western Cape and KwaZulu-Natal and Mpumalanga. There has been no spatial targeting directed from the national level. District and provincial offices have made the decisions about where resources should be prioritised.

'Report of the high level panel on the assessment of key legislation and the acceleration of fundamental change' November 2017 211.

⁴ 94 of 1998.

⁵ JM Pienaar 'Lessons from the Cape: Beyond South Africa's Transformation Act in L Godden & M Tehan (eds) *Comparative perspectives on communal lands and individual ownership* (2010) 204.

customary law rights in land. In other words, although the purpose of the Transformation Act is to transform the existing rural land tenure system, I contend that this purpose may be achieved while the customary law rights in land used as grazing of the residents of the Reserves are maintained. In the first part of this chapter, I make suggestions as to how the Transformation Act may be amended and motivate the suggested amendments. The purpose of the first part of this chapter is to illustrate that, by making modifications to an existing land reform tool like the Transformation Act, the customary law rights in land of the residents of the Reserves as discussed in Part 4 may be incorporated into the constitutional land reform programme.

In the second part of the chapter I contend that the environmental circumstances that prevail in the region serve as a further motivation for the suggested amendments to the Transformation Act and the consequential incorporation of customary law systems in the Northern Cape. These contentions are in line with the following recommendations made by Hall:⁶

First, area-based targeting of land reform could play a key role by expanding the areas available by adding to existing commonages, decongesting communal areas, and enabling flexible access to diverse habitat patches to enable herd mobility and enhance resilience. Second, this would require the strengthening of institutions for the management of rangeland commons and in order to limit elite capture, by drawing on available expertise to identify and work with existing institutions rather than relying solely on business planning modalities. Third, exploration of new and more appropriate common property management systems is needed in redistributive land reform. While the CPA model has proved problematic in practice, improved support and implementation might address many of the problems, and alternative institutional models should also be explored. Much of the rangelands and land reform literature suggests that learning from local institutions, and experiences of local institution-building, is key (Swift 1995, Cousins and Hornby 2002, Lahiff 2009). While the search for a technical institutional fix continues, an exclusive focus on national policy frameworks would be a mistake.

⁶ R Hall & B Cousins 'Livestock and the rangeland commons in South Africa's land and agrarian reform' (2013) 30 *African Journal of Range & Forage Science* 14.

In Chapter 14 the fact of the dispossession of the customary law rights in land of the residents of the Reserves in the nineteenth century is discussed.⁷ I also discuss the prejudice that the descendants of the dispossessed residents of the Reserves are suffering, because these rights cannot be restored in terms of the constitutional land reform programme.⁸ In the last part of this chapter I discuss the change in status of customary law rights in land that may result from the suggested amendments to the Transformation Act.

15.2 Recognition of the customary law rights in land of pastoral indigenous communities in terms of the Transformation Act

Apart from the remarks of the Supreme Court of Appeal ('SCA') in *Richtersveld Community and Others v Alexkor Ltd and Another*⁹ (*RichtersveldSCA*) and the Constitutional Court ('CC') in *Alexkor Ltd and Another v The Richtersveld Community and Others*¹⁰ (*Alexko*), little interest has been shown in customary law rights in land of pastoral indigenous communities.¹¹ The Transformation Act, which is legislation contemplated in section 25(9) of the Constitution, does not refer to the strengthening of customary law rights in communal land as is done in the Communal Land Rights Act¹² ('CLR Act'), which was also enacted in terms of section 25(9) of the

⁷ See sections 14.4.1 and 14.4.3 of Chapter 14.

⁸ See sections 14.4.2 and 14.4.4 of Chapter 14.

⁹ 2003 6 SA 104 (SCA) 119.

¹⁰ 2004 5 SA 460 (CC) 482.

¹¹ The remarks of the courts in *RichtersveldSCA* and *Alexkor* are made in the context of the Restitution of Land Rights Act 22 of 1994. The CC deemed it necessary to compare the customary law rights in land of the Richtersveld community to the Western legal concept of ownership. See in this regard the remarks of Pope and of Mostert, who are of the opinion that this finding of the CC is problematic. A Pope 'Indigenous-law land rights: Constitutional imperatives and proprietary paradoxes' (2011) *Acta Juridica* 326-327; H Mostert & P Fitzpatrick "'Living in the margins of history on the edge of the country" — Legal foundation and the Richtersveld community's title to land (part 1)' (2004) *Tydskrif vir die Suid-Afrikaanse Reg* 317-318. It must also be borne in mind that, as the Richtersveld community's claim was lodged in terms of the Restitution of Land Rights Act 22 of 1994, the Courts were not primarily interested in the nature of the right that the community had, but whether it in fact had a right in land as defined in section 1 of that Act (and whether it had been dispossessed as a result of a racially discriminatory law or practice).

¹² 11 of 2004. Although the CC declared the whole of the CLR Act unconstitutional in *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 6 SA 214 (CC) ('*Tongoane*'), it must be borne in mind that the CC did not base its finding on substantive grounds but on procedural grounds. In this regard, see the remarks in paragraph [116] and the order the CC made in paragraph [133]. *Tongoane* (above) 257, 262. The Government and Parliament's current effort to comply with its constitutional obligation in terms of section 25(9) of the Constitution to enact the legislation provided for in section 25(6) of the Constitution is contained in the draft Communal Land Tenure Bill, 2017, which was published for comment in *Government Gazette* No. 40965 of 7 July 2017. As the CC did not make a determination on the substantive matters raised in *Tongoane*, I deem it to be in order to

Constitution.¹³ This fact strengthens my contention in section 14.4.2 of Chapter 14 that the customary law rights in land of the residents of the Reserves are neglected in comparison to the protection of such rights of other communities. Therefore, I contend that the Transformation Act must be amended to provide for the protection of the customary law rights in land of the residents of the Reserves in the communal land of the Reserves, as was done with regard to the communal land referred to in section 2 of the CLR Act.¹⁴

Before discussing these amendments, it must be emphasised that the Reserves are not subject to a system of traditional rule where a traditional ruler or council has authority over the manner in which communal land is allocated.¹⁵ The discussion in section 13.3 of Chapter 13 makes it clear that it is only the customary law rights in land that survived on the Reserves.¹⁶ I am therefore of the opinion that the protection of customary law rights in land on the Reserves will not have the negative effects that were anticipated if the CLR Act entered into force.¹⁷ However, Kleinbooi points out that notwithstanding the abolition of traditional governance

refer to certain aspects of the CLR Act in the context of the suggested amendments to the Transformation Act.

¹³ From paragraph (c) of the definition of 'old order right' in section 1 of the CLR Act, it is clear that the CLR Act is applicable to communal land that is occupied in terms of customary law rules. See also the remarks of the CC in paragraphs [31] and [32] of *Tongoane*, which indicate that the communities who instituted the action in the High Court referred to the fact that their use of communal land was based on indigenous law. *Tongoane* (n 10 above) 230-231.

¹⁴ See the remarks in note 12. It must be noted that I do not contend that the customary law rights of the residents of the Reserves must be protected by a conversion process from 'old order rights' to 'new order rights' as is provided for in the CLR Act.

¹⁵ Carstens remarks that the Board (*Raad*) consisting of members of the Steinkopf community that governed Steinkopf had to cease its activities when the Mission Stations and Communal Reserves Act 29 of 1909 (Cape of Good Hope) ('Mission Stations Act') was implemented at Steinkopf in 1913. P Carstens 'Opting out of colonial rule: The Brown Voortrekkers of South Africa and their constitutions' (1983) 42 *African Studies* 149. Therefore, the provisions of the said Act made the existence of traditional rulers and councils on the Reserves impossible. See section 5 of the Mission Stations Act for the measures relating to the management of the mission stations and communal reserves. See section 13.2.1 of Chapter 13 with regard to the applicability of the Act to the Reserves.

¹⁶ The remarks of Schapera quoted in section 11.2.3 of Chapter 11 make it clear that even when indigenous communities had rulers during the seventeenth and eighteenth centuries, these rulers did not have rights in land that could be allocated by them.

¹⁷ In advocating the retention of the allegedly less secure customary law rights in communal land regulated by the CLR Act, instead of a unitary system of registration of rights in land, Pope enumerates some of the flaws in the existing traditional governance of communal land as follows:

The task at hand would change from trying to find a fit with the common-law system to one that endeavours to fix the indigenous-law system. For example, *it will be necessary to root out the possibility of abuse of power, corruption, and the imposition of unelected chiefs on communities to allow the essentialist indigenous-law land tenure system to re-establish itself.* (Emphasis added.)

Pope (n 11 above) 322.

institutions on the Reserves, access to land on the Reserves remained confined to males.¹⁸ She also remarks as follows with regard to the failure of the Transformation Act to address this particular problem:¹⁹

Yet, disappointingly, the Act appears to be gender blind. It stipulates principles for municipalities to follow in implementing tenure reform – i.e. all residents must be afforded an opportunity to participate in the decision-making processes regarding governance of communal resources. The Act also prohibits discrimination against any resident. Yet, given the history of women’s invisibility in land matters, women’s dependency status – very few women have land legally registered in their names – and the fact that their land needs remain largely unarticulated, it is unsurprising that the Act is silent on distinctive rights for women and men (Wisborg and Rohde 2005).

15.2.1 Amendment of the Transformation Act to ensure the protection of the rights of use of the communities in board areas

In order to make a coherent and effective suggestion regarding the amendment of the Transformation Act, I consider in the first place the purpose of the proposed amendment.²⁰

15.2.1.1 Purpose of the proposed amendment of the Transformation Act

Pienaar gives the following description of the Transformation Act:²¹

The underlying idea of the *Transformation Act* is that different communities should determine *when* and *how* the new dispensation in landholding should occur. It was envisaged that change might be effected independently in the different areas (sub-s. 10(2)(b)). If executed correctly, the Act should dismantle the existing rural land tenure regime and replace it with measures in line with the overall land reform programme, while at the same time dealing with the needs and aspirations of the particular

¹⁸ K Kleinbooi ‘Gendered land rights in the rural areas of Namaqualand: A study of women’s perceptions and understandings’ unpublished Masters dissertation, University of the Western Cape, 2011 51-52.

¹⁹ Kleinbooi (n 18 above) 55.

²⁰ Crabbe remarks as follows in this regard:

Legislation is the framework by which, the world over, governments seek to achieve their purposes. Politicians and administrators use legislation to attain their cultural, economic, political and social policies. A modern state has to legislate in order to accomplish certain political objectives and particular public policies.

VCRAC Crabbe ‘The ethics of legislative drafting’ (2010) 36 *Commonwealth Law Bulletin* 15.

²¹ Pienaar (n 5 above) 188.

community. Keeping the aims in mind, the Act is both a redistribution and a tenure reform tool.

From these remarks, I deduce that the purposes of the Transformation Act are to transfer the land that is held in trust by the state to entities where members of communities can play an active role and to 'dismantle the existing rural land tenure regime and replace it with measures in line with the overall land reform programme'. The suggested amendments to the Transformation Act that are considered in this section must be aligned with these purposes of the Transformation Act. In view of the additional purpose of the Transformation Act, to provide for participation by communities in the decisions regarding the communal land in the board areas,²² I contend that the suggested amendments should make the provisions of section 3(2) of the Transformation Act more specific.

Section 3(2) provides as follows:

(2) No transfer of land referred to in subsection (1) must take place unless the Minister is satisfied that, in the event of a transfer to—

- (a) a municipality, the legislation applicable to such a municipality; or
- (b) a communal property association or other body approved by the Minister, the rules of such association or body,

make suitable provision for a *balance of security of tenure rights and protection of rights of use of—*

- (i) the residents mutually;
- (ii) individual members of such a communal property association or other body;
- (iii) present and future users or occupiers of land, and the public interest of access to land on the remainder and the continued existence or termination of any existing right or interest of a person in such land. (Emphasis added.)

It appears that the emphasised phrase in section 3(2) means that the Minister of Rural Development and Land Reform ('Minister') must be satisfied that the legislation of a municipality or the rules of the communal property association ('applicable laws and rules') do not give undue preference to individual titles in the communal land, to the detriment of the communities who use the communal land for various purposes. However, as I remarked in section 14.3.2 of Chapter 14, section 3(2) of the

²²

The phrase 'board area' is defined as follows in section 1 of the Transformation Act: **'board area'** means an area, or part of an area, consisting of one or more pieces of land, whether they are contiguous or not, to which the provisions of the Rural Areas Act, 1987, applied immediately before the commencement of this Act...

Transformation Act is drafted in terms too wide to afford real protection to the last mentioned communities.²³

The purpose of the suggested amendment of the Transformation Act is therefore to give a specific meaning to the phrase 'rights of use', in order to afford greater protection to existing users of communal land in the board areas.

15.2.1.2 Suggested amendment of sections 1 and 3 of the Transformation Act

As the phrase 'rights of use' is not defined in the Transformation Act, it is accepted that it refers to the rights that communities are exercising on the communal land in the board areas for various purposes such as grazing for livestock, cultivation and gathering of resources. I contend that due to the difference between secure title in land, such as ownership or lease, and a use right, such as gathering of resources, it will be difficult for the Minister to determine whether there is a balance between secure titles and the rights of use.²⁴ The discussion in section 14.3.1 of Chapter 14 shows that, even though the municipal laws that are applicable to Leliefontein made provision for a democratic and participatory process, the views of the advocates of making communal land available to individuals prevailed over that of the majority of the residents, who were in favour of preserving the communal land for all the residents.²⁵ On the other hand, if the Minister has a defined concept to compare with secure title in land, he will be able to determine whether the applicable laws and rules provide for a balance between such a concept and secure titles in land. I am of the opinion that the Transformation Act must be amended to make it clear what the phrase 'rights of use' means.

²³ My remarks in section 14.3.2 of Chapter 14 refer to the residents of the Reserves who are also communities as contemplated in the Transformation Act.

²⁴ In other words, if the Minister is not made aware by a definition of rights of use that such rights include actual occupation of land for purposes such as grazing and cultivation, he may come to the conclusion that even if most of the communal land is surveyed, fenced and sold or leased to individuals, the community members will still be able to gather resources on the remaining communal land. In such a case he will be satisfied that the applicable laws and rules create a satisfactory balance between security of tenure rights and rights of use. Although not all rights of use on communal land are customary law rights, it is significant that as far as customary law rights are concerned, Pope refers to a paradigmatic difference between customary law rights and Western legal concepts like ownership. Pope (n 11 above) 312.

²⁵ In my opinion the example of Leliefontein shows that, even if provision is made for a democratic and participatory process, as is the case with the principles for the constitutions of communal property associations as provided for in section 9 of the Communal Property Associations Act 28 of 1996, the will of the majority of the residents of a Reserve may still be negated.

15.2.1.2.1 *Inserting new definitions in section 1 of the Transformation Act*

It will be expedient to retain the phrase 'rights of use' in section 3(2) of the Transformation Act, as it is accepted that communal land in the board areas is used for various purposes. As customary law rights in land are only applicable to land used as grazing, section 3(2) of the Transformation Act cannot only provide for a balance between security of tenure rights and customary law rights in land. It is therefore suggested that a definition for the phrase 'rights of use', drafted along the following lines, is inserted in section 1 of the Transformation Act after the definition of 'resident':

'rights of use' means—

- (a) the right to occupy land on the remainder—
 - (i) for residential purposes;
 - (ii) to cultivate crops;
 - (iii) as grazing for livestock;
 - (iv) in terms of customary law; and
- (b) the right to gather and use resources on the remainder;²⁶

As the concept of occupation of land in terms of customary law is not currently used in connection with land in the board areas, a definition must also be inserted in section 1 of the Transformation Act to define this concept. From the discussion in section 13.3.2.1 of Chapter 13 it is clear that the system of stock posts that is used at Leliefontein is an informal system that developed over a long period of time and is based on the norms that were established by the owners of the livestock on Leliefontein.²⁷ It is suggested that the definition of customary law in section 1 of the Transformation Act must make it clear that in cases where a stock post system prevails on the Reserves, such as the one used on Leliefontein or one similar to it, this system is based on customary law. I am of the opinion that a definition for

²⁶ The suggested definition of rights of use is only for the purposes of this thesis. It is conceded that this definition may include actions that are not conducted on communal land or that other uses have not been included.

²⁷ As far as I could determine, there is no literature that connects the traditional system of stock posts on Leliefontein to the customary law systems of pastoral indigenous communities prior to the establishment of the Reserves.

customary law may be drafted along the following lines and may be inserted in section 1 of the Transformation Act after the definition of 'board area':

'customary law' means the long established practices that regulate the occupation of land used as grazing for livestock on the outer commonage of the remainder of board areas.²⁸

15.2.1.2.2 *Amendment of section 3(2) of the Transformation Act to provide for the balancing of security of tenure rights and customary law rights*

In terms of sub-paragraphs (i) and (ii) of section 3(2) of the Transformation Act, the Minister must ensure that the applicable laws and rules provide adequate protection for the rights of all the residents of the Reserves as a group and for the rights of individual residents. However, sub-paragraph (iii) is a very long provision that does not, in my opinion, make it clear which persons' rights must be taken into account by the Minister. There is a clear difference between users of land and occupiers of land.²⁹ It is therefore not correct to provide for users and occupiers of land in the alternative. Furthermore, the part of sub-paragraph (iii) following after the comma does not fit in with the part of the section following after paragraph (b), as it does not deal with rights of persons and should be dealt with in a separate sub-section of section 3.

²⁸ The suggested definition is drafted to specifically provide for 'long established practices that regulate the occupation of land used as grazing'. I contend that in the context of the suggested amendment of section 3(2) of the Transformation Act, this definition makes it clear that land used as grazing in terms of customary law is different from the ordinary use of land as grazing, because it regulates the occupation of such land. In other words, the Minister must take into account that the system of stock posts used on the Reserves is different from a system where all the livestock owners on a Reserve make use of the same grazing and the same water resources.

²⁹ As the words 'user' and 'occupier' are not defined in the Transformation Act, these words must be understood in their ordinary dictionary meaning. The *Oxford English Dictionary* defines the word 'user' as, amongst other things, 'A person who has or makes use of a thing, esp. regularly; a person who employs or practices something'. 'user, n.1' *OED Online*. June 2018. Oxford University Press.

<http://www.oed.com.uplib.idm.oclc.org/view/Entry/220650?rskey=N9C5T1&result=1&isAdvanced=false> (accessed 3 September 2018). The *Oxford English Dictionary* defines the word 'occupier', as, amongst other things,

A person who takes or (more usually) holds possession; a person who holds or is in actual possession of property, esp. a dwelling or land, or a position or office; a holder, an occupant; *spec.* a person living in a dwelling as its owner or tenant.

'occupier, n.' *OED Online*. June 2018. Oxford University Press. <http://www.oed.com.uplib.idm.oclc.org/view/Entry/130187?redirectedFrom=occupier> (accessed 3 September 2018).

Sub-paragraph (iii) of section 3(2) must be redrafted as section 3(3) to provide that the Minister must consider the rights of present and future users of land. This will mean that the applicable laws and rules must provide adequate protection for the rights of the communities that use the communal land to gather resources.

It is suggested that instead of providing for the present and future occupiers of land in general, a new sub-paragraph (iv) must provide for the rights of occupiers of specified types of land. As the suggested new section 3(2)(iv) provides that the Minister must consider the rights of occupiers of residential land, agricultural land and land used as grazing, and land used in terms of customary law, the Minister must be satisfied that the applicable laws and rules also protect the rights of community members or communities who do not want private ownership of fenced land used as grazing.³⁰

Taking the abovementioned considerations into account, it is suggested that section 3(2) of the Transformation Act be redrafted along the following lines:³¹

- (2) No transfer of land referred to in subsection (1) must take place unless the Minister is satisfied that, in the event of a transfer to—
- (a) a municipality, the legislation applicable to such a municipality; or

³⁰ The discussion in section 13.2.3.1 of Chapter 13 and section 14.3.1 of Chapter 14 highlights the fact that individual ownership of land used as grazing on the Reserves is not necessarily the preferred option of owners of livestock on the Reserves, or that fenced camps are the best method to occupy land used as grazing. In the context of the implementation of the processes in the Transformation Act relating to the transfer of land, Pienaar remarks as follows:

The low preference for the individualization of the commons is interesting. The concept of ownership has strong cultural connotations and is more associated with community than with individuals. One might conclude that individuality of the commons is seen as impractical and socially irresponsible. This aspect is one of the most surprising of the whole process: the legislature cannot automatically expect that individualization of ownership rights is the ideal or is naturally sought after by communities. These areas have always had a very strong sense of community, embodied in a communal approach to landholding as distinct from private land ownership prevalent in Western style landholding.

Pienaar (n 5 above) 193. By directing the Minister's attention to the fact that there are different types of occupation of land on the board areas, the suggested new section will compel him to consider whether the applicable laws and rules provide adequate protection for all types of occupation of land. For example, a community member who occupies communal land for agricultural purposes and as grazing must not be placed in a position where he must choose whether both types of land must be converted into private ownership or remain communal land. It is conceivable that such a member will want to have his agricultural land converted into ownership or lease, while the land occupied by his livestock as grazing remains part of the communal land. This may be so because he may be able to pay the price fixed for the conversion or the rent for the lease of the agricultural land, while he may not be able to afford the land that he needs to provide adequate grazing for his livestock.

³¹ To indicate the suggested amendments to section 3(2) and (3) of the Transformation Act clearly, I make use of the usual practice adopted in amendment legislation of underlining new insertions in a section and showing omitted parts in bold type between square brackets.

(b) a communal property association or other body approved by the Minister, the rules of such association or body, make suitable provision for a balance of security of tenure rights and protection of rights of use of—

- (i) the residents mutually;
- (ii) individual members of such a communal property association or other body;
- (iii) present and future users of land;
- (iv) present and future occupiers of—
 - (aa) land used for residential purposes;
 - (bb) land used to cultivate crops;
 - (cc) land used as grazing;³²
 - (dd) land used in terms of customary law.

[present and future users or occupiers of land, and the public interest of access to land on the remainder and the continued existence or termination of any existing right or interest of a person in such land.]

(3) No transfer of land referred to in subsection (1) must take place unless the Minister is satisfied that, in the event of a transfer to bodies contemplated in subsection (2)(a) and (b) the legislation or rules of the said bodies make suitable provision for a balance of security of tenure rights and protection of rights of use by ensuring that—

- (a) the public interest of access to land on the remainder is protected; and
- (b) existing rights of use in such land are protected.³³

15.2.1.3 Amendment of the Transformation Act to enhance the powers of the Minister

Pienaar remarks that

³² As not all communal land used as grazing on board areas is occupied in terms of customary law as contemplated in the suggested definition of 'customary law', this item is included in subparagraph (iv).

³³ The insertion of a new subsection (3) in section 3 of the Transformation Act will have the effect that subsections (3) to (16) are renumbered as subsections (4) to (17) and that reference in the present subsection (3) to subsection (2) is amended to provide for a reference to subsections (2) and (3). The several cross-references in the present subsections (3) to (16) will also have to be amended.

[d]ue to the key elements underpinning the Act, namely *participation, cooperation and choice* – all based on the premise of equality and democracy – the transformation process is a long, complicated process'.³⁴

Notwithstanding the fact that the key elements identified by Pienaar as underpinning the Transformation Act should ensure that the entity to whom land in the remainder is transferred will act on behalf of the community as a whole, past experience has shown that in certain instances even democratically elected committees failed to give expression to the will of the majority of the people that they represented.³⁵ There is no guarantee that the transfer of all land in the remainder to an entity as defined in section 1 of the Transformation Act will prevent this from happening again. I am of the opinion that making the powers conferred on the Minister in the current section 3(3) of the Transformation Act greater, may prevent the negation of the will of the majority of a community.

Section 3(3) of the Transformation Act provides as follows:

(3) If in the opinion of the Minister the legislation or rules referred to in subsection (2) do not fully achieve the objects of subsection (2), he or she may determine terms and conditions for the transfer of such land, in order to achieve such objects.

The object of section 3(2), namely a balance of security of tenure rights and protection of rights of use, cannot be achieved, because the Minister does not know what the nature of rights of use is. I contend that the suggested amendments to section 3(2) of the Transformation Act make the nature of rights of use clear and therefore enable the achievement of this balance. The Minister must have the necessary information at his disposal to make a decision in terms of section 3(3) of the Transformation Act. If, in the light of this information, he is satisfied that the applicable laws and rules favour security of tenure rights while the communities wish to exercise their rights in the land used as grazing in terms of customary law systems, he must act in terms of section 3(3) of the Transformation Act to rectify the situation.

Section 3(3) of the Transformation Act should be amended to provide clearly for the abovementioned objective of section 3(2). The purpose of this amendment is

³⁴ Pienaar (n 5 above) 192.

³⁵ See the discussion in section 14.3.1 of Chapter 14.

to show that the Minister cannot perform his functions in terms of section 3(2) of the Transformation Act without considering the choices of the majority of the members of a community.³⁶ It is suggested that section 3(3) of the Transformation Act, which will be the new subsection (4) of the amended Act, be redrafted along the following lines:

(4) If in the opinion of the Minister the legislation or rules referred to in subsection (2) do not provide sufficiently for the choices made by the majority of the members of a community [fully achieve the objects of subsection (2)], he or she may determine terms and conditions³⁷ for the transfer of such land that will ensure that effect is given to the choices of the community with regard to the types of right that it prefers [, in order to achieve such objects].

15.2.1.4 Motivation for the suggested amendments to the Transformation Act
 Pope remarks that, in terms of sections 25, 39(3) and 211(3) of the Constitution, the state is obliged to ‘put into place or to implement appropriate mechanisms that will facilitate the achievement of land reform, including, where appropriate, the preservation of indigenous-law land rights’.³⁸ However, when enacting the Transformation Act, the legislature did not consider it necessary to put in place ‘appropriate mechanisms’ that would ensure the preservation of customary law rights in the board areas. It must be accepted that the legislature was not aware that the residents of the Reserves still occupy communal land in terms of customary law systems. The suggested amendments to the Transformation Act will address this misconception of the legislature.

³⁶ Clause 30 of the draft Communal Land Tenure Bill, 2017 published for comment in the *Government Gazette* No. 40965 of 7 July 2017, provides as follows:

Any community resolution having the effect of selling, donating, leasing, encumbering or in any manner alienating or disposing of communal land, must be supported by 60% of households of that community.

It is suggested that the Minister may request that the applicable laws and rules should include a similar provision to ensure that effect is given to the choices of the majority of a community.

³⁷ An example of such terms and conditions may be that the transfer of land may only take place if a specific percentage of the communal land used as grazing is left unfenced for occupation in terms of customary law.

³⁸ Pope (n 11 above) 309. Section 39(3) of the Constitution provides as follows:

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill

Section 211(3) of the Constitution provides as follows:

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Pope is of the opinion that the *White paper on South African land policy April 1997 (White paper)* identifies a unitary system of land rights³⁹ as a 'fundamental principle' of tenure reform.⁴⁰ It must therefore be accepted that, by providing for the transfer of land to an entity in the Transformation Act, the legislature intended that such transfer would lead to the application of a unitary system of land rights in the board areas. However, Pope also remarks that the *White paper* 'envisaged that a choice between indigenous-law tenure and civil-law land rights should be available in appropriate circumstances'.⁴¹ This principle is expressed as follows in the *White paper*.⁴²

In particular, it is accepted that both group based and individually based ownership systems play valuable roles under different circumstances and the match between the circumstances and the system must be made by the people affected.

It appears that the policy expressed in the *White paper* entails that rights in land must be registerable, even if it is based on customary law, and that the choice whether the rights in land will be registered in the name of a group or individually, must be made by the holders of the rights concerned. Without entering into the question whether customary law rights in land must be registerable, I contend that the residents of the Reserves should have the right to make a choice on whether they wish to occupy land as individuals or as a group in terms of customary law. The Transformation Act does not currently provide the residents with such a choice.

The suggested amendments to the Transformation Act in sections 15.2.1.1 to 15.2.1.3 preserve the basic purpose of the Transformation Act, that the land in the board areas must be transferred to an entity. The suggested amendments also have the effect that the applicable laws and rules of the entities must provide that the communities may choose to occupy different types of land in terms of different systems of rights.

³⁹ Pope describes a unitary system of land rights as a system in which 'all land rights would be registrable in the Deeds Registry'. Pope (n 11 above) 310.

⁴⁰ Pope (n 11 above) 309.

⁴¹ Pope (n 11 above) 315.

⁴² *White paper on South African land policy, April 1997* 84.

<http://www.ruraldevelopment.gov.za/phocadownload/White-Papers/whitepaperlandreform.pdf> (accessed 2 September 2018).

Based on the discussion in section 14.3.1 of Chapter 14 and the discussion in the following section, I am of the opinion that if the residents of the Reserves are given the choice in terms of the applicable laws and rules to continue to occupy land used as grazing in terms of customary law, there is a good chance that they will exercise this choice.⁴³ This may have the effect that tenure reform in the Northern Cape in terms of the Transformation Act takes place in a different manner from tenure reform in board areas in other regions. The suggested amendment of the Transformation Act may therefore lead to a form of tenure reform that is unique to the Northern Cape.⁴⁴

15.3 Reasons to retain customary law systems on the Reserves based on environmental factors

When the land in board areas is transferred to entities in terms of the Transformation Act, the entities may have the power to survey and sell communal land in the board areas to individuals in terms of the applicable laws and rules. They may also have the power to compel owners to fence their land. In this section I discuss the reasons why such a development, from an environmental viewpoint, will be detrimental to land used as grazing on the Reserves.

15.3.1 Negative effect of fencing of land used as grazing in the Northern Cape

Salomon postulates that

the focus on ‘correct’ stocking rates, fencing, and rotational grazing to manage veld and improve productivity is inappropriate because it ignores the ecological, social, and economic realities of livestock keeping in areas under communal land tenure.⁴⁵

In particular, Salomon argues that the herding of livestock by herders in the Northern Cape is preferable to dividing the available grazing into fenced camps. It is

⁴³ See in this regard Pienaar’s remarks quoted in note 29 and Allsopp’s remarks quoted in section 15.3.2.

⁴⁴ The suggestions for the amendment of the Transformation Act are made on the assumption that the amendment will take place before the Minister has approved the transfer of any land. However, if the Transformation Act can only be amended after the transfer of a board area, a further amendment can be made by inserting a provision that communities that have reasonable grounds to be aggrieved by the applicable laws and rules of the entities, may submit representations to the Minister to again consider the applicable laws and rules in terms of the amended section 3 of the Transformation Act.

⁴⁵ M Salomon et al ‘The good shepherd: Remediating the fencing syndrome’ (2013) 30 *African Journal of Range & Forage Science* 71.

contended that using herders instead of fences to regulate grazing will have the effect that—

- (a) rural livelihoods are improved;
- (b) customary practice is revived;⁴⁶
- (c) stock theft and predation are prevented; and
- (d) biodiversity is managed.⁴⁷

The discussion in section 14.3.1 of Chapter 14 makes it clear that as far as Leliefontein is concerned, the introduction of fenced camps and rotational grazing has not improved the circumstances of the majority of the livestock farmers on that Reserve. Vetter considers the overall position with regard to use of communal land in South Africa and remarks that the introduction of measures such as rotational grazing on fenced grazing camps and privatisation of the commonages have been relatively unsuccessful, for the following two reasons.⁴⁸

The first is that the interventions were appropriate and desired by at least part of the rural population but that they failed because of various constraints that made their implementation difficult. The other is that the interventions themselves were inappropriate to the ecological and/or socioeconomic context, and undesirable to all or the majority of people because they were uninformed by their aspirations, needs and constraints.

She remarks that while it has not been shown that rotational grazing improves the quality of grazing or of livestock, it has been established that provision must be made for the resting of grazing to prevent degradation. She also remarks that while fencing is the obvious way in which resting of grazing can be achieved, it also has negative effects. She therefore suggests that from a policy viewpoint, innovative ways of resting grazing without necessarily using fencing should be developed.⁴⁹ With regard

⁴⁶ The customary practice referred to is the traditional practice of herding. Salomon (n 43 above)

73.

⁴⁷ Salomon (n 45 above) 73-74.

⁴⁸ S Vetter 'Development and sustainable management of rangeland commons – aligning policy with the realities of South Africa's rural landscape' (2013) 30 *African Journal of Range & Forage Science* 3. Vetter identifies some of the constraints that made the implementation of the interventions difficult as 'market instability, droughts, diseases, climate change and other risks'. Vetter (above) 3.

⁴⁹ Vetter (n 48 above) 6.

to semi-arid regions, she remarks that the quality of grazing varies over time and place and that these characteristics make it necessary for livestock to have greater mobility than that offered by a system using fencing.⁵⁰

Vetter remarks as follows with regard to the factors that militate against the introduction of private landholding on commonages in semi-arid areas:⁵¹

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

15.3.2 Research on the management of livestock on the Reserves

Allsopp acknowledges that making the correct choice regarding the use of commonages on the Reserves is a complex matter in which a number of factors play a role.⁵² However, with regard to Leliefontein, and based on the results of the study she conducted in 2007, she is of the opinion that the majority of the livestock farmers were in favour of continuing to use herders to look after livestock at stock posts on the commonage:⁵³

The almost complete absence of examples of transgression of the rules regarded by livestock keepers in this study as governing the commons suggest [sic] that it is the shared norms which govern common resources, rather than the occupation of a defined spatial unit, or social homogeneity which may define the Leliefontein community's relationship with their environment (cf. Agrawal and Gibson, 1999).

⁵⁰ As above.

⁵¹ As above.

⁵² N Allsopp et al 'Environmental perceptions and practices of livestock keepers on the Namaqualand Commons challenge conventional rangeland management' (2007) 70 *Journal of Arid Environments* 751. She remarks as follows with regard to the different approaches of the different role players who are involved in the management of commonages:

One has to recognise that the situation is complex because of the diversity of livestock keepers who do not share the same immediate and future interests and have different practices. The struggle of larger farmers to monopolise communal areas in many places around the world, the resistance of poor farmers and the endless sequences of crisis and compromises which is [sic] the essence of commons management institutions since the eighteenth century, has [sic] been described by historians and social scientists dealing with land tenure changes on numerous occasions. In such a situation, external support may provide assistance to improve the government of the commons (Dietz et al., 2003) but it may also support one group against another.

⁵³ Allsopp (n 52 above) 751.

These shared norms have resulted in a pastoral system that through ownership of livestock, sharing of livestock products and the recognition of livestock keeping as a way of life, is a unifying feature of the Leliefontein and other Namaqualand communities. Despite more than 200 yr of restriction to small areas of land and the imposition of colonial and apartheid policies, this pastoral system has persisted suggesting that informal institutions have been effective in ensuring adherence to norms, and that tacit knowledge supporting herders' practices are [sic] effective in this environment.

She also remarks as follows with regard to the possible consequences of implementing a different system of management for the commonages:⁵⁴

In the post-apartheid Leliefontein situation, observations showed that extension services pursue interventions aimed mainly at supporting livestock farmers with commercial objectives operating on communal land, often ignoring other livestock keeping groups. Since commercialisation of their operations is not the aim of the majority of livestock keepers, the agricultural services fail to address many of the needs of the land users in communal areas. They concentrate their efforts on those livestock keepers who have adopted a profit motive, or pay lip service to such a motive to better exploit the proffered services. However, if advisory services are successful in these interventions it will be at the expense of the majority of livestock keepers who will find themselves marginalised and restricted from access to grazing land when commercial farming practices are put in place. This is likely to lead to greater inequity in the division of resources among people who are currently benefiting from access to the commons, to deterioration of the livelihoods of the poorest households and to exacerbation of conflicts between different groups. Other development paths need to be explored for the commons of South Africa. The development of technical intervention for communal rangelands based on concepts in the tragedy of the Commons, assumptions that rangeland is degraded by communal practices, that herders have no technical skills and that production for the market is the most important motive are misguided attempts to intervene in systems which are still insufficiently understood (Rohde et al., 2006). This study of livestock keepers in Leliefontein shows that a better understanding of the objectives, ecological knowledge and grazing practices of livestock keepers might help agricultural support services to find innovative solutions for using and sustaining the commons.

⁵⁴ Allsopp (n 52 above) 751-752.

In a more recent article Samuels remarks that the main land use on the Reserves is still livestock farming. The reason for this is that

keeping livestock is not just a cultural attribute in these poverty-stricken communities: it serves as financial security since animals can be sold in times of need or used as source of meat and milk.⁵⁵

Although the subject matter⁵⁶ of the article falls outside the matters considered in this thesis, some of the conclusions reached are important in the discussion of the question whether the livestock management practices of the residents of the Reserves are still viable. The research indicates that the knowledge that herders possess about their environment, the palatability of grazing and the best locations for grazing is an invaluable asset for livestock farming in the Northern Cape. It appears that if the current practice of using herders for livestock farming on the Reserves is replaced by a system of camps and rotational grazing, it may be detrimental to the residents of the Reserves.

I am of the opinion that the research conducted by Allsopp and Samuels gives an indication that if the necessary information about the benefits of communal use of grazing is provided to the residents of the Reserves, they may be convinced that the environmentally sound choice to make will be to exercise their customary law rights in land used as grazing rather than choosing individual ownership of such land.

15.4 Long term implications of amending the Transformation Act

It is very probable that the restoration of the customary law rights in land of the residents of the Reserves of which their ancestors were dispossessed during the colonial period, will be a slow process. The first step in this process will be the amendment of the Transformation Act in the manner suggested in the preceding parts of this chapter. If such an amendment can be made to the Transformation Act

⁵⁵ MI Samuels et al 'Through the lens of a herder: Insights into landscape ethno-ecological knowledge on rangelands in Namaqualand' (2018) 41 *Anthropology Southern Africa* 139.

⁵⁶ The purpose of the article is stated as follows:

This study sets out to determine 1) how herders classify their grazing landscape; 2) the indicators (direct and indirect) herders use to assess rangeland conditions; and 3) how knowledge on plant palatability compares among herders.

Samuels (n 55 above) 138.

there are certain implications with regard to the status of South African common law rights in land and customary law rights in land.⁵⁷

15.4.1 The proposed amendment of the Transformation Act and the overlapping of the right to ownership and customary law rights in land

If it is accepted that the communal land in the board area of Leliefontein⁵⁸ is transferred in ownership to the Kamiesberg Local Municipality ('Municipality') in terms of section 2 of the suggested amended Transformation Act, it can also be accepted that the applicable laws of the Municipality allow the residents to occupy the land used as grazing on Leliefontein in terms of customary law rules. This situation means that the Municipality's ownership of the transferred land will be limited by the unregistered customary law rights in the land used as grazing on Leliefontein.

Pope remarks that

[m]ost indigenous property systems include clearly defined individual and family rights to some types of land, although there are generally no formalised boundaries dividing these portions of land or dividing those portions allocated to different members of the community. Naturally occurring topographical features (such as streams, particular trees, hills or rivers) are often used to define social boundaries broadly, which means that a fair degree of imprecision and uncertainty as regards such boundaries prevails. Nevertheless, it is accepted that all members of the community have access to the commonage and may use its resources.⁵⁹

⁵⁷ The mere amendment of the Transformation Act will not be sufficient to ensure that the customary law rights of the residents of the Reserves in land used as grazing are safeguarded. The Minister will also have to be satisfied that the applicable laws and rules enable the communities on the Reserves to make informed choices with regard to the use of the communal land on the Reserves.

⁵⁸ In this section I refer to Leliefontein as it is the Reserve in the Northern Cape where the most extensive research into the residents' rights in land and into environmental factors has been done.

⁵⁹ Pope (n 11 above) 331-332.

She contrasts indigenous property systems, as described above, with the South African common law property system and remarks that it is not possible 'to have two systems of law applying to land in one geographical area'.⁶⁰

I am of the opinion that Pope's remarks are not applicable to the customary law systems of pastoral indigenous communities as discussed in this thesis. The discussion in Chapters 11 and 13 of the nature of the customary law rights in land used as grazing makes it clear that communal land use units⁶¹ (stock posts in the context of Leliefontein) do not have fixed boundaries. However, it is also made clear that pastoral indigenous communities exercised their customary law rights at specific locations. Consequently, the residents of Leliefontein cannot contend that, because they may exercise their customary law rights in land used as grazing, all land that can be used as grazing on Leliefontein is reserved for their exclusive use. It must be borne in mind that the customary law rights of the residents of Leliefontein do not give them the right to prevent the Municipality from acquiring livestock and letting it graze on the available grazing. As long as the Municipality's livestock occupies the land used as grazing on Leliefontein in accordance with the customary law system, the residents cannot exclude it from the land. The customary law rights in land of the residents only authorise the owners of a flock to protest, if their communal land use unit is appropriated or the water resource of the flock is used by other parties without permission. As the customary law systems of pastoral indigenous communities do not contain a principle that can be compared to South African common law ownership, the exercise of their customary law rights is compatible with the right of ownership of the Municipality.

I contend that the theoretical situation in Leliefontein, that customary law rights in land can exist on land owned by a corporate body, can and must be created by legislation. There are fundamental differences between the customary law rights in land of pastoral indigenous communities and South African common law

⁶⁰ Pope (n 11 above) 331.

⁶¹ See section 11.2.2.5 of Chapter 11 and section 13.3.2.1 of Chapter 13.

ownership of land, as the first named system is based exclusively on occupation of land by livestock. This means that the two systems must be harmonised in terms of a statute or the Constitution to create the circumstances where both systems can operate on the same parcel of land.⁶²

15.5 Conclusion

The current lack of concern by the Government for the legitimate claims of the residents of the Reserves to also share in the benefits of the constitutional land reform programme is reflected in the following remarks made at a public meeting of the Constitutional Review Committee at Concordia in the Northern Cape in June 2018:⁶³

The committee heard from several speakers that large parts of Namakwaland were classified as communal land, which had been alienated during colonialism and apartheid from communities who lived there for centuries. They still don't own this land it is in the state's hands.

He said the pre-1994 and the post-1994 government held his community's land in trust. After 1994, they were told to establish an entity to manage it themselves. He said up until now they struggled to get this entity off the ground and they were not

⁶² In *Salem Party Club and Others v Salem Community and Others* 2018 3 SA 1 (CC) 45 the CC, in considering the right in land that must be given to the successful claimants in terms of the Restitution of Land Rights Act 22 of 1994, expressed a similar view and remarked as follows in this regard:

I have already found that the Salem Party of Settlers did not possess exclusive rights in the Commonage before 1940. So, too, the rights the Community exercised over the Commonage did not exclude the Settlers from possessing and exercising their rights in the Commonage. Both groups used and exercised rights over the Commonage. Could either the Salem Party or the Community do as they pleased with the land between 1878 and 1940? In both cases the answer, clearly, is 'no'. ... Since the Community's rights never excluded the Salem Party's rights in the Commonage, they could not alienate any part nor all of the Commonage. Nor could they exclude the landowners from the Commonage. The system of registered title precluded that. Equally, the Community's rights could not preclude the Salem Party from grazing their cattle there, or prevent recreational riding or cycling over the Commonage, as the Van Rensburg siblings did. Until dispossession, neither party's rights amounted to exclusive ownership. ... It is clear that the property controlled by the Salem Party Club itself, comprising the church or churches and the cricket field, is distinctive. Control was effectively exercised over these portions of the Commonage. But, further, the history of the Commonage reveals a richness and complexity in which both the black Community and the white landowners enjoyed a living functional relationship with the land.

⁶³ J Gerber 'The land: South Africa speaks - SA's first people want their land back' <https://www.news24.com/SouthAfrica/News/the-land-south-africa-speaks-sas-first-people-want-their-land-back-20180626> (accessed 4 September 2018).

receiving any support from the government. He asked for the government's help in this regard.

These remarks clearly indicate that the communities regard the Government as doing very little to actively implement the constitutional land reform programme in the Northern Cape. The failure of the Government to implement the Transformation Act in the Northern Cape in the ten years that it has been in force, is a further indication that land reform in the Northern Cape is not a priority of the Government.⁶⁴

In this chapter I make suggestions regarding the amendment of the Transformation Act. These amendments are aimed at acknowledging the existence of customary law systems on the Reserves and empowering the residents of the Reserves to ensure that their choices with regard to the manner in which they wish to occupy land are taken into account.⁶⁵

The delayed implementation of the Transformation Act may have been to the advantage of the residents of the Reserves if it was in the realm of possibility that any of the suggested amendments (or similar amendments having the same aim) would be incorporated into the Act. However, thinking realistically, the implementation of the Transformation Act may well cause the demise of the exercise of customary law rights in land by the residents of the Reserves. The Transformation Act currently does not recognise customary law systems existing on board areas. Furthermore, the Transformation Act lacks an effective mechanism that can be used by the residents of the Reserves to preserve the use of their customary law systems of occupation of land.

In view of my contention in section 15.4 that the amendment of the Transformation Act is only the first step in the direction of the eventual restoration of the land that the ancestors of the residents of the Reserves used as grazing in terms

⁶⁴ See the remarks in section 13.2.5 of Chapter 13.

⁶⁵ These amendments will be applicable to the residents of all the board areas, but as this thesis is only concerned with the Reserves in the Northern Cape, I limit the discussion in this section to them.

of their customary law systems, I discuss the drafting of appropriate legislation in terms of section 25(8) of the Constitution in Chapter 16.

16 Conclusion

16.1 Introduction

The purpose of this thesis is to determine whether the dispossession of the customary law rights in land of the pastoral indigenous communities in the study area, who were the first indigenous communities to be dispossessed of their rights in land in South Africa, can be 'addressed and reversed' in terms of the Constitution of the Republic of South Africa, 1996 ('Constitution'). I contend that this dispossession will only be addressed and reversed when the residents of the Reserves in the Northern Cape are able to exercise their customary law rights in land, which they are still exercising, on the land on which their ancestors exercised these rights.

The requirement that the rectification of the injustice of the dispossession of the customary law rights in land of these pastoral indigenous communities must be achieved in terms of the Constitution, forms an important element of this thesis.¹ This means that I take the rights of owners of land and the rights of the descendants of the dispossessed pastoral indigenous communities into account. By determining the nature of the rights in land of both non-indigenous persons and indigenous communities during the colonial period, the historical factors that must be taken into account when rectification takes place in terms of the Constitution are established. The drafters of legislation and Parliament must be aware of the nature of the rights in land to which the descendants of dispossessed indigenous communities may aspire when they draft and adopt the legislation to address colonial dispossession of land.²

16.2 Conclusions regarding the ownership of land by governments

When the Company decided to establish a refreshment station at the Cape it did not envisage the development of a colony. From the charter of the Company it is apparent that as a rule the Company was authorised to establish trade relations with

¹ In section 1.1 of Chapter 1 I refer to the decision of the Constitutional Court ('CC') in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 1 SA 530 (CC) 565 ('*Mkontwana*') where it is remarked that the Constitution is a 'document committed to social transformation'. *Mkontwana* (above) 565-566.

² In other words, academic writers and politicians who must fulfil this important task cannot be guided by misconstrued facts and historically unfounded perceptions about the process of colonial dispossession of rights in land that took place in the study area or about the nature of the rights in land that the occupiers of land had.

foreign rulers within its area of jurisdiction and to establish the necessary fortifications and governments in their territories.³ The establishment of the refreshment station at the Cape, although necessary, was not envisaged in the charter. This is a factor that is not often considered in the context of the private law ownership of land by the Company at the Cape.

One of the historical factors referred to in section 16.1 that must be taken into account, is that in terms of the international law rules of the seventeenth and eighteenth centuries⁴ and Roman-Dutch law, the Company could not in 1795 have been the private law owner of any of the waste land in the Cape Colony. As the Company was not the owner of the waste land of the Cape, the Roman-Dutch law rules relating to property were adapted to conform to the circumstances in the Cape Colony. The domestic law of the Cape Colony relating to land therefore developed in a manner that gave it many unique features that were not to be found in the legal systems of the United Provinces or any of the settlements forming part of the Dutch trade empire.

The main characteristic of the unique domestic property law system in the Cape Colony is that the acquisition of rights in land not only depended on the actions of the colonial government, but also on the manner in which land was occupied by non-indigenous persons. Consequently, the domestic property law system of the Cape Colony had more in common with the customary law systems of the indigenous communities in the study area than is generally acknowledged by legal historians.⁵

The impact of the change in status of waste land in the Cape Colony brought about by the second British occupation of the colony from 1806 and the cession of the colony in 1814 may, as far as the property law of the Cape Colony is concerned,

³ See Article XXXV of the charter quoted in note 14 of Chapter 5.

⁴ These rules as they are applicable to the Cape and the interior of the Cape Colony are discussed in Chapter 3.

⁵ The significance of the features that the domestic law of the Cape Colony and customary law systems of pastoral indigenous communities had in common, is considered in section 16.3.

be compared with the effect of the Natives Land Act⁶ of 19 June 1913. As mentioned above, the initial acquisition of rights in land in terms of the domestic law of the Cape Colony was based on occupation of land.⁷ However, the introduction of the doctrine of tenures by the British colonial government made the acquisition of rights in land dependent on a grant of land by that government.

The legislation adopted by the British colonial government, starting with the Perpetual Quitrent Proclamation of 1813, transformed the right of the non-indigenous settlers to occupy an unspecified expanse of land used as grazing without interference from another settler, to ownership of a surveyed land unit. This transformation was based on the erroneous views advanced by Truter that the 1714 Proclamations transformed previously insecure rights in land used as grazing into a lease of such land. The same legislation denied the residents of the Reserves the exercise of their customary law rights in the land they occupied as grazing, since this land often overlapped with the land that was used by non-indigenous settlers in terms of the domestic law of the Cape Colony prior to 1813. In *Alexkor Ltd and Another v The Richtersveld Community and Others*⁸ the CC found that this type of legislation is racially discriminatory. Therefore, the conclusion in Chapter 7 that the British colonial government dispossessed the residents of the Reserves in the Northern Cape of their rights in land by the survey and sale of land, provides a compelling reason to redress colonial dispossession by returning the ancestral land of these residents to them.

16.3 Conclusions regarding the nature of rights in land in the study area during the colonial period

The study of the history of the development of the domestic law of the Cape Colony from 1652 until the end of the eighteenth century and the customary law systems of pastoral indigenous communities reveals that, in terms of both systems, rights in land were obtained by occupying the land. This is significant, because it means that the rights in land were created by the actions of communities and individuals, they were not conferred by governments.

⁶ 27 of 1913.

⁷ My conclusions with regard to the rights that non-indigenous settlers acquired in land by occupation are set out in section 16.3.

⁸ 2004 5 SA 460 (CC) 491.

In the case of non-indigenous persons, the States-General was not able to confer private law ownership of the land at the Cape on the Company, just as in turn the Company was not able to confer ownership of the land on the non-indigenous settlers. The Company had to obtain private law rights in land at the Cape by occupation of land. However, the Company did not obtain private law ownership of land used as grazing as Roman-Dutch law does not provide for ownership of land that is not clearly demarcated as a land unit. As sovereign ruler of the Cape Colony, the Company exercised control over the extent of the land at the Cape that it deemed necessary for its needs as a refreshment station. Although it was not the private law owner of this land, it could institute the necessary control measures to ensure the good government of the settlement. Therefore, it could enter into contracts with its non-indigenous subjects that authorised them to occupy a demarcated land unit. For various reasons discussed in this thesis, the Company chose to only enter into such contracts with regard to agricultural land that had to be cultivated by non-indigenous settlers for the benefit of the Company. Although the Company did control the land used as grazing by the livestock of the non-indigenous settlers, no contracts regarding demarcated land units used exclusively as grazing were entered into.

I contend that the dual system of rights in land that non-indigenous persons had in terms of the domestic law of the Cape Colony, discussed above, was not as detrimental to the customary law rights in land of the indigenous communities as the racially discriminatory legislation that was imposed by the British colonial government. Although the indigenous communities were dispossessed of their customary law rights in land by the demarcation of land units used for agricultural purposes, the area within which this type of dispossession took place was limited to the South-Western Cape. In the interior of the Cape Colony, non-indigenous settlers mostly occupied land used as grazing in terms of the control measures adopted by the colonial government which conferred very limited rights in such land on them.

The fact that the occupation of land used as grazing by indigenous communities overlapped with the occupation of land by non-indigenous settlers on loan places, is evidence of the flexibility of the customary law systems of these

communities. This inherent flexibility made it possible, as long as they owned livestock, for them to keep on occupying land and exercising their customary law rights in land.

When the domestic law of the Cape Colony was amended by the introduction of the doctrine of tenures, the manner in which land was occupied by non-indigenous settlers and indigenous communities did not change immediately. Even when land in the Northern Cape was surveyed and sold it did not mean that the residents of the Reserves were immediately prevented from using the grazing on the surveyed land. However, the right of ownership of the owners of the surveyed land precluded any other persons from acquiring any rights by temporary occupation of such land.⁹ Consequently, the residents continued to use land as grazing, but were not exercising their customary law rights on the surveyed land. This fact became manifest when during the twentieth century owners of surveyed private land around the Reserves started to fence their land and the residents were progressively limited to the proclaimed boundaries of the Reserves.

16.4 Conclusions regarding the dispossession of the customary law rights in land of pastoral indigenous communities

In Chapter 12 I provide the following definition for dispossession of customary law rights of pastoral indigenous communities:

... dispossession is concerned with cases where indigenous communities were dispossessed of their customary law rights in land by the introduction of legislation which over time precluded them from exercising the rights in land they had acquired by occupation of such land.

This definition is in line with the purpose of this thesis as referred to in Chapter 1 and section 16.1, as it identifies the mischief that must be addressed in terms of the Constitution. In the light of this definition, I did not deem it necessary for the purposes of this thesis to take into account the arguments regarding the accepted fact that indigenous communities of South Africa were dispossessed of their land by

⁹ From the discussion of the customary law systems of pastoral indigenous communities in the study area in Chapter 11, it is clear that communal land use units in arid regions like the Northern Cape were occupied on a seasonal basis as the residents of Reserves migrated with their livestock between different rainfall regions. The non-indigenous settlers also adopted this practice which they had learned from the indigenous communities of the Northern Cape. Consequently, the Roman-Dutch law rules relating to acquisitive prescription were not applicable to such occupation.

colonialism and are still disadvantaged by this dispossession. I accept these arguments as true, but of little value in reversing the effect of colonial dispossession in terms of the Constitution. In section 12.4 of Chapter 12 I consider the actions of non-indigenous settlers that displaced pastoral indigenous communities from some of their communal land use units in the study area. I come to the conclusion that, due to the abundance of land available and the practice of overlapping occupation of land used as grazing, these actions of the non-indigenous settlers cannot be regarded as dispossession of customary law rights in land as defined above. However, I also come to the conclusion that in cases where the non-indigenous settlers—

- (a) by armed force seized land occupied by indigenous communities to utilise for their own purposes; or
- (b) used essential resources such as water in a manner that made it impossible for the indigenous community to retain the land they occupied,

they were dispossessing the indigenous communities of their customary law rights in land. These cases are not included in the definition of dispossession, because in most cases where indigenous communities were dispossessed of their rights in land by these actions, the details regarding the identity of the dispossessed indigenous communities and the location of the land cannot be determined.¹⁰

Pastoral indigenous communities did not cultivate the land that they occupied as grazing and left no lasting sign of their customary law rights in a communal land use unit when they migrated. In sections 14.4.2 and 14.4.4 of Chapter 14 I give the reasons why I contend that this fact should not be regarded as a reason to exclude the descendants of pastoral indigenous communities from restitution of their ancestral land.

I contend that by using the above definition for dispossession of customary law rights in land during the colonial period, it is possible to consider the restitution of such rights in a manner that is similar to the restitution process provided for in the

¹⁰ From the conclusions that I reach in section 16.5 regarding the rectification of colonial dispossession of land from indigenous communities, it will be clear that if any indigenous community that is still occupying land used as grazing in terms of customary law rules can show that their ancestors were dispossessed of their rights in such land in the manner described, the land should also be returned to them.

Restitution of Land Rights Act.¹¹ In the same way that the drafters of the interim Constitution of the Republic of South Africa¹² deemed it appropriate to provide that 19 June 1913 is a suitable limitation to impose for the lodging of claims for restitution of land dispossessed in terms of racially discriminatory laws and practices, the drafters of legislation to provide for colonial land restitution must find appropriate limitations for claims for restitution of dispossessed land before the cut-off date. In my opinion the appropriate limitation on claims for restitution of land by pastoral indigenous communities dispossessed during the colonial period, is that they must still be occupying land used as grazing or must be willing to do so in terms of customary law systems. If that is the case, they are entitled to again exercise such rights on the land used as grazing by their ancestors in the manner that their ancestors had done.¹³

16.5 Addressing and reversing the dispossession of land in the Northern Cape during the colonial period

In section 14.4.4.1 of Chapter 14 and section 15.6 of Chapter 15 respectively I conclude that the residents of the Reserves are excluded from the restitution sub-programme of the constitutional land reform programme and that the customary law system of occupation of the communal land on the Reserves may be preserved, if the Transformation of Certain Rural Areas Act¹⁴ ('Transformation Act') is amended. In Chapter 15 I also contend that the residents of the Reserves should be provided with all the necessary information regarding the ecological benefits of using the customary law system of grazing instead of a rotational fenced camp system of grazing. In other words, the residents of the Reserves who are interested in utilising land as grazing must be empowered to decide whether such a system will be to their benefit or not, when the communal land on the Reserves is transferred to the municipality or communal property association in terms of the Transformation Act. I also point out that if the Transformation Act is amended this may be to the advantage of the residents, who will be able to resist the efforts of influential people

¹¹ 22 of 1994.

¹² 200 of 1993 sec121(3).

¹³ As I conclude in section 11.5.2.1 of Chapter 11 that the new communities that developed at the mission stations in the South-Western and Southern Cape were not able to continue occupying land used as grazing in terms of their customary law systems, it is only the residents of the Reserves that can be regarded as the descendants of pastoral indigenous communities in the study area.

¹⁴ 94 of 1998.

in their communities to appropriate the communal land that is supposed to be occupied by all the residents. However, even if the Transformation Act is amended, it will not have the effect of reversing the colonial dispossession of the customary law rights in land of their ancestors.

The conclusions discussed above mean that reversing the effects of colonial dispossession of land must be achieved by adopting the legislation contemplated in section 25(8) of the Constitution which provides as follows:

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

The privately owned land that has been acquired and will be acquired by the state in the Northern Cape in the vicinity of and around the Reserves for the purpose of redistribution, should be made available to the residents of the Reserves in terms of legislation made in terms of section 25(8) of the Constitution. Such legislation may, subject to section 25(1) and (2) of the Constitution, provide for a system where land is made available to livestock owners to use as grazing in accordance with the customary law systems used on the Reserves.¹⁵ As the proposed amended Transformation Act already provides guarantees for the owners of livestock to exercise their customary law rights on communal land on the Reserves, it will be a logical step to provide for similar guarantees in the legislation made in terms of section 25(8) of the Constitution. The history of the occupation of land used as grazing prior to dispossession shows that, at that time, the land was occupied in an environmentally beneficial manner. Environmental studies relating to grazing that I refer to in this thesis show that this system is still the most beneficial for a semi-arid region like the Northern Cape.

If such a system is implemented it will be an important advance for the status of customary law rights in land within the South African legal system. The history of occupation of land used as grazing in the Northern Cape and in other parts of the study area proves that for more than 150 years of the colonial period the concept of

¹⁵ The adoption of such legislation will have to be preceded by consultation with all the members of the communities to ensure that the rights and wishes of everybody are taken into account.

ownership of land used as grazing did not exist in the study area. I contend that it was the introduction of the survey and sale system and ownership of land used as grazing that led to the dispossession of the customary law rights in land of the residents of the Reserves. Consequently, there are compelling reasons to adopt legislation that will, subject to the wishes of the communities concerned, reintroduce a system where all livestock owners in the Northern Cape will be able to benefit from the grazing and water resources of the region. In my opinion, the proposed legislation must not provide that an individual or a community may obtain ownership of land used as grazing that is acquired outside the Reserves in terms of such legislation.

16.6 Conclusion

To determine the nature of the rights in land of the pastoral indigenous communities I considered the manner in which land was occupied in the study area from before the start of the colonial period. This means that the legal history relating to land rights in the study area is, for the purposes of this thesis, assumed to have begun long before 1652. My premise is that the occupation of land was the source of rights in land of all communities in the study area. I did not assume that the States-General or the Company had obtained private law ownership of the land at the Cape and in the interior of the Cape Colony by some process that has not yet been considered by legal historians.

The conclusions in this thesis differ substantially from the conclusions reached by the British colonial government officials who conducted a similar investigation at the beginning of the nineteenth century on the assumption that all land not in private ownership as well as waste land was the private law property of the Company. If I had relied on the investigation conducted by these officials, I would have been compelled to accept that non-indigenous settlers leased the grazing on loan places from the Company. In turn this would have meant that the indigenous communities could not have retained customary law rights in the same land that they used as grazing. I would then have had to conclude that indigenous communities had not occupied land used as grazing in terms of their customary law systems. Consequently, I would have had to conclude that the loss of customary law rights in

land of indigenous communities in the study area during the colonial period cannot be addressed or reversed.

By proposing and substantiating an alternate view of the history of the rights in land of the communities living in the study area, I hope to have illustrated that the residents of the Reserves are still exercising customary law rights in land and that they should be enabled by legislation to claim back the land used as grazing by their ancestors.

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