

# TITLE TO LAND AND LOSS OF LAND IN THE GRIQUA CAPTAINCY OF PHILIPPOLIS, 1826-1861\*

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## 1 Introduction

In the introductory chapter of his book on Adam Kok's Griquas, Robert Ross states:<sup>1</sup>

This is a tragedy, *sensu stricto*. It describes the growth, the aspirations, the flourishing, the decline and the final collapse of the Griqua Captaincies of Philippolis and Kokstad, during the evolution of nineteenth-century South Africa. The Griquas were descendants of early Boer frontiersmen; of the remnants of Khoisan tribes – hunters, gatherers and pastoralists; of escaped slaves from the wine and wheat farms of the south-west Cape; of free blacks from the colony who could find no acceptable place for themselves in it; and of African tribesmen, detached from their tribes by war or choice. They formed a community which attempted to discover what their role in South Africa was, or if there was none, to create one for themselves. In the end they could not do this.

Many reasons have been advanced for the failure of the Griqua Captaincies of Griquatown and Philippolis.<sup>2</sup> These include the political squabbles among the Griquas and their inability to create effective forms of political authority; detrimental policies of the missionaries; the indecision of the Cape government and their ineffective protection of Griqua interests; the disruptive effects of the Mfecane; and increasing racial stratification. Hobart Houghton has drawn attention to the economic changes and exposure to international markets during the era of the British sovereignty, in particular

1 Ross *Adam Kok's Griquas A Study in the Development of Stratification in South Africa* (2009) 1.

2 The reasons are summarised by Ross (n 1) ch 1. See also Legassick "The Northern Frontier to 1820: The emergence of the Griqua people" in Elphick & Giliomee (eds) *The Shaping of South African Society 1652-1820* (1989) 390-405.

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the development of sheep farming and the wool trade.<sup>3</sup> The observation that in the longer term “the British authorities let them [the Griquas] down”<sup>4</sup> must be seen within the context of the fact that at the time, political and economic power was in white hands in South Africa and that “British overlordship based itself on this reality.”<sup>5</sup>

## 2 The invitation to settle at Philippolis

In 1825 Dr John Philip of the London Missionary Society invited the Griqua leader, Adam Kok II, to settle with his people at Philippolis, the invitation being subject to the condition that the Griquas protect the interests of the San in the region.<sup>6</sup> The invitation was controversial from the outset. In 1832, in the course of a dispute between Dr John Philip of the London Missionary Society and the Wesleyan Missionary Society who were attempting to establish themselves at Daniëlskuil to the north of Griquatown in Griqualand West, the Wesleyan missionary James Archbell said:<sup>7</sup>

What right had the Doctor [Philip] to go into that country at the first and to claim possessions there? What right had he to take the Griquas there? Who were the original proprietors of the soil as claimed? Did Dr Philip or his agents purchase it? Where are the documents?

These sentiments were repeated by Sir Andries Stockenström in 1836 in his evidence before the Select Committee on Aborigines in which he, *inter alia*, said that “the Bushmen had a right to be there” and “[t]he Griquas established themselves there [at Philippolis], and cultivated the soil, and most of the Bushmen disappeared”.

Dr Philip defended his position in his evidence before the Committee and in a lengthy statement read into the evidence.<sup>8</sup>

3 Wilson & Thompson (eds) *The Oxford History of South Africa* Vol 2 (1971) 4; Ross (n 1) 66-80. In this regard, Legassick (n 2) at 405 says that “if, as Houghton has written, the ‘economic impact of international markets were carried into the interior, not in the wagons of the Voortrekkers, but on the backs of merino sheep’, it was the effects of that international market, of those merino sheep, which created the Orange Free State and sealed the fate of the Griqua”. On the general significance of the development of sheep farming, see Thom *Die Geskiedenis van Skaapboerdery in Suid-Afrika* (1936).

4 Davenport & Saunders *South Africa. A Modern History* (2000) 151.

5 Legassick (n 2) 405.

6 In a document dated Aug 1842 and headed “The tenure by which the Griquas hold the lands at Philippolis” Dr Philip *inter alia* stated that in 1825 he proceeded to the residence of Adam Kok II “whose territory lay next to the lands of Philippolis, and who proposed to protect the Bushmen against the aggression of the Boers provided that I would permit him to reside at Philippolis. To this proposal I gave my consent, on this condition that he was not to dispossess the Bushmen of such land as they might require”: Council for World Mission Archives 266 (LMS 18/4/4/A) as quoted in Schoeman *The Griqua Captaincy of Philippolis 1826-1861* (2002) 46 (Schoeman *Grinqua Captaincy*).

7 As quoted by Schoeman *Griqua Captaincy* (n 6) 54.

8 See the *Report of the Select Committee on Aborigines (British Settlements)* in *Imperial Blue Books (Minutes of Evidence)* Vol 1 (1836) 216-217, 607ff.

The Griqua relationship with the San is an equally controversial issue, and nothing seems to have come of the promised protection of the San.<sup>9</sup> Both Ross<sup>10</sup> and Davenport and Saunders<sup>11</sup> remark on the “brutality” with which the Griquas treated the San. The Griqua attitude to the San is shown by the Griqua Law passed on 8 October 1846 whereby only those San who were either under mission influence or under contract with a Boer or Griqua, and registered as such with the British Resident or with Adam Kok III, would be allowed into Griqua territory.<sup>12</sup> In the final result, the San were the real losers in the “tragedy” of the Transgarieb.

### 3 Griqua claims to land in the Transgarieb

Fifteen years after the invitation to settle in Philippolis, in 1840, Adam Kok III claimed almost the entire Southern Free State as Griqua territory. The boundaries of the territory he claimed are partially described in various documents.<sup>13</sup> From these documents the total area claimed by Adam Kok III appears to have been bounded in the south by the Orange River from the Bossies Spruit<sup>14</sup> to Ramah;<sup>15</sup> in the west by the line from Ramah to Davids Graf near the confluence of the Modder and Riet Rivers; in the north by the Modder River; in the east, where the boundary was less well defined, the territory claimed was bounded by the territory of Moroka II of the Rolong at Thaba Nchu, that of Mosjesj of the Basuto, that of Chief le Pui, and the Bossies Spruit to where it falls into the Orange River.<sup>16</sup> The territory claimed by the Griquas was large, about 27 300 square

9 On the Griqua attitude towards the San, see Pretorius *Die Geskiedenis van die “Vrystaatse” Griekwas* (MA, University of the Orange Free State, 1963) 30-35.

10 (n 1) 24-25.

11 (n 4) 51.

12 The text of the Wet op Bosjesmans appears in *Griqua Records. The Philippolis Captaincy 1825-1861* compiled and edited by Karel Schoeman, Van Riebeeck Society, 2nd Series, 25 (1996) 6-7 (Document 11) with an English translation at 246 (Schoeman *Grinqua Records*).

13 The documents include the agreement signed by Adam Kok II and the French missionary Jean-Pierre Pellisier in 1835, fixing the boundary between the mission station of the Paris Missionary Society at Lephoi (Bethulie): Schoeman *Griqua Records* (n 12) 25-26 (Document 29); the treaties of 1837 and 1838 between Andries Waterboer and Adam Kok II fixing the boundary between their territories: *idem* 36-40 (Documents 37 and 38); the definition of the area of white settlement issued in 1840 by Adam Kok III and his *Raad* to the party of MA Oberholster: *idem* 40-42 (Document 39); the letter of 12 Nov 1843 from Adam Kok III and his *Raad* to Sir George Napier: *idem* 68-69 (Document 57); the treaty of 1846 between Adam Kok III and Sir Peregrine Maitland: *idem* 96-105 (Document 73).

14 The Bossies Spruit falls into the Orange River near Bethulie.

15 Ramah was on the line of the present boundary between the Free State and the Northern Cape, about three kilometres north of the Orange River.

16 Maps of the area claimed by Adam Kok III are to be found in Böeseken *Geskiedenis-atlas vir Suid-Afrika* (1948) 66, and in Van Aswegen *Die Verhouding tussen Blank en Nie-blank in die OVS 1854-1902* in the *Archives Year Book of South African History* Vol 34 (1971) Map 5.

kilometres or 2 730 000 hectares in extent,<sup>17</sup> and far greater than they could utilise.<sup>18</sup> The British Resident in the Sovereignty estimated that the inalienable territory<sup>19</sup> was large enough for twenty times the Griqua people.<sup>20</sup> While this perception might have been exaggerated, there can be no doubt that the population of the Philippolis Captaincy was small. In 1845 Adam Kok III estimated that “[t]he people under my rule amount in number to about six thousand, of whom rather more than three thousand are Grikwas, and the remainder consists of the tribes mentioned above [ie Bechuanas, Bushmen, and Korannas]”.<sup>21</sup>

In the Anglo-Griqua treaty of 1843 negotiated by Sir George Napier and Adam Kok III,<sup>22</sup> and that of 1846 negotiated by Sir Peregrine Maitland and Adam Kok III,<sup>23</sup> Griqua claims to land to the north of the Orange River were recognised. During the time of British Sovereignty in the Free State, from 1848 to 1854, the Griquas were dispossessed of much of their land, and circumstances were created which facilitated the loss of the land of which they had not been dispossessed. The result was that twenty years after Adam Kok III had claimed almost the entire Southern Free State as Griqua territory, the Griquas had lost all that land and in 1861 they embarked on their historic trek to Nomansland (Griqualand East).

The question arises, what were the legal means by which the Griqua people were deprived, during a period of British administration, of land which the British had but a few years before in formal treaties “recognised unreservedly” as being theirs? For a proper understanding of the legal issues involved, regard must be had to the nature of land tenure in colonial South Africa at the beginning of the nineteenth century.

- 17 That is, approximately 10 538 sq miles or 68 500 000 acres. I am indebted to Dr A van Niekerk, Director of the Centre for Geographical Analysis of the Department of Geography and Environmental Studies, University of Stellenbosch, for the calculation of the extent of the area. The area claimed by Adam Kok III is almost the size of Belgium which, according to the *National Geographic Atlas of the World* (1999), is 30 518 sq km (11 783 sq miles) in extent.
- 18 Ross (n 1) 32. The size of the farms in the Modder River area recorded in the Deeds Registry (VAB AKT 2/1/1/16 (Bloemfontein) (reference is to the Free State Archives Repository, followed by the relevant document series)) vary from about 3 000 to 6 000 *morgen*. It is impossible to determine how many farms of that size the topography of the land claimed would allow. It is, however, clear that all the land claimed was not inhabited – hence Sir Harry Smith’s question to Adam Kok III at their meeting on 23 Jan 1848 as to why the land is not inhabited. In his negotiations with Sir Peregrine Maitland, Adam Kok III admitted as much and expressed his willingness to allow “the permanent settlement of a part of his territory by British subjects”: Schoeman *Griqua Records* (n 12) 87-92 at 90 (Document 69).
- 19 On the division of Griqua land into an inalienable part and an alienable part, see below par 7.
- 20 Midgley *The Orange River Sovereignty (1848-1854)* in the *Archives Year Book of South African History* Vol 12 (2) (1949) 412.
- 21 To John Montagu in response to a questionnaire; reproduced in Schoeman *Griqua Records* (n 12) 92-95 at 93 (Document 70). In a lecture in 1855 Edward Solomon estimated the size of the “Griqua tribe” at between 8 000 and 10 000 souls: Solomon *Two Lectures on the Native Tribes of the Interior* (1855).
- 22 Schoeman *Griqua Records* (n 12) 67-68 (Document 56).
- 23 *Idem* 96-103 (Document 73).

#### 4 Forms of land tenure in the Cape Colony

During the era of the Dutch East India Company, land grants were made in various forms:<sup>24</sup> there were grants in *eigendom* (*dominium*), grants in loan ownership and grants in *erfpacht*, a form of tenure in the nature of Roman-law *emphyteusis*. The most common form of tenure during the Dutch era, in the outlying and frontier areas, was the grant of *leningsplaatsen* (loan tenure),<sup>25</sup> 80 per cent of available land being held in this way, and the only form of tenure in the districts of Graaff-Reinet and Swellendam.<sup>26</sup> The grant of the loan was an administrative step which conferred no legal title and amounted to nothing more than a licence to occupy the land – the grant of such a loan has been characterised as a form of “legalised squatting”.<sup>27</sup> The applicant merely asked his local *landdrost* for permission to occupy a fixed point of land. The boundaries of the loan farms were established by riding out from that central point.<sup>28</sup> The area of land obtained in this way usually amounted to about 3 000 *morgen*. After 1714, the occupier was required to pay a rent (*recognitie*) to the Company.<sup>29</sup> In this way, gratuitous loan for use was converted into a *locatio conductio*. In a letter to the Colonial Secretary dated 28 June 1811 the Fiscal, JA Truter, *inter alia* states:<sup>30</sup>

Although now by this resolution of a yearly rent and tithes the grant, which at 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 payment of a fixed sum, still however such places kept the name of *loan places*, and the same as in other cases is not strange. *Re mutata manset idem nomen*.<sup>31</sup>

Despite the precarious nature of *leningsplaats* tenure – there was no survey or registration and the land-holder (grantee) had no title – loan farms in practice came to be treated as the property of the land-holder and it was customary for land-holders to sell their tenure at a price calculated according to the value of the land, with the new owner ostensibly

24 Duly *British Land Policy at the Cape, 1795-1844 A Study of Administrative Procedures in the Empire* (1968) *passim*; Davenport & Hunt *The Right to the Land* (1974) 1-5; Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806. Met 'n Bespreking van die Historiese Agergrond* (1969) 80-84; Guelke “Freehold farmers and frontier settlers, 1657-1780” in Elphick & Giliomee (n 2) 66-108; Milton “Ownership” in Zimmermann & Visser (eds) *Southern Cross. Civil Law and Common Law in South Africa* (1996) 657 at 659-670; Van der Merwe *Sakereg* (1989) 582ff.

25 Van der Merwe *Die Trekboere in die Geskiedenis van die Kaapkolonie* (1938) 63-132.

26 Duly (n 24) 15; Penn *The Forgotten Frontier. Colonist and Khoisan on the Cape's Northern Frontier in the 18th Century* (2005) 43. In the Africana Collection of the University of Stellenbosch library there is an interesting, unpublished study of the grants of *leningsplaatsen* and (after 1813) perpetual quitrents in the Colesberg district, which initially formed part of the Graaff-Reinet district: Badenhorst *Die Stelsel van Grondbesit in die Kaapkolonie (1852-1845) met spesiale Verwysing na die Distrik Colesberg* (2000?).

27 Duly (n 24) 16.

28 Davenport & Hunt (n 24) 1-5; Visagie (n 24) 82.

29 See Jeffreys & Naude (eds) *Kaapse Plakkaatboek, 1652-1806* Vol 2 (1948) 31.

30 The letter is reproduced in Theal (ed) *Records of the Cape Colony* (1897-1905) (RCC) Vol 8 at 91-107 (the passage cited appears at 95).

31 See further Botha “Early Cape land tenure” 1919 *SALJ* 149-160 at 157; Visagie (n 24) 83.

paying not for the land but for the “opstal”, or fixed improvements on the farm.<sup>32</sup> The result of this state of affairs was that though the formal *dominium* of the land resided in the Company, *leningsplaats* tenure in fact provided most, if not all, of the benefits and advantages of private *dominium* in the land.<sup>33</sup>

The grant of *leningsplaatsen* was the way in which the Company extended its rule into the interior of the Cape. The Company granted requests for *leningsplaatsen* beyond the frontiers of the colony, thereby appropriating land beyond the frontiers. This is the underlying reason why *leningsplaatsen* was the only form of tenure in the districts of Graaff-Reinet and Swellendam.

Roman-Dutch law was not replaced by English law in 1814 when the Dutch Government ceded the Cape to Britain. Accordingly, the system of land tenure remained as it was under the Dutch administration.<sup>34</sup> The British did not like *leningsplaats* tenure. Their objection to the system was threefold: (i) the *recognitie* (rental) payable by the landholders was uniform with no consideration of the value of the property; (ii) the legal uncertainty of the landholder’s possession discouraged capital investment in the improvement of the land, and gave rise to instability in the occupation of land, and (iii) the ill-defined boundaries of the farms gave rise to endless disputes between neighbours.<sup>35</sup>

In 1813 the Governor at the Cape, Sir John Cradock, replaced *leningsplaats* tenure by Proclamation<sup>36</sup> with a new system of land tenure for the Colony to be known as “perpetual quitrent”.<sup>37</sup> In English law, quitrent denoted a form of tenure under which a person holding land in freehold is obliged to pay an annual rent to the lord or manor in order to be “quit or free of other services or dues”.<sup>38</sup> It is a form of tenure which derives from feudal law and which fits uneasily into a civil-law environment.<sup>39</sup> Denoon points

32 In a memorandum to the Governor of the Colony, Charles D’Escury, the Inspector of Government Lands and Woods, refers to the “opstal”-issue and the effective security of tenure holders of *leningsplaatsen* enjoyed; see also Penn (n 26) 43.

33 Milton (n 24) 663-664; Van der Merwe *Trekboere* (n 25) says (at 122) that “grondbesit onder die leningsplaasstelsel nie so wankel was as wat dikwels voorgegee is nie”.

34 Dutch terms were translated into English and sometimes mistranslated where there was no exact English equivalent for Dutch terminology. Thus, for example, *erfpacht* was translated as “quitrent”. In *Webb v Giddy* [1878] 3 AC 908 (PC) *voortdurende erfpacht* and *perpetual quit-rent* are treated as equivalents.

35 See the letter of Sir John Cradock dated 23 Aug 1813 to Lord Bathurst, reproduced in *RCC* Vol 9 at 223-226.

36 Procl of 6 Aug 1813 (Cape).

37 Although Sir John Cradock in his letter to Lord Bathurst refers to perpetual quitrent as “in fact freehold”, Duly (n 24) 44 points out that Cradock had been advised that freehold tenure could not be introduced and that a right of resumption had to be included in any land-granting system. The reason was that at the time the British occupation of the Cape was a wartime measure and until the colony’s future ownership had been settled by treaty, Britain had to abide by her interpretation of international law which prohibited the enforcement of any policy that might curtail the future income or prerogatives of the government.

38 *The Oxford Companion to Law* (1980) sv “quit-rent”; see also Milton (n 24) 665.

39 See Reid & Van der Merwe “Property law: Some themes and some variations” in Zimmermann, Visser & Reid (eds) *Mixed Legal Systems in Comparative Perspective. Property and Obligations in Scotland and South Africa* (2004) 637 at 643-644.

out that in our law the erroneous adoption of the word “quitrent” as an equivalent of “erfpacht” or “emphyteusis” gave rise to confusion, also in Deeds Office practice.<sup>40</sup>

Cradock’s Proclamation was “a document of remarkable obscurity”.<sup>41</sup> Obscure in particular was the nature of the tenure created by the Proclamation. Before 1886 it was accepted that the tenure was emphyteutic or *erfpacht*, and that the Government did not transfer the *dominium* in the land to the grantee.<sup>42</sup> In 1886 the Chief Justice of the Cape, Lord De Villiers, made it clear that in his view the grantee of perpetual quitrent becomes the owner of the land, subject only to such reservations in favour of the Crown as had been provided for by the Proclamation of 1813.<sup>43</sup> This judicial construction of the Proclamation was not received into the practice of the Deeds Registries in the Cape and a perpetual quitrent grant, which came to be called an *erfpachtbrief* or quitrent lease, was not treated as a grant of *dominium*.<sup>44</sup>

The implementation of the Cradock Proclamation developed into a nightmare which plagued the British authorities at the Cape for many years.<sup>45</sup> The delay in the granting of perpetual quitrent titles resulted in a dramatic rise after 1820 in so-called “request” tenure whereby a person who had lodged an application (request) for a quitrent tenure would be allowed by a local official to occupy the land, and dispose of it, notwithstanding the fact that the application had not yet been approved by the authorities in Cape Town and no title deed had been issued.<sup>46</sup> As will become apparent below, in the Philippolis Captaincy, individual Griquas obtained their land upon the grant of a request by the Griqua authorities. The tenure so granted to individual Griquas was not the same as the “unlawful” request tenure in the Cape.

*Leningsplaats* tenure, and perpetual quitrent tenure, implied an entitlement, which may be less than full legal *dominium*, by an individual to a demarcated piece of land. This was contrary to the Khoisan and San custom of regarding land and its resources as being the communal property of the group.<sup>47</sup>

40 Denoon “Conditions in deeds” 1948 *SALJ* 545-563.

41 Milton (n 24) 666 quoting Lord De Villiers CJ who said in *De Villiers v Cape Divisional Council* (1874) Buch 50 at 62 that “it is impossible to conceive a statute more loosely drawn or more inartistically worded.”

42 In *De Villiers v Cape Divisional Council* (n 41) the majority of the Court adopted this construction of the Proclamation. The dissenting view of Lord De Villiers CJ was upheld by the Privy Council in *Divisional Council of the Cape Division v De Villiers* [1877] 2 AC 567 (PC).

43 *Colonial Government v Fryer and Huisamen* (1886) 4 SC 313 at 316.

44 See Denoon (n 40) 546.

45 See Duly (n 24) *passim*.

46 *Idem* 77-78, 113; Davenport & Hunt (n 24) v.

47 See Penn (n 26) 43, citing Schapera *The Khoisan Peoples of South Africa* (1930) 319-321 and Barnard *Hunters and Herders of Southern Africa A Comparative Ethnography of the Khoisan Peoples* (1992) 240-246.

## 5 Land tenure in the Philippolis Captaincy

The Griqua authorities granted parcels of land from the territory claimed upon application (request or *rekwest*) to individual Griqua. The making of such grants is apparent from the numerous “renewed” grants recorded in the early volumes of the Free State Deeds Registry. When during the 1850s and afterwards Griquas sold their farms, the Registrar of Deeds required proof of ownership on the part of the seller or transferor. Such proof was in many cases provided by Adam Kok III in the form of a “renewed” certificate of grant. Thus, to give but one of many examples, in relation to the farm *Palmiet Fontein* in the Fauresmith district, the Deeds Register<sup>48</sup> contains a reference to –

Een vernieuwd Grikwa Grondbrief met datum 19 Feb. 1856, onder de hand van Kaptyn Adam Kok waarvan gecertificeerd copij in het Registratie Kantoor gedeponeert blyft, en waarin gemeld wordt dat de originele grondbrief was met datum van den 21 Augustus 1839, werd de Plaats met de volgende lynen<sup>49</sup> aan den Grikwa Burger Lukas van der Westhuizen verleend . . . .

The tenure of land in the Philippolis Captaincy was both similar to, and different from *leningsplaats* tenure. It resembled *leningsplaats* tenure in that it derives from an appropriation of land by a “colonising” authority which then makes grants of parcels of that land to individuals. It differs, however, from *leningsplaats* tenure in one respect: under *leningsplaats* tenure the grantee did not obtain ownership of the land; the *dominium* remained vested in the grantor. The grant of a *request* to a Griqua conferred *dominium* on the grantee who was not required to pay any form of *recognitie*. This is apparent (i) from statements made by Adam Kok III and from the Griqua Law concerning the sale of farms; (ii) from the terms of reference of the Griqua Land Commission established on 3 June 1850; (iii) from the manner in which the grants were subsequently treated in the Orange Free State Deeds Office, and (iv) from judgments of the Free State Courts. These are briefly considered below.

(i) In 1845 in response to an official questionnaire from the Colonial Secretary, Adam Kok III makes it clear:<sup>50</sup>

Individual right of property is recognized by our laws, but no lands can be hired or sold among my own people without my consent, and it is contrary to our laws to sell land to any person not being a Grikwa subject.

I should not be able to alienate any portion of my territory without the consent of all my people, as such an act would require a change of one of our fundamental laws.

48 VAB AKT 2/1/1/51 (Fauresmith) No 55.

49 The farms were not surveyed and the boundary lines were described in the grants by way of physical features. Many such descriptions of boundary lines are contained in the early volumes of the Orange Free State Deeds Registry before the farms were surveyed.

50 The document is reproduced in Schoeman *Griqua Records* (n 12) 92-95 (Document 70); the passage cited appears at 93.

Earlier, in 1842, Adam Kok III mentioned to Dr Philip “a law against selling any of the lands, that was made in 1830”.<sup>51</sup> Such a law is not recorded in the *Law Book* of the Philippolis Captaincy, but the Griqua Law of 11 March 1838 *Betreffende het Transport of Verkoopung der Plaatzten*<sup>52</sup> imposed an obligation on the seller of a farm to affirm in writing that the farm has been sold on condition that it shall in no circumstances be sold to anyone but a Griqua subject. Failure to comply renders the sale null and void.<sup>53</sup>

(ii) On 29 May 1850 a Griqua Land Commission (*Lands Raad*), with Adam Kok as chairman, was established at Philippolis,<sup>54</sup> the duties of the Land Commission being further elaborated upon in a document dated 3 June 1850.<sup>55</sup> The purpose of the establishment of the Commission was to keep watch over all Griqua farms, in particular those in the hands of British subjects, farms which after the expiry of the existing leases had to be returned to the Griqua nation.<sup>56</sup> Included in its terms of reference was the keeping of a *Land Book* containing a record of all the farms in the inalienable territory, both those that are under lease to British subjects and those still in possession of Griqua owners. The record had to include the names of the owners (*eigenaren*), the name of the farm and the tax (*taxatie*) that may be levied on each farm in terms of the settlements of January 1848 between the British Government and the Griquas;<sup>57</sup> the tax to be collected from all owners, both those who are in possession of their farms and those who have leased their farms. The *Land Book* further had to contain a register of all farms that have been leased, containing the names of the owners (*eigenaren*) and the lessees, and the term of the lease.

(iii) In the Deeds Registry of the Orange Free State, the grants were treated as being grants *in eigendom*, the grantee being entitled to give transfer of the property to another. The following two entries are instructive in this regard. In relation to the farm *Knapzakrivier* in the Philippolis district, the Deeds Register<sup>58</sup> contains the following note:

1 Uit ene Griqua grondbrief door Kaptyn Adam Kok blykt deze plaats eigendom te zyn van Jan Steenkamp (Griqua) met lynen en bakens zoo als in gemelden grondbrief beschreven. Gemelde grondbrief is gedateerd 5 Oktober 1840.

51 Schoeman *Griqua Records* (n 12) 44-46 (Document 42).

52 *Idem* 1 (Document 1); English translation at 241.

53 “onder voorwaarde dat gemelde plaats geenzins aan enige Kolonist of burger of aan iemand dan wettige onderdanige van Kapityn Adam Kok of zyn navolgers verkocht kan worden, en in gevolge zulke verkoopung zoude plaats hebben, dat alle zulke verkoopung zal niet en van geen waarde zyn”.

54 Schoeman *Griqua Records* (n 12) 140-141 (Document 97); English translation at 271.

55 *Idem* 141-142 (Document 98); English translation at 271-272.

56 “om te bewaken over de landpalen en alle plaatsen binnen het grondgebied van Grikwaland, zoowel byzonders om de bewaking te nemen over de plaatsen en gronden thans in die handen van Britsche onderdanen geraakt door huurigen &c., en welke plaatsen en gronden na verloop van de bestaande huurtyden moeten terugkomen tot het byzonder gebruik van de Grikwa volk”.

57 “uit kragte van de schikkingen van January 1848 tusschen de Britsche Gouvernment [en de Grikwas].”

58 VAB AKT 2/1/1/121 (Philippolis) No 1.

2 Eene certificaat door Kaptyn A Kok, in dato 16 September 1861 wordt gecertificeert dat dezen plaats van gemelde Jan Steenkamp eigendom is, en dat dezelve door hem getransporteerd kan worden.

William Collins

Deze geheel plaats wordt verkocht op den 24 dag van Maart 1861, getransporteerd en geregistreerd te Bloemfontein op de 20 Mei 1862, ten faveure van Louis Petrus Boshof.

W Collins

In respect of the farm Platberg, in the Fauresmith district, the Deeds Register<sup>59</sup> contains the following note:

Volgens een vernieuwd Titel-Regt onder de hand van Kaptyn Kok met den datum den 9den January 1855, werd deze Plaats op den 12den September 1840 gegeven in eigendom aan Grikwa Onderdaan Abraham Kok. Ziet Copij van gemelde document in dit Kantoor, waarin grenslyne word beschreven.

(iv) In *Hendrik Hendrikse v Gouvernement OVS*,<sup>60</sup> in a dispute about the ownership of two farms, Eerste Geluk and Welgevonden, which the Government had let for a period of ten years, the Free State High Court held that land given by *rekwest* confers *dominium*. The farms in question had been granted to the plaintiff by Adam Kok in 1859. The Court (per Reitz CJ, Buchanan J and Melius de Villiers J concurring) held:

Volgens wet hebben Grikwa onderdanen even zoo veel recht op gronden hun op rekwest door Kapitein Adam Kok gegeven, als een Oranjevrijstaatsche onderdaan hebben zou op gronden hem krachtens eenen Oranjevrijstaatsche grondbrief toegekend.

Er kan geen twyfel bestaan dat Eerste Geluk en Welgevonden het eigendom zijn van Hendrik Hendrikse ...

Bovendien heeft het hof geen recht om op eenige wijze afbreuk te doen aan het duidelijk bewezen eigendomsrecht van den eischer. Om te kunnen verhuuren moet men eigendomsrecht bezitten, of namens een eigenaar handelen. Het Gouvernement bezat nimmer zulk eigendomsrecht over de gronden van Hendrik Hendrikse ...<sup>61</sup>

In 1857 Willem Platje(s), a Griqua, lost his claim to the ownership of the farm Grys Kop, a subdivision of the farm Goeimansberg, situated near the modern Luckhoff in what was (under the Maitland Treaty) an inalienable part of Griqua territory. The case, decided by the Circuit Court of Landdrosts in Fauresmith and confirmed by the Executive Council in Bloemfontein sitting as a court of appeal, elicited scathing comment from J Groenendaal in *The Friend* of 8 December 1857. He said *inter alia*: “Niemand is bevoegd om aan Willem Platje de vrye beschikking over zyn eigendom te ontseggen, en allerminst onze regering en onze Regtbanken.”<sup>62</sup>

59 VAB AKT 2/1/1/51 (Fauresmith) No 79.

60 1879 ORC 2.

61 At 3.

62 Details of the case are sparse. The only trace of it in official records is a note in the Deeds Registry (VAB AKT 2/1/1/51 (Fauresmith) at 340) that on 19 May 1856 the conveyance of the farm had been interdicted by Landdrost Smellekamp, and a further note that on 7 Jul 1856 the interdict had been

## 6 Leases of land to emigrant farmers

Many of the Griquas who received farms upon the grant of a *rekwest* were poor and lacked the means of exploiting their assets in land. During the 1830s they started leasing their farms to emigrant farmers on an increasingly large scale.<sup>63</sup> In 1840 Adam Kok III and his *Raad* made a treaty<sup>64</sup> with the emigrant farmers under the nominal leadership of MA Oberholster who had settled in the Riet River area.<sup>65</sup> The area in which land could be leased to emigrant farmers, as set out in the treaty, straddles the Riet River, a large part of the area being to the south of the Riet River.<sup>66</sup> In the treaty, Adam Kok III and his *Raad* acknowledge that Griquas who have been granted land within the area “have hereby liberty to hire to the abovementioned Colonists the same lands by days, months or years, according to their own will and desire, without consulting either the Chief or Council or the members of the community”.

Annexed to the treaty is a “Schedule of Farms hired from Griquas”.<sup>67</sup> This contains a list of ninety nine farms<sup>68</sup> with their Griqua owners, colonist tenants, period of lease and amounts already paid.

## 7 The Maitland Treaty

The terms of the Maitland Treaty were settled at Touwfontein in the winter of 1845. The purpose of the Treaty, according to the preamble, was to settle “the relations between the

discharged by the Vereenigd Hof van Landdrosten at Fauresmith. The facts are briefly set out in Groenendaal’s note: Willem Platjes in 1850 bought the farm from another Griqua, Christiaan Kok, who during a prolonged absence of Platjes in 1854 fraudulently (so it was alleged) re-sold the farm to another purchaser. Groenendaal was prominent in Free State affairs and for a long time member of the Volksraad for Fauresmith. His full comments on the case must be seen within the context of the dispute which arose after the Bloemfontein Convention as to whether Free State burghers who owned land in the (former) inalienable territory were subject to the jurisdiction of the Griqua government. See Van Aswegen (n 16) 111.

63 Ross (n 1) 31-32. The movement of emigrant farmers (*trekboere*) into the Transgarieb was initially resisted by Andries (later Sir Andries) Stockenström, magistrate of Graaff-Reinet and later Lieutenant-Governor. The emigrant farmers were pastoralists whose movement across the Orange River was in search of pasturage, initially only in times of drought in the Cape Colony, but their settlement in the Transgarieb became increasingly permanent. They were loyal to the Colonial Government, unlike the participants in the Great Trek whose movement across the Orange River was in search of political independence. On the northward movement of the *trekboere*, see Van der Merwe *Die Noordwaartse Beweging van die Boere voor die Groot Trek* (1937) and Pretorius (n 9) 40-61.

64 The emigrant farmers spoke of “treaties”; Schoeman *Griqua Captaincy* (n 6) 93 is of the opinion that the documents in question amounted to no more than “a formal acknowledgement of the rights and privileges claimed by the whites”.

65 The treaties were transmitted to the Colonial authorities by the emigrant farmers. The documents are kept in the Cape Archives, KAB GH 8/10 at 193-196 (reference is to the Cape Town Archives Repository, followed by the relevant document series) reproduced in part in Schoeman *Griqua Records* (n 12) 40-43 (Documents 39 and 40).

66 The area is shown on the map in Ross (n 1) 40, and on the map in Pretorius (n 9) 99-100.

67 In the Cape Archives, KAB GH 8/10 at 203-205.

68 Schoeman *Griqua Records* (n 12) 40 points out that the farms are incorrectly numbered 1-100.

subjects of Her Majesty resident in that territory and the said Captain [Adam Kok] in such a manner as to preserve therein peace and order”.<sup>69</sup>

In furtherance of this object, a British Resident was appointed whose primary function, set out in article 8 of the Treaty, was “to exercise constant vigilance in regard to the state and condition of the Griqua territory, so as to secure the peace and tranquillity thereof”.<sup>70</sup>

During the negotiations preceding the conclusion of the Treaty,<sup>71</sup> in a memorandum on the proposals made to Adam Kok III, the Reverend Brownlow Maitland, secretary to Sir Peregrine Maitland,<sup>72</sup> set out a proposal for the division of Griqua land into two parts. The idea of a division of Griqua land was not new. In October 1844 the Reverend William Thomson had suggested to Sir Peregrine Maitland that Griqua land be divided, the Griquas to give up all claims to land to the north of the Riet River, and the emigrant farmers to evacuate the land south of the river, the owners of unexpired leases to be compensated in amounts determined by arbitration.<sup>73</sup>

The Treaty was formally entered into on 5 and 19 February 1846.<sup>74</sup> In terms of article 2 of the treaty, Griqua territory was divided into two parts, generally referred to as the “inalienable” territory and the “alienable” territory. The “inalienable” territory was

to consist of land in regard to any part of which it shall not hereafter be competent for Captain Adam Kok or any of his people to grant leases or make sales or give any right of occupation to any British subject, or generally to any person of European birth or extraction.

In article 5 of the Treaty the boundaries of the inalienable part are set out in detail: on the north it was bounded by the Riet River, the Kromellenboog Spruit and the Van Zyl Spruit to its source in the Pram Berge and then to Breipaal; in the east for the most part by the Bossies Spruit up to the Orange River; in the south by the Orange River to Ramah and in the west by the line from Ramah to David’s Grave, near the confluence of the Riet and Modder Rivers.<sup>75</sup> The boundaries of the “alienable” territory are not set out in the Treaty. Article 6 merely provides that the portion of Griqua territory which may be leased “shall consist of so much of the hitherto recognised Griqua territory as is not comprised within the limits” of the inalienable area.<sup>76</sup>

Ross has drawn attention to two strange features of the division of Griqua land agreed upon in the Treaty. The first is that the major emigrant farmer settlement, sanctioned in

69 The Treaty is reproduced in Schoeman *Griqua Records* (n 12) 96-103 (Document 73).

70 *Idem* 98.

71 The negotiations are discussed in considerable detail by Pretorius (n 9) 94-105.

72 The memorandum is reproduced in Schoeman *Griqua Records* (n 12) 82-86 (Document 67).

73 The Revs Hughes and Thomson also made the suggestion in a letter to the Colonial Secretary, John Montagu (KAB GH 19/7). See Galbraith *Reluctant Empire. British Policy on the South African Frontier 1834-1854* (1963) 206; Pretorius (n 9) 92-93.

74 The Treaty is reproduced in Schoeman *Griqua Records* (n 12) 96-103 (Document 73).

75 The inalienable territory is shown on maps in Böeseken (n 16), in Van Aswegen (n 16) and in Pretorius (n 9) 99-100. The Pram Berge are today known as the Tafelkoppe, twenty kilometers east of Trompsburg.

76 See maps referred to in n 73.

the agreements with the Oberholster group, was situated south of the Riet River in the inalienable lands.<sup>77</sup> The second is that Griqua farms in the better watered area to the north-east of Philippolis were not included in the inalienable territory.<sup>78</sup>

In terms of articles 33 to 36 of the Treaty, British subjects “now holding lands in any part of the Griqua territory” were permitted to continue in occupation on the conditions set out in article 34, and the payment of an annual assessment, the assessment to be divided in the same manner as the quitrents provided for in article 30. Article 37 of the Treaty provided that upon the expiry of existing leases of land in the inalienable territory, it shall not be competent for Adam Kok III or any of his subjects again to lease the land in question to any British subject and that the land shall be reserved for the exclusive use and occupation of the Griqua people.

Article 2 provides that “all leases to British subjects [are] to be made in the manner and under the conditions” set out in the Treaty. In regard to the lease of land in the alienable territory, articles 29 and 30 provide that the British Resident shall settle the conditions and duration (not exceeding forty years) of all intended leases to be granted to British subjects, and that upon each lease there “shall be reserved” an annual quitrent payable to the British Resident (who shall be furnished by Adam Kok with the necessary powers to recover it). Article 31 provides that one half of the quitrents shall annually be handed over to Adam Kok III who, in turn, shall pay over his share to any Griqua who may as “the *owner* of any of the lands out of which any part of such quitrent shall have arisen” (my emphasis) be entitled to any proportion thereof. The “remaining half of the ... quitrents” is to be retained by the British Resident and to be used to defray “the expense of his establishment”.<sup>79</sup> In communication with Lord Stanley, the Colonial Secretary, Sir Peregrine Maitland suggested that it was only fair that these expenses be defrayed from part of the income which Adam Kok III derives from the sale and lease of land to the emigrant farmers.<sup>80</sup>

Destined to become a source of much dissatisfaction was article 38 of the Treaty which provides as follows:

Inasmuch as the alienation of the absolute dominion of landed property by Griqua subjects is in direct opposition to the well-known laws and customs of the Griqua people, the cases, if any, in which British subjects shall have purchased or shall purport to have purchased absolute dominion of any landed property of the Griqua territory shall be deemed to be cases of a hiring of such property for a term of forty years from the commencement of the occupation, and any leases or agreements of that nature heretofore made which purport to be made for a longer term than forty years shall be deemed to have been originally made for that term and no longer.

77 (n 1) 60 where it is pointed out that some 59 per cent (85 out of 143) of the farms that had been leased were within the inalienable territory, while only 40 per cent (58 out of 146) in the alienable territory had been leased. See also Theal *History of South Africa* Vol 2 (1904 repr 1964) 494 and Davenport & Saunders (n 4) 151.

78 Ross (n 1) 60.

79 Art 34 of the Treaty.

80 KAB GH 19/7.

The principal features of the Maitland Treaty may be summarised as follows:

- the division of Griqua land into two parts, an “inalienable” and an “alienable” part;
- no further leasing of farms in the inalienable part to non-Griquas after the expiry of existing leases;
- the sale of *any* landed property in Griqua territory (both alienable and inalienable) to British subjects to be deemed to be leases for forty years;
- leases in excess of forty years to be deemed to be leases of forty years;
- in the alienable part the conditions of all future (intended) leases to be settled by the British Resident;
- “quitrents” payable on such (future) leases to be collected by the British Resident, half to be handed to Adam Kok III;
- land in the alienable part that have not been leased or leased for periods less than forty years were not affected by the provisions of the Treaty.

In article 1 of the Maitland Treaty, the “absolute domain of Captain Adam Kok over all the land hitherto received and regarded as belonging to him or to his people is ... recognised by the Governor on the part of Her majesty the Queen”. It was neither the intent, nor the effect of the Treaty to bring about any loss of ownership of land by the Griqua government or by individual Griquas. Griqua rights of ownership were curtailed only in so far as intended (ie future) leases of the land in the alienable territory were required to be settled by the British Resident. He was to do so “in conjunction with the parties interested”; that is, at least, the lessor and the lessee (the lessor being the Griqua land-holder and the lessee or tenant a British subject). The “quitrents” which the British Resident collected as the authorised agent of Adam Kok III were in reality nothing but the rental paid by lessees of farms in the alienable territory, half of which to be retained by the British resident to defray “the expense of his establishment”. In communication with Lord Stanley, the Colonial Secretary, Sir Peregrine Maitland said that the purpose of the arrangement that the British Resident was to collect the “quitrents” was to avoid friction between Griqua (lessors) and emigrant farmers (lessees).<sup>81</sup> The effect of the Maitland Treaty was not to introduce true quitrent tenure in which the ownership of the land remains vested in the grantor and the quitrent is payable by the grantee.

This was, however, not the interpretation subsequently put on the Maitland Treaty by the British authorities. In a Government Notice dated 29 January 1850 and signed by Lieutenant Colonel Garvoek, Sir Harry Smith’s secretary,<sup>82</sup> it is stated with reference to the Maitland Treaty that all rights of occupation to be acquired after June 1845 were to be restricted to the alienable territory, and to be held “on *quitrent leases* framed by the British resident” (my emphasis). The question arises on whose behalf the British Resident was acting when he framed the quitrent leases – who was grantor of the leases, the *dominus eminens* of the land in whom the *dominium* remained vested? Despite the

81 KAB GH 19/7.

82 Reproduced in Schoeman *Griqua Records* (n 12) 133-135 (Document 94).

presence of a British Resident, the Griqua people were at that time independent and not subject to British sovereignty.

The practical application of the provisions of the Maitland Treaty gave rise to dissatisfaction amongst both Griqua and emigrant farmers, and to endless disputes.<sup>83</sup> The stated purpose of settling the relations between the emigrant farmers and the Griquas in a peaceful manner was not achieved. If anything, the levels of acrimony and hostility were aggravated. It was under such circumstances that Sir Peregrine Maitland's successor, Sir Harry Smith, arrived on the scene.

## 8 The Orange River Sovereignty

On 3 February 1848 Sir Harry Smith proclaimed British sovereignty over the Transgarieb. The Proclamation<sup>84</sup> provides at the outset (i) that the law applicable in the sovereignty shall be that applicable in the Cape Colony, and (ii) that the Government assumes responsibility to the various Chiefs in the sovereignty as regards their "just indemnification" for land occupied by Her Majesty's subjects, "upon the latter paying an annual quitrent".

On 23 January 1848, that is about twelve days before the issue of the Proclamation, Sir Harry Smith met with Adam Kok III and his *Raad* in Bloemfontein.<sup>85</sup> On 24 January 1848 agreement was reached<sup>86</sup> whereby certain of the terms of the Maitland Treaty were modified. The modifications, and their application in practice, became the source of deep dissatisfaction amongst the Griquas.<sup>87</sup> Their dissatisfaction was raised in memorials addressed to Sir Harry Smith;<sup>88</sup> in communications with Sir Andries Stockenström,<sup>89</sup> Dr Philip and John Fairbairn,<sup>90</sup> and in a lengthy letter to Assistant Commissioners Hogge

83 See Pretorius (n 9) 106-114.

84 The Proclamation is reproduced in Eybers *Select Constitutional Documents Illustrating South African History 1795-1910* (1918) 270-273 and in Schoeman *Griqua Records* (n 12) 107-110 (Document 76).

85 An account of the meeting kept in the archives of the London Missionary Society (LMS) is reprinted in Schoeman *Griqua Records* (n 12) 104-105 (Document 74) and, in part, in Ross (n 1) 63-64. The meeting was acrimonious and Adam Kok III resented the manner in which he had been treated until the year he died: See his statement made to the Commission appointed "to inquire into the affairs of the territory of Griqualand East": Schoeman *Griqua Records* (n 12) 225-229 (Document 160). See further Midgley (n 20) 56-58. De Kiewiet *British Colonial Policy and the South African Republics 1848-1872* (1929) 20 describes the meeting as "short and sharp". Theal (n 77) Vol 7 272 gives another perspective by saying that Sir Harry Smith's "temper failed him" by reason of the assumption by Adam Kok of a tone of "ridiculous self-importance".

86 The text of the agreement is reproduced in Schoeman *Griqua Records* (n 12) 106 (Document 75).

87 See Ross (n 1) 82.

88 The first memorial is dated 22 Feb 1848: Schoeman *Griqua Records* (n 12) 110-111 (Document 77); English translation at 261-262. The second one is dated 28 Sep 1848: *idem* 114-117 (Documents 82 and 83); English translation at 264-265.

89 *Idem* 119-121, 126-129 (Documents 86 and 92).

90 *Idem* 121-122 (Document 87) addressed to Dr Philip and John Fairbairn; and (Document 89) at 123-124 addressed to Dr Philip only.

and Owen.<sup>91</sup> The legal issues which caused dissatisfaction are set out in a list of “Griqua grievances” dated 8 November 1849.<sup>92</sup> In what follows, the issues raised in regard to the inalienable and alienable territories are dealt with separately.

### 8 1 Inalienable territory: Interference with contractual freedom

Adam Kok’s attitude was that in terms of article 37 of the Maitland Treaty, the emigrant farmers at the termination of their leases in the inalienable territory had to leave and go to the alienable territory where they could settle and lease land. On 24 January 1848 agreement was reached whereby the Griquas were to retain the farms in the inalienable territory after the expiry of the leases, on payment by Griqua lessors for the buildings and improvements which the lessees might have carried out. The amount of compensation was to be assessed by a commission consisting of the British Resident (Major Warden), Hendrik Hendrikse (Adam Kok’s secretary) and one of the emigrant farmers. In the event of the Griquas being unable to pay the amount of the valuation, the lessee would be entitled to retain possession of the property at an annual rental to be fixed or agreed upon, until the payment is made, “or until the annual rental (which the lessee shall in that case be entitled to retain) shall amount to the valuation”.<sup>93</sup>

The Griquas objected not only to the manner in which amount of compensation for improvements was assessed,<sup>94</sup> but also to the very “principle of appraisal”.<sup>95</sup> In the list of “Griqua grievances” the objection is raised that the imposition of an obligation to compensate for improvements constitutes an unwarranted interference in the contractual freedom of the parties.<sup>96</sup> In the Government Notice of 29 January 1850,<sup>97</sup> it is stated that the terms of the agreement were “proposed by Captain Adam Kok himself”, and that the High Commissioner is “assured by the best authority that no degree of misconception exists upon the point, and that both Emigrants and Grikwas comprehend it well”.<sup>98</sup>

91 *Idem* 146-152 (Document 105).

92 *Idem* 129-133 (Document 93); English translation at 266-270.

93 *Idem* 106 (Document 75).

94 For example, in the letter to Assistant Commissioners Hogge and Owen: *idem* 146 at 149-150 (Document 105). See further Ross (n 1) 83-84.

95 Explicitly in the letter to Assistant Commissioners Hogge and Owen: Schoeman *Griqua Records* (n 12) 146 at 149 (Document 105).

96 *Idem* 129-133 (Document 93); English translation at 266-270. The complaint in regard to contractual freedom is embodied in Part 3 at 130-132; in the English translation at 268-269.

97 See above n 80.

98 Both the Griqua and the British authorities were, for understandable reasons, unaware of the provisions of the Placaet of 1658 which, in the case of rural leases, regulated the compensation for fixed improvements made with the landlord’s permission (*Groot Placaetboek* Part 2 cols 2515-2520). It was only towards the end of the nineteenth century that the Cape Courts held that the Placaet is part of South African law: see, for example, *Barnard v Colonial Government* (1887) 5 SC 122 at 125 and *De Beers Consolidated Mines v London and South African Exploration Co* (1893) 10 SC 559 at 368-369; full reference to later decisions is given by Van Zyl J in *Syffrets Participation Bond Managers v Estate and Co-op Wine Distributors* 1989 (1) SA 106 (W). Under the Placaet, there was no right of retention and even where the tenant was entitled to compensation, he was obliged to vacate the land at the end of the lease. See further Cooper *Landlord and Tenant* (1994) 328ff. In *Business Aviation*

The provisions regarding compensation for improvements in the agreement of 24 January 1848 created a mechanism which could, at least in the eyes of some of the Griquas, be manipulated by excessive valuation of the improvements in order to deprive Griqua landowners of their farms. In an editorial in *The Friend* of 20 February 1851<sup>99</sup> it is remarked that the prohibition of the sale of Griqua farms to British subjects is “little better than a dead letter” and that there are rumours that there are few farms that had not been secretly sold to emigrant farmers. The editorial continues:

The Griquas are awkwardly situated. They are exposed to a temptation that seems too great for their self-denial. Their leased farms having been valued, or nearly so, for improvements up to February 1848, they are required to pay large sums to Boers on the termination of leases, otherwise to let these sums be liquidated by a rent to be fixed on the termination of the present leases. The Boers have shrewdly enough offered large cash prices for the farms in perpetuity, and it has now become a question amongst the Griquas whether they will sell their farms at once, thereby pocketing in the year 1851 what their children’s children may perhaps receive in 1881. A goodly number of Griquas are of opinion that a “bird in hand is worth two in the bush” – hence some sharp contentions among the politicians of Philippolis, some of whom think that posterity may take care of itself.

## 8 2 Alienable territory: Deprivation of rights

In their agreement, Sir Harry Smith and Adam Kok III modified the provisions of articles 29, 30 and 38 of the Maitland Treaty which deal with leases of land in the alienable territory. The relevant portions of the agreement provide as follows:<sup>100</sup>

[I]n lieu of the half of the quit rents he [Adam Kok III] now receives in virtue of the treaty of 5th of February 1846 [the Maitland Treaty], he shall receive two hundred a-year, in half-yearly payments of one hundred pounds; and that his people for the lands they have let shall receive one hundred pounds per annum, in two payments of fifty pounds each.

It was further provided that the aforesaid sum of three-hundred pounds a year

shall be payable in perpetuity for the farms leased now only for forty years in the alienable territory; and which leases shall be in perpetuity for the consideration aforesaid, viz three-hundred a year.

In a Proclamation dated 8 March 1848<sup>101</sup> the “Burghers” are reminded that “they now hold their lands ... from Her Majesty in *perpetuity*, and not on a lease of 40 years as formerly, upon the express condition of paying a Quit-rent to be established by the Board”.

*Corporation (Pty) Ltd & another v Rand Airport Holdings (Pty) Ltd* 2006 (6) SA 605 (SCA) the Supreme Court of Appeal, after some earlier uncertainty, reaffirmed that the Placaet only applied to rural leases.

99 Schoeman *Griqua Captaincy* (n 6) 228 suggests that the editorial might have been written by CU Stuart, magistrate of Bloemfontein, who acted unofficially as editor of *The Friend* in the early years and was well disposed towards the Griquas.

100 The text of the agreement is reproduced in Schoeman *Griqua Records* (n 12) 106 (Document 75).

101 VAB OSH 13 at 7-8; an extract appears in Eybers (n 84) 273-274.

The British authorities construed the modifications of the Maitland Treaty agreed upon as agreement by Adam Kok III to relinquish, in consideration of £200 a year for himself and £100 a year for distribution among his subjects, his claim and that of his subjects to all the land outside the inalienable territory.<sup>102</sup> Thus in regulation 30 of Regulations for the Government of the Orange River Sovereignty issued on 14 March 1849<sup>103</sup> it is stated:

*All lands* within the Orange River Sovereignty, not allotted to any native chief or people, shall be held of Her Majesty the Queen by grant, on such moderate quitrents as may be fixed; such grants to be in the name of the High Commissioner, acting on Her Majesty's behalf, and to be signed, under His Excellency's order, by the British Resident. (my emphasis)

This interpretation of the modifications was implemented immediately by way of the issue of land certificates as provided for in the Proclamation of 8 March 1848. The Proclamation makes provision for the establishment of a Land Commission in each district of the Sovereignty. The Commission was to register each farm, record the size of the farm and, according to the value of the land, fix the amount of quitrent.<sup>104</sup> Thereafter, the President of the Land Commission was to issue a land certificate in prescribed form<sup>105</sup> to each land-holder which was to serve as his title deed, and right of occupation, until a survey was made and a more formal document issued.

The Deeds Registry records the issue during the latter part of 1848 and the early months of 1849 of some ninety seven land certificates in respect of farms in the alienable territory and in respect of farms to the immediate north of the Modder River in the Van Wijksvlei (Boshoff) area.<sup>106</sup> Immediately following upon the issue of the land certificates, brisk trade and speculation in the land ensued, the land certificate being treated as a certificate of title which enabled the holder to give transfer of the farm to a purchaser.

102 The construction is also adopted by historians. Thus De Kiewiet (n 85) 20 says that Sir Harry Smith "blustered [Adam Kok] into relinquishing all territory over the alienable portion of the territory, and in lieu of the quit-rent, to accept a pension of £200 per annum, with another £100 for his people"; see also Theal (n 77) Vol 7 at 273. Pretorius (n 9) 138 describes the transaction as one in terms of which a sum of money was paid to the Griqua Government in *perpetual exchange* ("in ewigdurende ruil") for the land in the alienable territory. I do not share the optimistic view of Pretorius that the matter "skyn so duidelik te wees dat daar geen verdere verskil oor hoef te bestaan nie".

103 VAB OSH 13 at 49-54; reproduced in Eybers (n 84) at 275ff.

104 This was the beginning of a proper land register in the Orange Free State. By Procl of 6 Apr 1850 (Cape) the Cape Governor appointed Joseph Allison as Registrar of Deeds in the Orange Free State (VAB OSH 13 at 61). Percy Crause took over from Allison on 11 Sep 1852 who was in turn succeeded on 17 Apr 1854 by William Collins who held the position for almost twenty years to 1873.

105 The prescribed form of the land certificate was as follows: The farm of ... now occupied by ... is granted to ... at a Quitrent of ... per annum; and this shall be his Title Deed, and right of occupation, until a survey be made, and a more formal document be furnished to ... Date at ... this Day of ... 184 ... (Signed) President of the Commission.

106 VABAKT 8/1/1. By the beginning of February, the British Resident reported the issue of 153 certificates by the Bloemfontein Land Commission, and a few months later reported that the Commission had dealt with 218 farms in the Middle Veld of the Riet River: see Midgley (n 20) 179 who remarks on the "slipshod" manner in which the certificates were issued, especially in the absence of a survey.

A single example will suffice. A land certificate in prescribed form was issued to James Robinson in respect of the farm Mazels Poort on 12 July 1848. On 17 April 1849 the farm was sold and transferred to Jurie Jacobus Wessels, the purchase price being £375. On 16 March 1852 the farm was sold and transferred to Andries Johannes Erwee, the purchase price being £600.<sup>107</sup>

Adam Kok III and his *Raad* were “astounded to discover that the British administration of the Sovereignty was treating all the farms within the alienable territory as though they had been leased for the full forty years”.<sup>108</sup> Ross points out that although only forty two of the fifty eight farms leased in the alienable territory had been leased for forty years or more, and another eighty eight farms in the alienable territory had not been leased, all were moved out of the control of the Griquas when the British Resident began distributing them among the emigrant farmers and land speculators.<sup>109</sup>

Adam Kok III objected in memorials addressed to Sir Harry Smith dated 22 February 1848<sup>110</sup> and 28 September 1848,<sup>111</sup> and in the list of “Griqua grievances” dated 8 November 1849.<sup>112</sup> In the Government Notice of 29 January 1850,<sup>113</sup> it is averred, as has been pointed out above, that in terms of the Maitland Treaty, rights of occupation to be acquired after June 1845 were to be restricted to the alienable territory and to be held on quitrent leases formed by the British Resident, half of the quitrents to be paid to Adam Kok.

In the Notice it is further stated that there “cannot be a doubt” that the annual sums of £200 and £100 respectively, to be paid to Adam Kok and the Griqua people in terms of the agreement of 24 January 1848

were considered by the High Commissioner and Captain Adam Kok as the equivalent agreed to be paid by Her Majesty for the reversion in perpetuity of all the lands in the alienable territory, no matter what the term of the holding, whether forty years or some term longer or shorter.

And that the agreement of 24 January 1848

clearly provides that for the annual sums of £200 and £100 ... Captain Adam Kok parted with his former claims to the half quitrents. As quitrent tenure is properly a perpetuity subject to a rent, the effect of the sale by Captain Adam Kok of his half of the quitrents was to part with all his interest in the rents payable by British emigrant subjects to the

107 VAB AKT 2/1/1/16 (Bloemfontein) No 8. On land speculation in the Sovereignty, including speculation by public servants, see Midgley (n 20) 514-516.

108 Ross (n 1) 81.

109 *Idem* 91-92.

110 Reproduced in Schoeman *Griqua Records* (n 12) 110-111 (Document 77); English translation at 261-262.

111 Reproduced in Schoeman *Griqua Records* (n 12) 116-117 (Document 83); English translation at 264-265).

112 *Idem* 129-133 (Document 93); English translation at 266-270. The complaint in regard to the land in the alienable territory is embodied in Part 4 at 132-133; English translation at 269-270.

113 See above n 82.

north of the Riet River and Kromelboog [*sic*] Spruit, and vest all the lands there situate in the Queen.

In conclusion it is stated that it was never understood by any party that land occupied by emigrant farmers in the alienable territory would revert to the Griqua Government or the Griqua people:

The lands in question are vested for ever in Her Majesty the Queen of England, and no idea of their reverting to Captain Adam Kok has ever been entertained by Her Majesty, or by the High Commissioner, or by any British or Grikwa functionary.

The views expressed in the Government Notice are in accordance with current principles of land tenure of English law in which, in the words of Pollock and Maitland:

The king himself holds land which is in every sense his own; no one else has any proprietary right in it; but if we leave out of account this royal demesne, then every acre of land is ‘held of’ the king. The person whom we may call its owner ... holds the land of the King either immediately or mediately.<sup>114</sup>

Hogg<sup>115</sup> has described the effect of “the doctrine of Common Law tenure” in words which are apposite to the present context:

In the first place, there is one rule of the most supreme importance implicit in the doctrine of tenure, viz. that, in the words of Bacon, ‘the law supposeth all land to have been granted by the King’. Even Blackstone admits this to be a fiction, as Bacon implies. Nevertheless it is a rule of English law, and has had the most important consequences of the most practical kind. These consequences have been illustrated in very concrete fashion since the spread of the King of England’s authority beyond the United Kingdom, and may be summed up by saying that English law requires any subject who claims to be owner of land to show, expressly or by necessary implication, a grant of that land from the Crown. Unlike Roman law, English law does not recognize title to land by mere first occupation; all land not owner by any one else is owner by the King or Queen and title to it can only be gained by a grant from the King or Queen.

Sir Harry Smith was of the view that the land issue which at the time bedevilled relations between Griqua and emigrant farmers in the Transgarieb could only be resolved by the Griquas giving up their claim to all the land in the alienable territory: The Griqua claim to land was excessive; they did not utilise all the land nor did they need it. The agreement of 24 January 1848 and the subsequent declaration of sovereignty were construed by the British authorities in a manner which furnished the legal means whereby all the lands in the alienable territory would vest in the Queen, thereby enabling the British authorities to dispose of the land by way of the grant of quitrent leases of the Queen to emigrant farmers and other British subjects. This construction derives from the application of principles of English law relating to land tenure, and an assumption that Griqua land tenure was based on a system of land tenure similar to that of English law. This despite

114 Pollock & Maitland *History of English Law before the Time of Edward 2* ed (1969) re-issued with a new introduction and select bibliography by Milsom, at 232.

115 Hogg “Effects of tenure on real property law” 1909 *LQR* 178 at 183-184.

the explicit recognition in the Proclamation of sovereignty that the law in the Sovereignty shall be that applicable in the Cape Colony, and the fact that the only form of quitrent tenure applicable in the Cape Colony was the perpetual quitrent tenure introduced into the law of the Colony by the Cradock Proclamation of 1813. Hence the objections of Adam Kok III which he raised at the meeting with Sir Harry Smith on 23 January 1848, and repeated for the rest of his life, that “it is not in my power to give away my people’s lands”, objections which were never of any avail.<sup>116</sup>

## 9 The Bloemfontein Convention and thereafter

The run-up to the Bloemfontein Convention, by which the Orange Free State achieved independence, was a long and tortuous process. The withdrawal of the British from the Sovereignty was orchestrated by Sir George Clerk who was appointed special commissioner for the purpose.<sup>117</sup> The question of land, which featured prominently in these negotiations, was not resolved by the Bloemfontein Convention and negotiations between Adam Kok and British and Orange Free State Officials continued.<sup>118</sup> One of the principal issues in dispute, which was only resolved when the Griquas left the Transgarieb, was the jurisdiction of the Griqua Government over non-Griqua owners of land in the (former) inalienable territory. The Orange Free State authorities also had to deal with a plethora of disputes between individuals, many of which arose from the chaotic state of Griqua records and from the fact that Griqua farms were not surveyed.<sup>119</sup>

The fate of the Griquas was effectively sealed by the annulment by the British of the Maitland Treaty which prohibited the sale of Griqua land in the inalienable territory, and by two Proclamations by the Orange Free State authorities on 10 April 1854 and 27 May 1854.

In regard to land in the inalienable territory, the Bloemfontein Convention of 23 February 1854<sup>120</sup> in article 3 provided:

With regard to the treaty [ie the Maitland Treaty] existing between the British Government and the Chief Kaptijn Adam Kok, some modification of it is indispensable. Contrary to the provisions of that treaty, the sale of lands in the inalienable territory has been of frequent occurrence, and the principal object of the treaty thus disregarded. Her Majesty’s Government therefore intends to remove all restriction preventing Griquas from selling their lands, and measures are in progress for the purpose of affording every facility for such transactions, the Chief Adam Kok having himself concurred in and sanctioned the same.

116 See Midgley (n 20) 58-59, and the text to n 50 above.

117 The process is set out by Midgley (n 20) 403-578; see also De Kiewiet (n 85) 70-84; Galbraith (n 73) 268-284; Theal (n 77) Vol 7 349-369. See further Williams “Sir George Russell Clerk and the abandonment of the Orange River Sovereignty” 1991 *Historia* 30-42.

118 The negotiations that followed upon the Bloemfontein Convention are considered by Van Aswegen (n 16) 105-112.

119 See *idem* 108.

120 Schoeman *Griqua Records* (n 12) 153-156 (Document 108).

In an advertisement in *The Friend* of 11 March 1854 Adam Kok made it known that he had not approved of and ratified any such measures.<sup>121</sup> Nothing was achieved in further negotiation and on 17 March 1854, Sir George Clerk made it clear that the altered position brought about by the withdrawal of the British from north of the Orange River, rendered the Maitland Treaty “inoperative and annuls the treaty”.<sup>122</sup>

Following upon the annulment of the prohibition of the sale of land in the inalienable territory, the President of the Orange Free State on 27 May 1854 issued the following Government Notice:<sup>123</sup>

All Burghers of this State who buy land or farms within the formerly so-called unleaseable line of Griqualand, will be obliged, if they wish to rely on the protection of the Government, to declare, jointly with the seller, their purchase before the Landdrost, to be immediately put in possession, by the seller, of whatever they have bought and, furthermore, to have it registered in terms of the law.

Further protest by Adam Kok, also in regard to the timing of the Notice, was of no avail: Griqua land in the inalienable territory could be alienated and, as Van Aswegen puts it, “die lot van die Griekwas was verseël”.<sup>124</sup>

An Orange Free State Government Notice of 10 April 1854 on land ownership in the alienable territory confirmed the total loss of Griqua land in the territory by providing that the Land Certificates issued by the previous British Sovereignty conferred ownership on occupiers of the land.<sup>125</sup> In the Notice, occupiers of such land were advised that they are under no compulsion to enter into any contract of sale or lease with the Griquas “omdat zy uit kracht van verkregen landcertifikaat onder en van het vorig Gouvernement een onvervreemdbaar eigendomsregt op de plaatsen verkregen hebben”.

The annulment of the Maitland Treaty and the two Orange Free State Proclamations probably accounts to a large extent for the exceptionally large number of sales of Griqua farms recorded in the Deeds Registry in 1854. Ross<sup>126</sup> points out that most of these sales took place between June and October of 1854. In this regard it is not without significance that in a letter to Sir George Clerk dated 12 July 1854 Adam Kok<sup>127</sup> stated that he finds “that a greater number of my people than I had anticipated are desirous of selling”, and that he is willing, “though still disapproving of it”, to give his consent “that those of my people who wish to be at liberty to sell to Europeans their farms in the Griqua inalienable territory [may do so]”.

Hence the large number of “renewed” certificates of grant issued by Adam Kok III which enabled the farms to be transferred in ownership to the purchasers. The Free State

121 *Idem* 161 (Document 112).

122 See *idem* 162-163 (Documents 114 and 115).

123 *Idem* 167 (Document 120); English translation at 276.

124 (n 16) 107.

125 Schoeman *Griqua Records* (n 12) 167 (Document 119); English translation at 275-276.

126 Ross (n 1) 92.

127 Schoeman *Griqua Records* (n 12) 168 (Document 122).

*Volksraad* on 11 September 1854 resolved to encourage the purchase of Griqua property by the levy of only half of the transfer duty due on such transactions.<sup>128</sup>

Under the Orange Free State Government, the farms were in due course surveyed, diagrams were lodged and title deeds issued. In some cases, a *grondbrief* was issued before the completion of the survey. The *grondbrief* issued on 4 April 1860 in respect of the farm *Stink Fontein* affords an example:<sup>129</sup>

Eene Grondbrief voor deze plaats is van den volgende inhoud uitgereikt:

Plaats gelegen in de Wyk Onder Modder Rivier

Groot naar gissing 5500 morgen

Jaarlyksche Recognitie £3.0.0 p. jaar

Verleend aan Dirk Johannes van Niekerk eigenaar by Land Certificaat

Grondbrief met datum 4 den April 1860.

In 1878 the Privy Council held that after the grant of independence by the Bloemfontein Convention of 1854, the Orange Free State had a form of perpetual quitrent (*voortdurende erfpacht*), not derived from Cradock's Proclamation, which conferred "full proprietary rights on the grantees".<sup>130</sup> In the litigation between the London and South African Exploration Company Ltd and the Kimberley Divisional Council both the Court *a quo*<sup>131</sup> and the Court of Appeal<sup>132</sup> accepted the evidence of the expert witness who said that perpetual quitrent grants in the Free State differ from those in the Cape, the former being "virtually freehold title subject to a certain land tax, to which the word 'quitrent' in the Free State was equivalent".<sup>133</sup>

128 *Notulen der Verrigtingen van den Hoogedelen Volksraad* (Bloemfontein 1870) Part 1 57: "Dat de inwoners van Griekwaland maar de helft der Heerenregten zullen betalen op de eerste koop van de naturellen." The resolution was taken in response to a petition (*memorie*) dated 25 Aug 1854 by thirty five petitioners, reproduced as an Annexure in *Notule van die Volksraad van die Oranje-Vrystaat (volledig met alle Aanhangsels daarby)* toegelig en persklaar gemaak deur WB van der Vyver, onder leiding en met medewerking van JH Breytenbach (Staatsdrukker 1952) Part 1 77. See Grobbelaar *Die Ontstaan en Ontwikkeling van die Oranje-Vrystaat tot aan die Einde van President JN Boshof se Regering in 1859* (D Phil, Stellenbosch, 1941) 225.

129 VAB AKT 2/1/1/16 (Bloemfontein) No 41.

130 *Webb v Giddy* [1878] 3 AC 908 (PC). The case concerned the mineral rights to the farm Dorstfontein on which one of the largest discoveries of diamonds was made – the farm became better known under the name Du Toit's Pan, the site of the later Kimberley.

131 *London and South African Exploration Company Ltd v Kimberley Divisional Council* (1884) 3 HCG 125.

132 *Kimberley Divisional Council v London and South African Exploration Company (Limited)* (1885) 2 Buch AC 84.

133 See also *Van Niekerk and Union Government (Minister of Lands) v Carter* 1917 AD 359 at 393. In the fifth edition of Wille *Principles of South African Law* (1968) 211 it is said that in the Free State "quitrent tenure had evolved into what was hardly distinguishable from full ownership".

## 10 Conclusion

British Sovereignty over the Free State was an interlude of six years. During the interlude, the British authorities continued their efforts to resolve the intractable problem of the competing land claims of the Griquas and the emigrant farmers by dividing Griqua territory into two, one of which was to be an area of exclusive Griqua settlement. In implementing the scheme, the British authorities proceeded from the premise that they had legal power under the agreement of 14 January 1848 and the Proclamation of Sovereignty to deprive the Griquas of the land they claimed in the area not set aside for their exclusive settlement.

However, the Griqua loss of their land was in the ultimate result also due to two self-imposed weaknesses in their position: First, their claim for land was far in excess of their needs; they could not utilise the land and much of it remained unoccupied; and, secondly, the willingness of individual Griquas who had received allocations of land to lease and sell the land. By leasing their land to emigrant farmers for twenty, forty, sixty, and even ninety years for payments below the value of the land, the Griquas, in the words of Galbraith, “themselves had admitted the enemy within the gates”.<sup>134</sup>

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## Abstract

In 1825 a group of Griqua lead by Adam Kok II settled at Philippolis at the invitation of Dr John Philip of the London Missionary Society. Fifteen years after, in 1840, Adam Kok III claimed a large part of the Southern Free State as Griqua territory. In the Anglo-Griqua treaty of 1843 negotiated by Sir George Napier and Adam Kok III, and that of 1846 negotiated by Sir Peregrine Maitland and Adam Kok III, Griqua claims to land to the north of the Orange River were recognised. During the time of British Sovereignty in the Free State, from 1848 to 1854, the Griquas were dispossessed of much of their land, and circumstances were created which facilitated the loss of the land of which they had not been dispossessed. The result was that twenty years after Adam Kok III claimed the land, the Griquas had lost it all and in 1861 they embarked on their historic trek to Nomansland (Griqualand East). In this article, answers are sought to the question as to what the legal means were by which the Griqua people were deprived, during a period of British administration, of land which the British had but a few years before in formal treaties recognised unreservedly as being theirs.