

# **The Influence of English Poaching Laws on** **South African Poaching Laws**

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## DECLARATION

I hereby certify that the contents of this dissertation are entirely my own work, except where I have indicated to the contrary; and that neither the whole nor any part of this dissertation has previously been submitted toward any degree.

A handwritten signature in black ink, appearing to read 'Edmund W. Couzens', written over a horizontal line.

Edmund William Franz Couzens

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Ed Couzens  
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## ABSTRACT

*This dissertation examines the laws relating to poaching in South Africa - where these laws originated, how they were influenced by the long history of laws against poaching in England, and how they were shaped by factors unique to South Africa.*

*In particular, what is examined is the extent to which laws against poaching were designed and employed historically as a deliberate form of social control, and to enable control of property and access to natural resources, in both England and South Africa.*

*The dissertation is divided into two sections. The first section is an examination of English laws and mores against poaching from the date of the Norman Conquest, 1066, until near the end of the Victorian era in the late nineteenth century. The second section is an examination of South African laws against poaching, from the early years of the Cape Colony until the early part of the twentieth century. Where appropriate, comparisons are drawn and distinctions made between the English and the South African experiences. Direct and indirect influences which the English poaching and game laws had on South African laws are considered.*

*Aspects of English and South African history which are considered include game legislation, preservationist policies, colonial expansion, class consciousness, indigenous hunting systems, and resistance to and enforcement of laws against poaching.*

*The overriding impression gained from a historical study of poaching laws and other game legislation is that these laws were never concerned solely with preservation of wild animal species for any intrinsic worth these species might have, or even for conservation purposes. Rather, such laws have been driven by the narrow economic and social interests of the upper classes and the lawmakers. The experience of both England and South Africa has been that the more scarce natural resources become, the more strictly these are reserved to the dominant political groups.*

*It is not always easy to distinguish between influence on and parallel evolution of legal experiences, but numerous features of English laws can be found within South African history. Some are clearly deliberate impositions, but there are also important invasions by elitist consciousness. However, there are also important differences. In particular, the Roman-Dutch common law in South Africa had a significant influence on poaching laws. And to an extent South African history was shaped by a reaction to the restrictions of English poaching laws.*

*The objection might be made that this dissertation deals as much with general game control laws, as with laws enacted strictly to deal with poaching. The word 'poaching' is itself not encountered in South African legislation in the period under discussion. However, the conclusion reached is that the aim and the effect of the game laws in South Africa and England has historically been the transformation of the lower class hunter, the subsistence hunter, into an illegal hunter or 'poacher'.*

# Chapter I - England

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## Chapter I - England

### 1.1 The position prior to the Norman Conquest and the changes the Normans introduced

In 55 BC the Romans, under the Emperor Julius Caesar, first raided across the English Channel into present-day Britain. In AD 43 the Romans, under the Emperor Claudius, invaded on a large scale and subdued much of Britain. By AD 407, however, almost every Roman soldier had left Britain and the island was left in the hands of the Angles, the Saxons and the Jutes - people who became known as the Anglo-Saxons. The Romans left their imprint on the Anglo-Saxons in many areas, however, including that of legal ideas of property rights.

Britain remained in Anglo-Saxon hands until King Edward 'the Confessor' died in January 1066. He died without leaving an heir and the throne was claimed by, amongst others, the foreign Duke William of Normandy - who invaded successfully and was crowned king of England on Christmas Day 1066.<sup>1</sup>

King William I sought to entrench his position by replacing major English landowners with his own followers, giving them important positions within the Church hierarchy and land seized from Saxon owners. By 1086, the year before William died after falling from his horse, the Domesday Book<sup>2</sup> showed that only two English noblemen were still major landholders.<sup>3</sup>

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<sup>1</sup> N Barber & A Langley *British History Encyclopedia: From Early Man to the Present Day* (1999) 34-54.

<sup>2</sup> The Domesday Book was an extensive survey of most of the lands of England. It was compiled on the orders of William the Conqueror in 1086 in order to provide an informed register for taxation. It gained its permanent

Before the Norman conquest of Britain in 1066, certainly from the time of the Franks and their kindred tribes in the seventh century, hunting on continental Europe was regarded as being the exclusive right of the king and his nobles.<sup>4</sup> The Franks had been the first to introduce the '*foresta*' system - which reserved areas and animals for the exclusive use of certain classes.<sup>5</sup>

William the Conqueror basically accepted and enforced existing English laws, but the forest laws were different - the system imposed on the Saxon English was like none they had seen before.<sup>6</sup>

Prior to this, the Saxons had followed the conclusions and teachings of Roman jurists who had argued that wild animals ('*ferae naturae*' or '*ferae bestiae*'<sup>7</sup>) were ownerless property and that they could be hunted by anyone, subject only to the laws of trespass.<sup>8</sup> The idea of the reservation of game had been present, since under Saxon rule no man had been allowed to hunt or kill deer reserved to the king. However, any man had had the right to start, pursue and kill game upon his own land.<sup>9</sup> This was to change under Norman rule.

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soubriquet because no appeal lay from it.

<sup>3</sup> N Barber & A Langley *op cit* at 55.

<sup>4</sup> C C Trench *The Poacher and the Squire: A History of Poaching and Game Preservation in England* (1967) 16.

<sup>5</sup> J M Mackenzie *The Empire of Nature* (1988) 13.

<sup>6</sup> Trench *op cit* at 21.

<sup>7</sup> See, for example, J A C Thomas *Textbook of Roman Law* (1976) at 167: '... animals [under Roman Law] were classified as *ferae naturae* or *mansuetae naturae*, wild or domestic by nature, the distinction being dependent upon the species not the particular individual animal: a pet lion would still be *ferae naturae*; the most savage of dogs *mansuetae naturae*.'

<sup>8</sup> Trench *op cit* at 23.

<sup>9</sup> G Jones (ed) *The Sovereignty of the Law: Selections from Blackstone's Commentaries on the Laws of England* (1973) 213.



The previous distinction between possession by killing and ‘ownership’ through ownership of land, as laid out in the *‘res nullius’* concept of wild animals as things which did not belong inherently to any person, was overlaid under Norman rule by a severely restricted franchise for the right of killing.<sup>10</sup> Prior to the Norman Conquest, the Roman notion that wild game belonged to no one, and was capable of ownership by any person who killed it, was generally applicable in Saxon England. However, under Norman rule this became a sovereign prerogative, and all deer belonged to the king. Hunting for food became therefore poaching.<sup>11</sup>

Probably the earliest animal to be denied to the diet of the common man was the deer. Vast tracts of land were designated as royal forests (*‘foresta regis’*);<sup>12</sup> to protect these arbitrarily imposed rights William the Conqueror imposed the death penalty for the killing of a royal deer, and all deer at that time were by definition considered royal.<sup>13</sup>

These laws inflamed every subject of the king.<sup>14</sup> And this outrage was not solely because of the removal of a source of food. As Lund comments, ‘[b]ecause hunting provides one of the few justifications for the use of weapons, laws purportedly enacted to control hunting may actually be designed ... to restrict the use of weapons.’<sup>15</sup> The eminent English legal commentator Sir William

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<sup>10</sup> Mackenzie *op cit* at 14.

<sup>11</sup> P D Glavovic ‘An Introduction to Wildlife Law’ (1988) 105 *SALJ* 519 at 524.

<sup>12</sup> One way to understand the importance of the change to Saxon life is to appreciate how vast were the new ‘Royal forests’. In the Thirteenth Century, when royal forests were reduced, they still covered more than one quarter of England’s surface. Whole towns, villages and the county of Essex were *foresta regis*. See C R Young *The Royal Forests of Medieval England* (1979) 5.

<sup>13</sup> A Ingram *Trapping and Poaching (Shire Album 34)* (1978) 5.

<sup>14</sup> Trench *op cit* at 24.

<sup>15</sup> T A Lund *American Wildlife Law* (1980) 3.

Blackstone maintained that the earliest game laws were part of feudal policy to exclude the defeated from the use of arms - '[n]othing could do this more effectually than a prohibition of hunting and sporting.'<sup>16</sup> From the start, then, the Norman-based laws to protect wildlife were firmly embedded in ulterior motives.

Blackstone was to see the reservation of vast tracts of forest for the Royal Hunt as the 'point at which the Norman yoke chafed most painfully'.<sup>17</sup> The Norman hierarchies were concerned, when implementing the forest laws, with sport, class privilege and the assertion of royal status. Degrees of privilege were set out by the division of forest areas into the categories of forest, chase, park and warren. The highest category was that of the forest, in which only the king and those he delegated had access to the 'five beasts of venery' - hart and hind,<sup>18</sup> hare, boar and wolf. The chase and park (unenclosed and enclosed areas respectively) were reserved to the Norman nobility, who could there hunt buck and doe,<sup>19</sup> fox, marten and roe deer. The lowest category, the warren, contained hares, rabbits, pheasants and partridges and could be hunted only with permission from the king.<sup>20</sup> The ideas of categorisation and of class-reservation of animals considered worthy of hunting were thus in place at a very early date.

Blackstone was to describe this as '[a] violent alteration of the English constitution consist[ing] in the depopulation of whole countries (sic), for the purposes of the king's royal diversion; and

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<sup>16</sup> Glavovic *op cit* at 524.

<sup>17</sup> Mackenzie *op cit* at 13.

<sup>18</sup> Red deer - male and female, respectively.

<sup>19</sup> Fallow deer - male and female, respectively.

<sup>20</sup> Mackenzie *op cit* at 13.

subjecting both them, and all the ancient forests of the kingdom, to the unreasonable severities of forest laws imported from the continent, whereby the slaughter of the beast was made almost as penal as the death of a man.<sup>21</sup> He described the nation at this period in even more dramatic terms as ‘hav[ing] groaned under as absolute a slavery, as was in the power of a warlike, an ambitious, and a politic prince to create ...’<sup>22</sup>

King William died in 1087 and was succeeded by his second son, William II - known as ‘Rufus’. ‘William Rufus,’ wrote Blackstone, ‘proceeded on his father’s plan, and in some points extended it; particularly with regard to the forest laws.’<sup>23</sup> William II was succeeded on his death in 1100 by his younger brother, King Henry I. Henry I died in 1135 and was succeeded in the same year by his nephew, Stephen, who died in 1154 and was succeeded by Henry I’s grandson, Henry II.<sup>24</sup>

### 1.2 The next Kings and their refinements of the ‘qualification’ idea

At this stage, there was nothing to stop any person from hunting on his own land or on common land, so long as such common land did not form part of a designated forest, chase or warren; but he was unlikely to find much to hunt, besides small game.<sup>25</sup> Henry II (Henry Plantagenet) actually increased the extent of the royal forests - but this was clinging to a privilege that could not last, so unpopular was the concept.<sup>26</sup>

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<sup>21</sup> Jones (ed) *op cit* at 213.

<sup>22</sup> *Ibid* at 216.

<sup>23</sup> *Ibid* at 217.

<sup>24</sup> Barber & Langley *op cit* at 56-57.

<sup>25</sup> Trench *op cit* at 42.

<sup>26</sup> *Ibid* at 28.

Under his reign the harsh penalties for breaches of the forest laws included blinding, emasculation and death (although this ultimate penalty was reserved for the third offence).<sup>27</sup> And he made few concessions to popular discontent, even when in 1184 he codified the forest laws, in an attempt to meet complaints.<sup>28</sup>

Henry II died in 1189 and was succeeded by his third son, Richard the First.<sup>29</sup> Blackstone wrote of Richard I that he was ‘a brave and magnanimous prince, ... a sportsman as well as a soldier; and therefore enforced the forest laws with some rigour; which occasioned many discontents among his people: though ... he repealed the penalties of castration, loss of eyes, and cutting off the hands and feet, before inflicted on such as transgressed, in hunting; probably finding that their severity prevented prosecutions.’<sup>30</sup> It is uncertain exactly what was repealed and when, however, as extant assize records are scanty.

Richard I was succeeded in 1199 by his brother John. In King John’s time, and that of his son Henry the Third, wrote Blackstone, ‘... the rigours of the feudal tenures and the forest laws were so warmly kept up, that they occasioned many insurrections of the barons or principal feudatories: which at last had this effect, that first King John, and afterwards his son, consented to the two famous charters of English liberties, ‘*magna carta*’ [signed in 1215] and ‘*carta de foresta*’ [1218]. Of these the latter was well calculated to redress many grievances, and encroachments of

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<sup>27</sup> C R Young *The Royal Forests of Medieval England* (1979) 11, 30.

<sup>28</sup> *Ibid* at 26.

<sup>29</sup> Barber & Langley *op cit* at 60-61.

<sup>30</sup> Jones (ed) *op cit* at 219.

the crown, in the exertion of forest law.<sup>31</sup>

The gist of the Forest Charter can be gained from extracting examples of its provisions: '1. All forests created by Henry II shall be inspected. Any woods he afforested, except his own demesne woods, are to be disafforested. ... 3. All woods afforested by Richard and John are to be disafforested at once except for royal demesne woods. ... 6. An inquest for lawing of dogs shall be made along with the regard every third year. The amercement for unlawed dogs is three shillings. Three toes are to be cut from a front foot, but lawing is required only where customary at the first coronation of Henry II. ... 10. No man shall lose life or member for taking venison. He shall be fined unless he cannot pay, in which case he shall be imprisoned for a year and a day. Then he may be released if he can find sureties. If not, he must abjure his realm ...'<sup>32</sup>

Imprisonment was a procedural device rather than a penalty under forest law. However, the conditions under which men were kept in gaol made it something to be dreaded. Enforcement was in practice often arbitrary, many did escape imprisonment by virtue of official inefficiency or by exemptions such as privileges and pardons.<sup>33</sup>

However, King John's administrators took all possible opportunities for exploiting the forests financially. In fact, the main feature of his reign in regard to forest management was the creation

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<sup>31</sup> *Ibid* at 220.

<sup>32</sup> Young *op cit* 68-69.

<sup>33</sup> *Ibid* at 102,107.

of efficient forest administration in order to maximise profits.<sup>34</sup> The Forest Charter brought new stability to the administration of forests by providing a code for the guidance of justices trying cases, but it did not succeed in resolving the political issues inherent in an inequitable system.<sup>35</sup>

As Young comments, '[w]hatever may have been the period when the Robin Hood legend formed and whatever may have been the class to which the audience belonged, one theme of the stories is the hatred of the officials of the royal forest, and there is evidence from the king's own records to show this attitude in reality as well as in fiction.'<sup>36</sup>

The guiding principle of forest law remained that within the royal forests the 'beasts of the forest' (red deer, fallow deer, roe deer and wild boar) could be hunted only by the king and those mandated by the king. Other wild animals were indirectly protected, by means of a prohibition on the use of dogs and certain weapons within the forests.<sup>37</sup>

Intriguingly, to an extent such protection was of inherent rights possessed by the animals themselves. The view that animals might themselves possess rights was not an anathema to early English thinking - animals could in fact be held accountable for their 'wrongdoing' and tried as lawbreakers. They could even be excommunicated from the Church. The king, in this scheme of

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<sup>34</sup> *Ibid* at 21,25. 'Most of the destruction attributable to foresters was to the vert rather than to against the venison, foresters were adept at inflicting payments upon the men in their jurisdiction (even resorting to torture) or in collecting illegally high amounts for fees like cheminage and pannage that in themselves were legitimate charges pertaining to their office.' Young *op cit* at 82.

<sup>35</sup> *Ibid* at 73.

<sup>36</sup> *Ibid* at 164

<sup>37</sup> Trench *op cit* at 36.

things, was nominally the champion who would speak for wild animals.<sup>38</sup>

This period saw adumbrations of the course wildlife law was to follow for centuries to come, with the laws being forced down a path of categorisation and qualification. In 1389 the course of wildlife law was confirmed by a reference to ‘gentlemen’s game’, and this attitude, writes Lund, was ‘elaborated into a comprehensive scheme in the [eventual] qualification statutes ...’.<sup>39</sup>

Hunting played a significant role in the lives of the monarch and the nobility and a steady stream of legislation ensued. The special laws for the forests, which were in essence hunting reserves, served to protect them for their noble owners. And another group of laws arose to protect animals which were regarded as being of value to communities; for instance, wild fowl were protected at moulting times, when they could not fly. Hares were not to be killed ‘in time of snow’ and rabbits were also encouraged and their warrens protected. Salmon, herons and doves were similarly given protection.<sup>40</sup> More general restrictions began to prohibit the hunting of certain classes of animals and the hunting of particular animals began to be restricted to particular classes of society; for instance, a statute of 1551 permitted only gentlemen and nobles using hawks to kill certain wild fowl.<sup>41</sup>

Certain kings, however, began to see an economic wisdom in preserving wild animals that went

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<sup>38</sup> Lund *op cit* at 11.

<sup>39</sup> *Ibid* at 8.

<sup>40</sup> C Reid *Nature Conservation Law* (1994) 3.

<sup>41</sup> *Ibid*.

even beyond the need to preserve such for reasons of class consciousness. In the sixteenth century, what forests remained were regarded by Henry VIII (who reigned from 1509 to 1547) less as game reserves than as an economic asset to be quickly exploited.<sup>42</sup> James I (who reigned from 1603 to 1625) continued this thinking, as much as he considered that hunting was not a sport for the lower orders to practise.<sup>43</sup>

The 'lower orders' must have watched with some bemusement. When James I went stag hunting, he would personally cut the throat of the stag and would smear the faces of his courtiers with blood. The rituals of the time showed an unabashed delight in killing for its own sake.<sup>44</sup>

Charles I (who reigned from 1625 to his execution in 1649) has been described as 'characteristically' seeing in the royal forests and forest laws a heaven sent means of obtaining money when Parliament proved obdurate toward funding the court.<sup>45</sup> Although some early statutes to espouse the qualification idea sought to identify gentlemen, English legislators generally took the pragmatic view that money was what counted.<sup>46</sup>

Claims and counter-claims were part of forest life and had been for centuries,<sup>47</sup> so much so that a large staff was required to enforce forest laws - even though at this stage many convicted poachers were pardoned; habitual poachers and those of known bad character being the only ones

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<sup>42</sup> Trench *op cit* at 78.

<sup>43</sup> *Ibid* at 99.

<sup>44</sup> K Thomas *Man and the Natural World: Changing Attitudes in England 1500-1800* (1983) 29.

<sup>45</sup> Trench *op cit* at 104.

<sup>46</sup> Lund *op cit* at 8.

<sup>47</sup> E P Thompson *Whigs and Hunters: The Origin of the Black Act* (1975) 31.



to be more severely treated.<sup>48</sup> A definite humanitarian improvement on the penalties of castration and dismemberment earlier repealed. But as forest areas decreased, and poaching began to occur more often in private parks, normal court procedures were followed less. Juries were often sympathetic to poachers and all sorts of extra-legal considerations influenced Justices of the Peace. Many poaching cases began therefore to be referred to the Court of the Star Chamber.<sup>49</sup> However, the Star Chamber would not consider cases merely of poaching - there had to be in the case an element of riot or breach of the peace. It was therefore usually alleged that the accused poachers had been armed and violent.<sup>50</sup>

This adumbrates the later panic, perhaps, of landowners and gentry who feared class insurrection. It also foreshadows the Black Act of 1723.

### 1.3 The Game Act of 1671: entrenching 'qualification'

By the year 1697, when William III ordered a census of deer, the animals were confined across England to parks and royal forests and forest laws were no longer a serious point of contention.<sup>51</sup> As the deer disappeared across England, so the emphasis in both poaching and game preservation came to bear on smaller animals. And in 1671 a new era had begun when Parliament passed the

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<sup>48</sup> Trench *op cit* at 44,50.

<sup>49</sup> The Court of Star Chamber was a court which tried civil and criminal cases, especially those affecting Crown interests. The court developed from the Privy Council in the late 15<sup>th</sup> century and, particularly under Charles I, became an instrument of tyranny. The court had its *raison d'être* in religion and was not permitted to order execution without there being a confession. However, torture was sanctioned in order to gain such a confession. In 1641 the court was abolished by Parliament.

<sup>50</sup> Trench *op cit* at 81.

<sup>51</sup> *Ibid* at 114.

Game Act. This Act regulated the hunting of game birds and hares and entrenched earlier class-reservation ideas by creating classes of formally qualified persons who were permitted to kill game. Nobody, if not qualified, was permitted to kill game - even on his own land. The main categories of qualified persons were financially determined: the owners of land worth 100 pounds a year; the holders of ninety-nine year leases of land worth 150 pounds a year; the eldest sons of esquires, knights and nobles; and their gamekeepers. And not even qualified people were permitted to sell partridges, pheasants or hares. Excluding gamekeepers, there were probably not more than 30 000 qualified persons in an population of about five million.<sup>52</sup>

Trench comments that '[n]ever was an act so blatantly passed in the exclusive interest of the class which passed it.'<sup>53</sup> Although there had been game laws in force before 1671, they had not made hunting the exclusive privilege of the landed gentry. The Game Act of 1671 did this, and thus marked the beginning of a new era for both gentry and game - indeed, for every person and wild animal in England.<sup>54</sup> The king had always claimed the right both to hunt wherever he pleased to and to take whatever measures he thought necessary to preserve game. After 1671 the gentry had those rights also.<sup>55</sup>

There is no direct evidence extant as to the gentry's precise motives behind passing the Game Act. Munsche comments that it seems likely that the motive was the desire of country gentlemen

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<sup>52</sup> *Ibid* at 122.

<sup>53</sup> *Ibid*.

<sup>54</sup> P B Munsche *Gentlemen and Poachers: The English Game Laws 1671- 1831* (1981) 3.

<sup>55</sup> *Ibid* at 13.

to redefine and enhance their own social position *vis-a-vis* the urban bourgeoisie.<sup>56</sup> Certainly it seems unlikely that it was the importance of preserving game from the ravages of wanton destruction by the common people, as suggested by some contemporary supporters of the bill.<sup>57</sup>

Hay suggests that the 'gentlemen of England' usually agreed also that the practical effects of the laws were "... to prevent persons of inferior rank, from squandering that time, which their station in life requireth to be more profitably employed".<sup>58</sup>

Whatever the motives behind its being passed, the effect of the Act was at a stroke to prohibit the vast majority of the population from hunting those animals defined as game. It was class legislation, and it was passed with penalties included which were not initially particularly harsh - indeed they were relatively mild. This was soon to change, however.<sup>59</sup>

'True equality,' comments Hay, 'before the law in a society of greatly unequal men is impossible: a truth which is kept decently buried beneath a monument of legislation, judicial ingenuity and cant. But when they wrote the laws protecting wild game, the rulers of eighteenth-century England dispensed with such hypocrisies. By an act of 1670<sup>60</sup> a man had to be lord of a manor, or have a substantial income from landed property, even to kill a hare on his own land.'<sup>61</sup>

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<sup>56</sup> *Ibid* at 19.

<sup>57</sup> *Ibid* at 15.

<sup>58</sup> D Hay 'Poaching and the Game Laws on Cannock Chase' in D Hay; P Linebaugh & E P Thompson *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (1975) 189 at 189.

<sup>59</sup> Munsche *op cit* at 20-21.

<sup>60</sup> Presumably the Game Act of 1671 is being referred to.

<sup>61</sup> Hay *op cit* at 189.

#### 1.4 A change of emphasis: the Black Act

The penalties for poaching were changing - and in the early eighteenth-century became very much harsher. The British state, eighteenth-century legislators agreed, existed to preserve the property and, by extension, the lives and liberties, of the propertied - but as the century opened, it was not a matter of course for legislators to prescribe the death penalty for crimes against property.

This position changed in the four weeks of May 1723, with the enactment of *9 George I c.22* - the 'Waltham Black Act', or simply the 'Black Act'.<sup>62</sup> This Act created categories of offences involving mainly the hunting, wounding or stealing of deer, rabbits, hares or fish. Such offences carried the death penalty if the persons offending were found to have been armed and disguised in the commission or attempted commission of such offence.<sup>63</sup> It should be remembered that even under Henry II, five centuries before, the death penalty for breaches of the forest laws had not been automatic for a first offence.

The Act was supposedly a response to the depredations of poachers. It has been written of the Waltham Blacks that they were 'a gang of "owlers", smugglers and poachers ... who in their forays were well armed and blackened their faces so as not to be recognised. They demanded

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<sup>62</sup> L Radzinowicz *A History of English Criminal Law: Vol. 1, The Movement for Reform 1948 49-50*. '... *9 Geo. 1, c.22* bearing the title: "An Act for the more effectual punishing wicked and evil disposed Persons going armed in Disguise, and doing Injuries and Violences to the Persons and Properties of His Majesty's Subjects, and for the more speedy bringing the Offenders to Justice".' Radzinowicz describes the Act as having been enacted in 1722, while Thompson uses the date 1723. Thompson seems more accurate, writing that the Black Act was introduced to the House of Commons on 26 April 1723. See Thompson *op cit* at 69.

<sup>63</sup> Thompson *op cit* at 21-22.

from [] landowners money and venison: any who refused had their cattle maimed, their barns and haystacks burned down.<sup>64</sup>

‘The Waltham Blacks,’ wrote the Reverend Gilbert White in about 1767, ‘at length committed such enormities, that government was forced to interfere with that severe and sanguinary act called the “Black Act”, which now comprehends more felonies than any law that ever was framed before.’<sup>65</sup>

It is certainly true that the numbers of deer in the royal forests, Windsor Forest in particular, fell dramatically in the century preceding the Black Act, necessitating frequent restocking<sup>66</sup> - and this fall can be attributed largely to poaching,<sup>67</sup> but it is not until 1721 that reference is made to organised poachers or Blacks. Deer-hunting while disguised at night had been a felony since *I Henry VII c.8* (1485) but had long been in disuse and had virtually fallen into desuetude in the face of the trend toward clemency.<sup>68</sup> Prosecution does not appear to have been common in regard to Windsor Forest in terms of the Act of 1691 - until the 1720s the authorities appear to have been governed by a complex unwritten code of patronage and influence, which enabled many to escape indictment or conviction.<sup>69</sup>

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<sup>64</sup> Trench *op cit* at 114-115.

<sup>65</sup> G White *The Natural History of Selborne* (1996 ed.) 30.

<sup>66</sup> Thompson *op cit* at 55-57.

<sup>67</sup> White *op cit* at 28: ‘There is an old keeper ... who adds that, by means of the Waltham blacks, or, to use his own expression, as soon as they began blacking, they [the deer in the forest of Wolmer, near Selborne] were reduced to about fifty head, and so continued decreasing ...’

<sup>68</sup> Thompson *op cit* at 57-58.

<sup>69</sup> *Ibid* at 60.

Penalties were becoming harsher, though. By 1719 deer-poachers were incurring the threat of transportation (under 5 *George I c.28*) and in 1720 the forest officers secured a royal proclamation against disguised hunters.<sup>70</sup> Blacking, it has been suggested, arose partly in response to such attempted reactivations of what had become a relaxed forest authority.<sup>71</sup>

But there is no evidence among surviving Crown papers or court cases to support any of the more sensationalist stories reported in the press as to a highly organised conspiratorial fraternity.<sup>72</sup> The heart of Blacking lay in the 'middling orders' of the forest: a few gentry sympathisers, more substantial farmers, yeomen and tradesmen or craftsmen, and a few poorer foresters.<sup>73</sup> In fact, the character of the Windsor Blacks appears to have been that of a declining gentry and yeoman class confronted by newcomers with greater command of money and of influence, and with a ruthlessness in the use of both.<sup>74</sup> London sportsmen - merchants, lawyers, army officers - began to bring fashionable sporting parties down to the country at weekends, under licences sold for all game except deer, while local farmers and landowners ran the risk of prosecution for killing game on their own lands.<sup>75</sup> The established forest farmers bitterly resented the increasing numbers of parks created by royal or ministerial favour, which they saw as of dubious title and as trespassing upon their rights.<sup>76</sup> These farmers remained stationary or declined in position, with their reliance on a traditional economy, while the *nouveau riche* moved in around them.<sup>77</sup>

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<sup>70</sup> *Ibid* at 62-63.

<sup>71</sup> *Ibid* at 64.

<sup>72</sup> *Ibid* at 92.

<sup>73</sup> *Ibid* at 94.

<sup>74</sup> *Ibid* at 108.

<sup>75</sup> *Ibid* at 98.

<sup>76</sup> *Ibid* at 110.

<sup>77</sup> *Ibid* at 114.

Deer-poaching was by now virtually a full-scale occupation. A trade almost. By 1718, elements of what was later to become known as 'Blacking' were in place - deer-poaching, fence-breaking, arson, attacks on horses and cows. And it began to appear that such activities were supported by, if not actually conducted by, 'persons of estate and quality' - in fact by the 'old-established' resident gentry of the forests, who shared many of the 'lower class' attitudes to the forest of their tenants.<sup>78</sup>

In October 1721 about sixteen men broke into a park and shot and wounded a keeper, before killing five deer and leaving with three of them. The men were masked and wore black gloves. These men were clearly more organised than normal deer-stealers. As they continued with their raids and became better known, they engaged in public relations: from time to time giving out their objectives and sometimes apologies. They let it be known that their leader's name, somewhat ironically, was "King John".<sup>79</sup>

For some months they enjoyed the assistance of the community, as the legendary figure of Robin Hood became incarnated in "King John".<sup>80</sup> But to what number the actual fraternity of King John ever grew cannot be known. Only some twenty were ever seen at any one time. And no doubt their success encouraged and precipitated many freelance actions, by sundry poachers, smugglers, fishermen and foresters. To the authorities, of course, all were one.<sup>81</sup>

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<sup>78</sup> *Ibid* at 139-141.

<sup>79</sup> *Ibid* at 144. Ironic because in many of the legends of Robin Hood, King Richard the First's brother Prince John (later to become king himself) features, usually as a harsh and corrupt despot.

<sup>80</sup> *Ibid* at 144-145.

<sup>81</sup> *Ibid* at 145.

King John took care to make it public that he owed allegiance to King George. He even made public appearances to announce this, and to make it clear that the targets of his actions were the rich and the clergy who oppressed the poor and kept deer in areas where the poor had once kept their cattle. The ballads of Robin Hood lived on, but the flesh-and-blood figure of King John then disappeared for some 250 years - leaving behind him no evidence as to his identity.<sup>82</sup>

It may well be that King John was the 'genteel' owner of some small forest estate. Just as it seemed to be important for early chroniclers of the Robin Hood legend that Robin be a nobleman in rustic disguise.<sup>83</sup> The ballads of Robin Hood do not ever seem to deal directly with agrarian workers' problems, nor even to give them direct symbolic treatment.<sup>84</sup>

In an example from a ballad, though, Robin Hood meets a woman who tells him that three young men are to be hanged for the crime of having poached royal deer and, without enquiry into the merits, he promptly rushes off to rescue them - considering this per se an injustice.<sup>85</sup> Robin Hood seems thus to have played the role of symbolic liberator and to have appeared whenever there was a call for an image of resistance to undesirable authority. Much like other elusive, powerful and in some way menacing figures ... such as Ned Ludd and Captain Swing.<sup>86</sup> It does not seem that

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<sup>82</sup> *Ibid* at 145-146.

<sup>83</sup> S Knight *Robin Hood: A Complete Study of the English Outlaw* (1994) 19.

<sup>84</sup> *Ibid* at 51-52.

<sup>85</sup> *Ibid* at 66.

<sup>86</sup> *Ibid* at 10. Ned Ludd, or 'King Ludd', was said to have destroyed two stocking-frames in about 1779. His existence is uncertain, but his name inspired the 'Luddite' movement - groups apparently of craftsmen who destroyed cotton and woollen mills in Yorkshire and Lancashire from 1811, objecting to machine-produced products sold at prices which undercut their own products. The Luddites were never well-organised, but were considered a serious threat by the government. See generally K Sale *Rebels Against the Future: The Luddites and Their War on the Industrial Revolution* (1995). "Captain Swing" is another figure of doubtful existence, whose



Robin Hood arose in specific relation to any historical uprising.<sup>87</sup> However, his importance as a symbol cannot be underestimated - in the sixteenth-century for example, particularly in Scotland, Robin Hood plays were banned from being performed.<sup>88</sup> 'King John' chose his persona well before making his quiet disappearance.

Radzinowicz suggests that, according to Blackstone, '... the statute was enacted to stop the depredations being committed near Waltham, in Hampshire, by persons in disguise or with their faces blacked; he also observes that the technique of these offenders, who operated in the forests of Waltham, seemed to have been modelled on the criminal activities of the famous band of Roberdsmen, or followers of Robert, or Robin, Hood, who committed great outrages in the reign of Richard the First on the border of England and Scotland.'<sup>89</sup>

Going back to the idea that 'persons of quality' may have been involved, local tradition suggests that 'gentlemen' may have been involved - or at least yeomen of some substance. Certainly, the presence of horses and firearms in King John's parties suggests the support of the landed. And there were gentlemen who were sufficiently opposed to the forest or episcopal authorities to want to give at least passive support.<sup>90</sup> And the *modus operandi* of Black actions - such as the writing of threatening letters, the felling of young trees (forestry and timber rights being an issue with the established forest residents) and the blackmail of forest officers - disallows a simple economic

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name was lent to a series of demonstrations over a large number of counties in 1830 in which more than 400 machines were destroyed and over 300 fires set. See K Sale *supra* at 18, 194.

<sup>87</sup> Knight *op cit* at 51-52.

<sup>88</sup> *Ibid* at 282-284.

<sup>89</sup> Radzinowicz *op cit* at 50.

<sup>90</sup> Thompson *op cit* at 156-157.

explanation, where the essence would have lain in secrecy.<sup>91</sup>

To the country people, of course, deer-stealing was not a felony, or at least should not have been. The sheer risk and excitement of deer-poaching was an incentive, aided by indignation that the offence of taking property that in the taker's eyes belonged only to the taker, could merit death.<sup>92</sup>

The Black Act, however, was incredibly harsh - a clause stated that if any person did "conceal, aid, abet or succour" any other person who had been "proclaimed" under the Act (meaning that such person had failed, after forty days, to surrender himself to the authorities), then he also could be convicted of a felony and sentenced to death.<sup>93</sup> On the ground, where poachers faced keepers in the forests at night, the contest was no doubt more or less equal. But at the higher levels, where the petty began to inconvenience the great, there was little equality. The Black Act put unprecedented legal power into the hands of men whose only object often was to secure the convictions of men who were personal nuisances to them.<sup>94</sup>

Probably the forest officers, the church landowners, the gentry and the magistrates, had no doubt

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<sup>91</sup> *Ibid* at 160-161.

<sup>92</sup> *Ibid* at 161-162. See also Trench *op cit* at 118: '... forty Blacks were tried at a special assize at Reading in 1723, thirty-six being transported and four hanged. "They could scarcely be persuaded that the crime for which they suffered merited death. They said the deer were wild beasts, and that the poor, as well as the rich, might lawfully use them ...".'

<sup>93</sup> Thompson *op cit* at 175. See also Radzinowicz *op cit* at 57: 'The simple appearance, without any other crime being committed or even attempted, by anyone with his face blacked or otherwise disguised in any of the places set out [including High Roads, Open Heaths, Commons and Downs, as well as Forests, Chases, Parks or Paddocks where any deer had been or might usually be kept, and Warrens or any other places where hares or rabbits had been or might usually be kept] constituted an offence under the Waltham Black Act, for which a convicted offender was liable to be sentenced to death without benefit of clergy.'

<sup>94</sup> Thompson *op cit* at 188-189.

but that they were faced with an emergency and that they had to take emergency measures. But the point is that the clashes in the forest were not more serious than they had been in previous centuries; what made the ‘emergency’ was the repeated public humiliation of the authorities. Terrifying to the authorities was the sense of a confederated movement, especially under figures such as “King John”, which might well seek to enlarge its social demands. It was this displacement of authority, and not per se the offence of deer-stealing (with its venerable history), which constituted, in the eyes of Government, an emergency.<sup>95</sup>

The Act was passed dressed in the colours of emergency.<sup>96</sup> However, it was disproportionate to the legal histories of the various offences it covered. In 1723 neither sheep- nor cattle-stealing were capital offences; so that to make deer-stealing (if armed and disguised, or on royal property) a capital offence was to revert 200 years.<sup>97</sup> The Act was unprecedented in its severity. It was neither necessary, nor especially effective, in dealing with the particular ‘emergency’ to which it was supposedly a response.<sup>98</sup>

And certainly Parliament did not often enact the new capital statutes (which were passed thick and fast in terms of the Act) as a matter of conscious public policy. The Bills were not usually debated, and most changes were related to specific and limited property interests - often, these were in the personal interests of a few members, and both the Lords and the Commons enacted

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<sup>95</sup> *Ibid* at 190-191.

<sup>96</sup> *Ibid* at 196-197. (See also Radzinowicz *op cit* at 77, who suggests that the Act was initially enacted for three years only, then prolonged several times, before becoming permanent in 1758.)

<sup>97</sup> *Ibid* at 191.

<sup>98</sup> *Ibid* at 191-192.

them for the mere asking.<sup>99</sup> ‘It is significant,’ suggests Radzinowicz, ‘that practically all capital offences were created more or less as a matter of course by a placid and uninterested Parliament. In nine cases out of ten there was no debate and no opposition.’<sup>100</sup>

### 1.5 The philosophy behind the Black Act

But as severe as the Black Act was, and as many as were the new Acts passed to keep the capital sanction up to date, so the practice of capital punishment does not appear to have matched apparent legislative intention. The gentry, merchants and peers who sat in Parliament in the eighteenth-century sought to protect virtually every type of property from theft or malicious damage, and yet a declining proportion of death sentences were actually carried out.<sup>101</sup>

Why, then, were the Acts passed?

‘It is astonishing,’ comments Thompson, ‘[how much] wealth can be extracted from [the] territories of the poor, during the phase of capital accumulation, provided that the predatory elite are limited in number, and provided that the state and the law smooth the way of exploitation.’<sup>102</sup> The fortunes of many great men rested partly on access to public lands, perquisites of office, sinecures and commissions taken on public transactions. No doubt the small landowners of the

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<sup>99</sup> D Hay ‘Property, Authority and the Criminal Law’ in D Hay; P Linebaugh & E P Thompson *Albion’s Fatal Tree: Crime and Society in Eighteenth Century England* (1975) 17 at 20.

<sup>100</sup> Radzinowicz *op cit* at 35.

<sup>101</sup> Hay ‘Property, Authority and the Criminal Law’ *op cit* at 22-23.

<sup>102</sup> Thompson *op cit* at 245.

forest can have felt little allegiance to such great predators. ‘The forest conflict was, in origin, a conflict between users and exploiters.’<sup>103</sup>

But despite the relative paucity of actual executions, the Black Act remained part of the law for a century and its eventual repeal took place only after prolonged and vigorous resistance.

Thompson conjectures that in the first two decades after enactment the Act was employed regularly (although infrequently) against deer-stealers and poachers. Thereafter, it was rarely used against such offenders.<sup>104</sup> But other clauses in the Act were more regularly used - such as those against arming and disguising, sending threatening letters, cutting young trees, maiming animals, and so forth. ‘By the nature of the offences,’ he comments, it can be seen that ‘recourse to the Act was most likely in a context of agrarian disturbance, especially when this was combined with class insubordination ...’<sup>105</sup>

When applied, the Black Act could operate extremely harshly. By implication from the case of one unfortunate man, executed for poaching whilst ‘armed and disguised’, a stick and a dirty face would be enough in the eyes of the law to constitute arms and disguise.<sup>106</sup>

Historians of eighteenth-century England have long held the game laws to be a by-word for tyranny; but in the light of the evidence, the game laws were not that harsh - it might even be

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<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid* at 245-246.

<sup>105</sup> *Ibid* at 246.

<sup>106</sup> *Ibid* at 250. This man was probably executed, in 1725, under the Black Act, but may have been executed under a different and little-known Act (9 George 1 c.28) which concerned riots and was passed in the same parliamentary session as the Black Act. See Thompson *ibid* at 249, fn 1.

reasonably argued that the 'old game code' actually saved poachers from severe punishment. By comparison, at any rate, with certain other sections of the criminal code.<sup>107</sup> But in the 1740s game preservation started to be of increased significance to the gentry.<sup>108</sup>

An important Act of 1755 (which banned the sale of game) was of no greater significance than had been any previous act in halting the game trade, but its effect on poaching was profound. Denied a legal source of game, the second half of the eighteenth-century saw the emergence of a highly organised and profitable black market in game, with equally organised gangs supplying it.<sup>109</sup>

In a sense, though, the game laws were not in the late eighteenth and early nineteenth centuries increasing in severity, as much as what was increasing was the gentry's power to decide the fate of the convicted poacher.<sup>110</sup> Game was coming to be treated as a form of private property - but the formal contents of the law were still extremely important. For as long as the gentry maintained their legal monopoly on game, lesser landowners were denied the right to hunt game on their own land.<sup>111</sup>

However, the operation of the game laws was not as clear cut in practice as it may have been in law. Only landed gentry had the right under the game laws to hunt game (from 1831 this meant hares, partridges, pheasants and moor fowl<sup>112</sup>). The vast majority of England's population was not

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<sup>107</sup> Munsche *op cit* at 160.

<sup>108</sup> *Ibid* at 109-110.

<sup>109</sup> *Ibid* at 22-23.

<sup>110</sup> *Ibid* at 27.

<sup>111</sup> *Ibid* at 114.

<sup>112</sup> Under what eighteenth-century Englishmen called 'the game laws', only these animals were accorded

permitted even to own a gun or to keep a dog of a hunting type. But many did so, under the patronage of qualified persons.<sup>113</sup>

### 1.6 The need for reform and the influence of Blackstone

Sir William Blackstone was the greatest English jurist of the eighteenth-century. Between 1765 and 1769 he published his *Commentaries on the Laws of England*, which was both a description of the common law and a celebration of the existing constitution.<sup>114</sup> Blackstone wrote that '[f]rom a similar principle to which, though the forest laws are now mitigated, and by degrees grown entirely obsolete, yet from this root hath sprung a bastard slip, known by the name of the game law, now arrived to and wantoning in its highest vigour: both founded upon the same unreasonable notions of permanent property in wild creatures; and both productive of the same tyranny to the commons: but with this difference; that the forest laws established only one mighty hunter throughout the land, the game laws have raised a little Nimrod in every manor.'<sup>115</sup>

Blackstone pointed out the ridiculously low level of offence required for the capital sentence to be passed: '... the punishment of grand larceny or the stealing above the value of twelvecence, (which sum was the standard in the time of King Athelstan, eight hundred years ago,) ...'<sup>116</sup> He

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protection. There was no property qualification for hunters of deer or rabbits, but from 1692 these animals were protected by statutes which forbade anyone from hunting them without the permission of the person on whose land they were found. See *ibid* at 3-5.

<sup>113</sup> *Ibid* at 28-29.

<sup>114</sup> *Ibid* at 118.

<sup>115</sup> Jones (ed) *op cit* 213.

<sup>116</sup> Sir W Blackstone *Commentaries on the Laws of England, Book the Fourth* (15/e) (1982) 238-239.

went on: ‘... it is likewise true, that by the merciful extensions of the benefits of clergy by our modern statute; in law, a person who commits a simple larceny to the value of thirteen pence or thirteen hundred pounds, though guilty of a capital offence, shall be excused the pains of death: but this is only for the first offence.’<sup>117</sup>

Once property, as Hay has pointed out, had been ‘officially deified’, it became the measure of all things.<sup>118</sup>

Trench poses the question: ‘[w]hy ... were the Game Laws not sooner amended and the monstrous qualifications abolished?’ And answers it by suggesting that ‘Parliament, both Lords and Commons, was little more than an assembly of the country gentlemen of England, into which commercial interests and the legal profession penetrated but slowly. It is safe to say that all the Peers and nearly all the Commons were qualified persons.’<sup>119</sup>

Class considerations had become well entrenched in the Game laws. ‘To most country gentlemen,’ as Munsche writes, ‘the primary characteristic of a poacher was simply that he was not a sportsman ... [m]ost country gentlemen in the eighteenth-century believed that the only thing which stood between the poor and “immorality” was the necessity of having to work for a living.’<sup>120</sup> And the enforcement of the Game laws had become as much the prerogative of country

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<sup>117</sup> *Ibid* at 239-240.

<sup>118</sup> Hay ‘Property, Authority & the Criminal Law’ *op cit* at 19.

<sup>119</sup> Trench *op cit* at 133.

<sup>120</sup> Munsche *op cit* at 53.



gentleman as had the legal pursuit of game. ‘As prosecutors, as justices, as grand jurors and as employers of the gamekeepers who appeared as witnesses, the gentry dominated the legal system which determined the poacher’s fate.’<sup>121</sup>

But the gentry’s monopoly of game was beginning to become a serious issue and grievance. This is where Blackstone had most importance, in describing the game laws as constituting a “vital remnant” of feudal “slavery” standing among the restored glories of English liberty.<sup>122</sup> It was not simply the esteem in which Blackstone was held as a jurist that lent weight to his words. For the first time, somebody was setting the game laws into their historical context and ‘explaining their development within an easily understandable framework of natural and human law.’<sup>123</sup>

By linking the Game laws to the “Norman yoke”, Blackstone called their very legitimacy into question. In addition, he provided the necessary historical foundation for an alternative system, one based on the property rights of the individual landowner.<sup>124</sup>

However, there was a deep-seated conservatism in the English upper-classes which was not easily swayed. And reform of the game laws required greater enthusiasm for abstract principles than most members of Parliament appeared to have. They viewed with hostility any measures which sought to alter the relationship between the gentry and their communities.<sup>125</sup> This is not to be

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<sup>121</sup> *Ibid* at 76.

<sup>122</sup> *Ibid* at 118-119.

<sup>123</sup> *Ibid*.

<sup>124</sup> *Ibid* at 131.

<sup>125</sup> *Ibid* at 122,129.

wondered at, of course. The true object of the Game laws never had been the preservation of game. It had always been the preservation of a certain social order.<sup>126</sup>

### 1.7 Efforts to reform

In the early 1800s, many began to argue that the designation of game as property was essential if reform was going to be effective.<sup>127</sup> The poachers had a monopoly on the sale of game and people began to suggest that the only way to defeat them was to deprive them of this monopoly - the idea being to let sportsmen sell game and to let farmers shoot game, thereby depriving the poacher of public sympathy. The majority of the landed gentry, however, were governed by emotion rather than by reason and could not envisage losing any of their privileges.<sup>128</sup>

These privileges were necessary, in the minds of the gentry, to preserve social order. They were necessary for reminding the lower orders and the urban bourgeoisie of the superior position of the landed gentry in English society.<sup>129</sup> That they were beginning, however, to turn to the police for help was an unconscious admission by the gentry that they were in fact losing control over their own neighbourhoods.<sup>130</sup>

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<sup>126</sup> *Ibid* at 130.

<sup>127</sup> *Ibid* at 152.

<sup>128</sup> Trench *op cit* at 148.

<sup>129</sup> Munsche *op cit* at 86.

<sup>130</sup> *Ibid* at 142. See also Radzinowicz *op cit* at 28: '[The lack of] an effective police force ... was due in part to the general backwardness of the administrative machinery of the State, but in the main to the widely shared suspicion that a regular police force, once established, would be used by the government to curtail political liberty.'

What was most discussed in considerations of reform, however, was not 'true' reform, but where the boundary of qualification should be set. The idea being to bring the qualification level more closely into line with proprietary rights. Even when reforming, then, the gentry were desperately clinging to privilege. The Game Reform Act of 1831 did indeed extend the social range of access to game, but only by making game the property of the landowner - and the landowner had sole right of access.<sup>131</sup>

By the time of the Act of 1831, one-sixth of the total number of convictions in England and Wales were for poaching<sup>132</sup> - and this was probably because of an increase in the frequency of poaching itself.<sup>133</sup>

Poaching increased, but little suggests that it was because people were feeding themselves directly from the landlord's fields. The principal element of the labourer's diet was bread, not meat. And in hard times, game was more valuable to the labourer as source of money with which he could buy bread.<sup>134</sup> This although most rural crime certainly was economic - a 'defence against hunger'.<sup>135</sup> Many labourers were able to maintain themselves because of the extensive national market in game - a trade strictly proscribed by law, but conducted everywhere.<sup>136</sup> But the professionals who made their living solely through poaching were probably only a very small

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<sup>131</sup> Mackenzie *op cit* at 16-17.

<sup>132</sup> Trench *op cit* at 152.

<sup>133</sup> Munsche *op cit* at 101.

<sup>134</sup> *Ibid* at 62-63.

<sup>135</sup> J E Archer *By a Flash and a Scare: Incendiarism, Animal Maiming and Poaching in East Anglia 1815-1870* (1990) 15.

<sup>136</sup> Hay 'Poaching and the Game Laws on Cannock Chase' *op cit* at 203.

minority of those who poached.<sup>137</sup>

### 1.8 Living conditions and protest

By 1820 the signs had already been there of impending trouble. Game law convictions were always a tell-tale sign of unrest and these had risen by as much as 45 per cent in some areas.<sup>138</sup> Immediately prior to years of widespread rural protest, convictions for poaching tended to rise markedly - in such circumstances poaching (casual, rather than professional) was an act of hunger and economic necessity, and at the same time a statement of defiance.<sup>139</sup>

At the best of times, work and wages were barely adequate to support a labouring family, or even to sustain an unmarried man with no dependents.<sup>140</sup> And although there were supposedly safety nets in place, their mesh was too wide for the young single men. In 1835 a New Poor Law was introduced, offering even less security than had the old, and protests escalated - often violently in the form of riots, belligerent meetings and arson.<sup>141</sup>

Incendiarism began as a new form of social protest, so new that victims even sought to raise from desuetude provisions of the Black Act which allowed the victim of incendiarism to be compensated by the hundred (district) in which he resided.<sup>142</sup>

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<sup>137</sup> Archer *op cit* at 12.

<sup>138</sup> *Ibid* at 78-79.

<sup>139</sup> *Ibid* at 234.

<sup>140</sup> *Ibid* at 47.

<sup>141</sup> *Ibid* at 50.

<sup>142</sup> *Ibid* at 72.

## 1.9 Reform laws

Poaching remained the issue, the 'running sore', which created tensions between all classes of rural society for much of the nineteenth-century.<sup>143</sup> But reform was starting to happen and in 1827 the game laws were for the first time relaxed to some extent: the use of implements like spring-guns and man-traps, which had caused great resentment, was prohibited.<sup>144</sup> Also in 1827 the Black Act effectively came to the end of its 'reign of terror'.<sup>145</sup> And in 1828 the Night Poaching Act was passed, which ameliorated and codified much of the chaotic and brutal legislation which had been in place for the previous century.<sup>146</sup>

'Game' became fairly strictly defined - limited to hares, pheasants, partridges and water fowl. And although punishments were still severe, three years later the Game Reform Act of 1831 made a clean sweep of most of the old Game laws and changed everything. The Act abolished most of the harsher punishments and also abolished the archaic qualifications required for the killing of game. The Act permitted the killing and the sale of game by anyone who was the holder of a certificate.<sup>147</sup>

These changes in the laws were not effective in curbing poaching. However, the changes reduced most of the illicit trade in game, by making its sale legal. Also, the changes formally removed

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<sup>143</sup> *Ibid* at 255.

<sup>144</sup> Trench *op cit* at 154.

<sup>145</sup> The Black Act appears to have been partially repealed in 1823. See Radzinowicz *op cit* at 79.

<sup>146</sup> Trench *op cit* at 154.

<sup>147</sup> *Ibid*.

much in the way of gross and obvious social injustice from the game laws.<sup>148</sup>

This removal of social injustice was, however, largely cosmetic, because, in reality, neither farmers nor labourers benefited to any great extent.<sup>149</sup> There was still conflict between the idea that game was '*ferae naturae*' and the idea of reservation. That game was now reserved to a propertied minority (having become capable of ownership), instead of being reserved to a class, made little difference in practice. The class that had previously had the right to hunt game was the same group of people that now had the money to own the game.

So conflict continued. As Archer comments: '[p]oaching was the most constant and common method employed by the poor of snubbing the tenets of the wealthier classes.'<sup>150</sup>

Specifically, what the Reform Act of 1831 did was repeal the property qualification for being allowed to kill game - and declare game to be the property of the person on whose land it was found. The common law principle that the occupier of the land, who was usually a tenant farmer, could kill game was restored. Provided, of course, that such a tenant farmer had a certificate.<sup>151</sup>

The trouble was that the Act hedged on meaningful reform by allowing a landowner to reserve the right to kill game to himself, by way of a clause in the tenancy agreement. Such clauses became

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<sup>148</sup> *Ibid* at 155.

<sup>149</sup> Archer *op cit* at 224.

<sup>150</sup> *Ibid*.

<sup>151</sup> Trench *op cit* at 156.

almost standard and so the position of the tenant farmer was not much improved - he was still not allowed to kill the game, especially hares, which damaged his crops.<sup>152</sup>

In fact it was not until as late as 1881 that a new law permitted tenants to destroy hares and rabbits on the farms they leased, without having their landlord's permission for such killing.<sup>153</sup>

Munsche calls this a curious display of impressive *sang froid* in the face of the Game Reform Act's manifest failure to deliver on its sponsors' promises, and one which suggests that 'there was ... more involved in the long struggle to reform ... than a simple desire to curb poaching.'<sup>154</sup>

#### 1.10 A description of actual poaching, class attitudes and community attitudes

Much of what we know about poaching has to be gleaned from indirect sources, as few poachers left records of their aims and activities. Of what there is, James Hawker's 'autobiography' is a wonderful description of poaching on the ground - methods, realities and, also, perceptions of and attitudes toward the game laws. Richard Jefferies, likewise, is useful as to methods and realities (and for the sense of enjoyment) but his is an upper-class attitude.<sup>155</sup>

Hawker: 'You may say this too Bad. Is it any worse than we have been served? We Had no voice in making the Game Laws. If we Had i would submit to the majority for I am a Constitutionalist.

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<sup>152</sup> *Ibid.*

<sup>153</sup> G E Mingay *The Gentry: The Rise and Fall of a Ruling Class* (1976) 180.

<sup>154</sup> Munsche *op cit* at 158.

<sup>155</sup> See my Bibliography for R Jefferies *The Amateur Poacher* (1934, 1879) and *The Gamekeeper at Home* (1935, 1879).

But I am not going to be a Serf. They not only Stole the land from the People but they Stocked it with Game for Sport, Employed Policemen to Look after it, neglected their Duty in Looking after Private Property, and Hundreds of Keepers got the Sack. And we the Toilers have to Pay the Piper. Even the Farmer who fed the Hare with his Produce was not allowed to kill a Hare till we got the Ground Game Act under a Liberal Government.’<sup>156</sup>

‘Poachers,’ writes Archer, ‘certainly have a distinguished tradition as radicals; the story of James Hawker, the Nottinghamshire poacher who waged war against “the Class” is too well known to need recounting.’<sup>157</sup> ‘I have poached more for Revenge than Gain.’ said Hawker, ‘Because the Class poached upon my liberty when I was not able to defend myself.’<sup>158</sup>

Enforcement was difficult, village constables being notoriously ineffective for reasons of neighbourliness and self-preservation.<sup>159</sup> And keepers were in difficult positions too. They were often isolated and unpopular figures,<sup>160</sup> caught between the demands of their employers and the resentment of their communities.

The motives for poaching were many. We have dealt already with the economic one of necessity. There were also, of course, the prospect of gain, the love of adventure and the conviction that game was ‘the property of those who can take it’. There probably cannot be said to be one single

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<sup>156</sup> G Christian *A Victorian Poacher (James Hawker's Journal)* (1978) 62-63.

<sup>157</sup> Archer *op cit* at 244.

<sup>158</sup> Christian *op cit* at 95.

<sup>159</sup> Archer *op cit* at 155.

<sup>160</sup> Hay ‘Poaching and the Game Laws on Cannock Chase’ *op cit* at 197.



'grand cause'.<sup>161</sup> The conviction of the poacher that he had a 'God-given right' to take game was an unshakeable one.<sup>162</sup> And very real were the pleasures of poaching. The excitement of snaring hares, eluding keepers and shooting deer ...<sup>163</sup>

White wrote that '[t]hough large herds of deer do much harm to the neighbourhood, yet the injury to the morals of the people is of more moment than the loss of their crops. The temptation is irresistible; for most men are sportsmen by constitution: and there is such an inherent spirit for hunting in human nature, as scarce any inhibitions can restrain. Hence towards the beginning of this [eighteenth] century all this country was wild about deer-stealing. Unless he was a hunter, as they affected to call themselves, no young person was allowed to be possessed of manhood or gallantry.'<sup>164</sup>

The dividing line between the professionalism of the full-time poacher and the casual opportunism of the farm labourer must often have been very fine.<sup>165</sup> The farm labourer had usually grown up in the area, and as a boy would have learned many of the tricks of the poacher.

This distinction would have been blurred even more in times of economic distress and low employment.<sup>166</sup> Poaching was a commonplace crime committed by ordinary men.<sup>167</sup> And it was

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<sup>161</sup> Munsche *op cit* at 147-148.

<sup>162</sup> *Ibid* at 63. See also Archer *op cit* at 234; Thompson *op cit* at 82.

<sup>163</sup> Hay 'Poaching and the Game Laws on Cannock Chase' *op cit* at 201.

<sup>164</sup> White *op cit* at 30.

<sup>165</sup> Archer *op cit* at 233.

<sup>166</sup> *Ibid* at 234.

<sup>167</sup> *Ibid* at 249.

not viewed as 'criminal' in any way by the labouring community - even though illegal in the sense of being proscribed by the law. Smuggling and wrecking were viewed in much the same way.<sup>168</sup>

The typical community would protect its own. As Hay puts it, the keepers would meet a wall of silence when they tried to make enquiries, but found that word spread like lightning when they obtained a search warrant. Witnesses also tended to 'lose' their memories, like the dozen colliers who saw three "most notorious poachers" taking hares an eighth of a mile from the coal pits, but could not identify the offenders.<sup>169</sup>

### 1.11 *A specific grievance: dogs*

Keepers had the power to seize and kill hunting dogs. 'No power,' comments Thompson, 'provoked fiercer resentment than this ... Again and again the killing of dogs sparked off some act of protest or revenge.'<sup>170</sup> It might take months or years to train a dog properly, and a trained dog would represent a substantial investment.

In the centuries leading up to the Black Act, the nobility and gentry sought to control the dogs of the poor by destroying those caught in the commission of poaching activities and by 'lawing' those which might be used in such activities. Lawing meant the removal of several toes from a dog's foot, to prevent it from moving with any speed.

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<sup>168</sup> *Ibid* at 5.

<sup>169</sup> Hay 'Poaching and the Game Laws on Cannock Chase' *op cit* at 198.

<sup>170</sup> Thompson *op cit* at 63.

There is an amusing, and apparently well-authenticated, account of a man in the New Forest who trained a sow to retrieve birds while out shooting<sup>171</sup> - but for those without the skill and patience to train such a beast, a dog was a precious possession.

As Jefferies writes: '[e]xperience certainly educates the dog as it does the man. After long acquaintance and practice in the field we learn the habits and ways of game - to know where it will or will not be found. A young dog in the same way dashes swiftly up a hedge, and misses the rabbit that, hearing him coming, doubles back behind a tree or stole; an old dog leaves nothing behind him, searching every corner.'<sup>172</sup>

By the early 1700s, dogs were probably no longer being lawed.<sup>173</sup> But after 1722 it was certainly illegal for a man unqualified to hunt game to keep a dog of lurcher or greyhound type, whether the dog was used in hunting activities or not.<sup>174</sup> And yet there were dogs and there were dogs.

'While gentlemen,' writes Hay, 'urged the wholesale destruction throughout the country of the "babbling curs" of labourers, they were extraordinarily concerned to protect their own animals. ... in 1770 Parliament passed a very severe [A]ct against stealing them.'<sup>175</sup>

'[M]astiffs and mongrels,' writes Thomas, 'were lecherous, incestuous, filthy and truculent, and the butcher's cur snarling, angry, peevish and sullen. But the hound, by contrast, was noble,

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<sup>171</sup> A Dent *Lost Beasts of Britain* (1974); Trench *op cit* at 74.

<sup>172</sup> R Jefferies *The Gamekeeper at Home* (1935, 1879).

<sup>173</sup> Thompson *op cit* at 31.

<sup>174</sup> Hay 'Poaching and the Game Laws on Cannock Chase' *op cit* at 238.

<sup>175</sup> *Ibid.*

sagacious, generous, intelligent, faithful and obedient. The reason for this distinction was essentially social. Dogs differed in status because their owners did ... [o]ne feature of the game laws was that, since the late fourteenth century, they had confined the ownership of hunting dogs to people above a specified social level.<sup>176</sup> 'Greyhounds and spaniels,' suggests Thomas, 'were always acceptable gifts between aristocrats; and a gentleman's hounds were treated with much indulgence.'<sup>177</sup>

### 1.12 *In conclusion*

What we have seen several times in the above discussion is the idea that it was never the actual game animals that legislators were concerned about, nor even the hunting of them, so much as it was class division that was at issue. 'Game laws,' suggests Mackenzie, 'were to act as the litmus of class conflict into the twentieth century.'<sup>178</sup>

'The gentry's identification with the game laws,' writes Munsche, 'was complete. They wrote the game laws, benefited from them, defended them, enforced them - and they led the fight for their repeal ... [i]n other words, the game laws were measures designed to preserve a stable society, one which was rural-based, hierarchical and paternalist.'<sup>179</sup> The gentry were desperate to keep their privileges and fought reform all the way, eventually embracing it only as a change of tactics.

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<sup>176</sup> K Thomas *Man and the Natural World: Changing Attitudes in England 1500-1800* (1983) 106.

<sup>177</sup> *Ibid* at 103.

<sup>178</sup> Mackenzie *op cit* at 16.

<sup>179</sup> Munsche *op cit* at 6-7.

It is of course difficult to believe that laws that were so universally reviled and so universally disobeyed remained entrenched for so many centuries. And this with the weight of England's most eminent jurist leaning against their legitimacy and justice.

Blackstone wrote that '... many learned and scrupulous men have questioned the propriety, if not lawfulness, of inflicting capital punishment for simple theft. ... Sir Thomas More, and the [M]arquis Beccaria, at the distance of more than two centuries from each other, have very sensibly proposed that kind of corporal punishment, which approaches the nearest to a pecuniary satisfaction; viz a temporary imprisonment, with an obligation to labour, first for the party robbed, and afterwards for the public, in works of the most slavish kind: in order to repair, by his industry and diligence, the depredations he has committed upon private property and public order.'<sup>180</sup>

Despite the damning indictments by Blackstone of capital punishment in respect of poaching offences, the legislators persisted in keeping this penalty for centuries. And keeping the penalty even though it was not used as often as might seem at first glance. Hay points to 'majesty, justice and mercy' as a three-pronged form of social control which required the penalties to be harsh, even if they were not actually used.<sup>181</sup>

One J. Chitty wrote in 1816 that "[t]he subject of the Game Laws in whatever light it is considered, is one of no common importance. The property which they protect is viewed with

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<sup>180</sup> Blackstone *op cit* at 237-238.

<sup>181</sup> Hay 'Property, Authority and the Criminal Law' *op cit* at 26-49.

particular jealousy, both by those who are precluded from taking it, and those to whom its enjoyment is secured. The former consider it as a common right of which they are unjustly deprived; the latter as more sacred than any other class of property, on account, not only of its intrinsic value, but of the amusement which it affords them. These opposite feelings are continually called into exercise, not only by their immediate object, but by all the local disputes and antipathies with which they mingle.”<sup>182</sup>

‘Poachers,’ suggests Hay, ‘... were not only stealing a particularly valuable kind of social capital; they were also debasing its coinage. By supplying the black market they allowed tradesmen and Londoners to play the country gentleman at the dinner-table. Worse yet, in coursing and shooting, the poachers themselves aped gentlemen in the field.’<sup>183</sup>

Having moved through several incarnations of class reservation, from royal privilege through qualification by land and money, toward the end of the eighteenth century the ruling class sought a new incarnation. This saw what Mackenzie calls ‘[a]n imperial and largely masculine elite’<sup>184</sup> attempting to reserve the game resource to itself, by transforming the ‘hunt’ into a ‘ritual of prestige and dominance’, and later by separating the human and animal worlds to promote “preservation” as ‘a continuing justification of its monopoly.’<sup>185</sup>

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<sup>182</sup> Quoted in Hay ‘Poaching and the Game Laws on Cannock Chase’ *op cit* at 191.

<sup>183</sup> Hay ‘Poaching and the Game Laws on Cannock Chase’ *op cit* at 247.

<sup>184</sup> Mackenzie *op cit* at 22.

<sup>185</sup> *Ibid.*

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## Chapter II - South Africa

### 2.1 *The Cape Colony*

#### 2.1.1 *The common law and the earliest game legislation*

One of the 'neglected fields' of South African legal, social, economic and political history is the hunting of wild animals. In respect of, firstly, survival and subsistence and, later, the creation of income and capital, the importance of hunting has been often overlooked.<sup>186</sup> And poaching and laws against poaching have equally been overlooked.

This chapter examines laws against poaching in South Africa - where these laws originated, how they were influenced by the long history of poaching laws in England and how shaped by factors unique to South Africa. Also, to what extent these laws were designed and employed as a deliberate form of social control, as appears to have been the case in England.

Less than five years after arriving at the Cape, Governor Jan Van Riebeeck effectively initiated conservation legislation, and created the first poaching laws, by placing restrictions on hunting in the area of the Cape Colony. This was by way of a *Placaat* of 1657. Even before that, very soon after landing at the Cape, he had issued arguably South Africa's first wildlife conservation

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<sup>186</sup> S Trapido 'Poachers, Proletarians and Gentry in the Early Twentieth Century Transvaal' African Studies Seminar Paper, March 1984, African Studies Institute, University of the Witwatersrand 1.

measure: ordering “Two meals instead of three. Only half a penguin per person per day.” That was on 14 April 1654.<sup>187</sup> In 1658 the sale of game meat to ships was prohibited, unless consent was first obtained.<sup>188</sup> Legislation was necessary as in terms of Roman-Dutch law wild animals had the status of *res nullius* and would belong to any person who might capture or kill them.<sup>189</sup>

Generally, the South African position was that expressed by the Roman and Roman-Dutch jurists. To quote from Justinian’s *Institutes*, for example: ‘Wild animals, birds and fish, that is to say all the creatures which the land, the sea, and the sky produce, as soon as they are caught by any one become at once the property of their captor by the law of nations; for natural reason admits the title of the first occupant to that which previously had no owner.’<sup>190</sup>

The position, in fact, was much as had pertained in Roman-influenced Anglo-Saxon Britain before the Norman Conquest. To quote Justinian’s text further: ‘So far as the occupant’s title is concerned, it is immaterial whether it is on his own land or on that of another that he catches wild animals or birds, though it is clear that if he goes on another man’s land for the sake of hunting or fowling, the latter may forbid him entry if aware of his purpose. An animal thus caught ... is deemed to be [the catcher’s] property so long as it is completely under [his] control; ...’<sup>191</sup>

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<sup>187</sup> J A Pringle *The Conservationists and the Killers: The Story of Game Protection and the Wildlife Society of Southern Africa* (1982) 18.

<sup>188</sup> M A Rabie *South African Environmental Legislation* (1976) 53.

<sup>189</sup> *Ibid.*

<sup>190</sup> J Moyle *The Institutes of Justinian* 2.1.12-13 (Oxford 1913 at 37), quoted in: C Donahue ‘*Animalia Ferae Naturae*’ in R S Bagnall & W V Harris *Studies in Roman Law in Memory of A. Arthur Schiller* (1986) 42.

<sup>191</sup> *Ibid.*

Occupation (*'occupatio'*) comprised two 'elements': an act of the mind and an act of the body, *'animo et corpore'*.<sup>192</sup> The requisite *animus* being the intention to exercise the control which constitutes the *corpus*.<sup>193</sup> *Occupatio* was the acquisition of ownership of a thing which has no owner (a *'res nullius'*) by taking possession of it. A *res nullius* may either never have had an owner or have been abandoned by its owner,<sup>194</sup> but must be susceptible of ownership.

Contrast this to the English position of the time, where the law gave to the occupier of land rights to game on his land, so that if without this occupier's consent a partridge was shot on his land the partridge would immediately belong to such occupier and not to the successful hunter. Roman law had no such rules and the partridge would belong by the ordinary principles of *occupatio* to the hunter as soon as he had taken possession of it.<sup>195</sup> The capture of a wild animal would not therefore amount to theft<sup>196</sup> and, once captured, the wild animal would remain the property of the captor as long as the latter retained sufficient control over it as well as the intention to keep the animal for himself, the *animus occupandi*.<sup>197</sup>

It made no difference where a wild animal was captured. A successful hunter became the owner of the animal irrespective of whether it was captured on the hunter's own land, on the land of another or even on land belonging to the state. And the hunter would become owner of the

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<sup>192</sup> B Nicholas *An Introduction to Roman Law* Oxford: Clarendon Press, 1962 112-113.

<sup>193</sup> *Ibid* at 113.

<sup>194</sup> *Ibid* at 130-131.

<sup>195</sup> *Ibid* at 131.

<sup>196</sup> W A Joubert; L T C Harms; G J Pienaar & P J Rabie (eds) The Law of South Africa: Volume 1 (1993) 229.

<sup>197</sup> *Ibid* at 230.

captured animal even if the landowner had expressly forbidden hunting on his land.<sup>198</sup>

In Van Riebeeck's time racial issues had already arisen in regard to hunting. 'A particular cause for concern,' writes Rabie, 'was the hunting by slaves, hottentots and half-castes. Provision was accordingly made to restrain them in these activities.'<sup>199</sup>

Restrictions had in fact been imposed on hunting soon after 1652. In these early years of the Colony hunting was supposedly restricted to the Company's own three hunters, who supplied the Commander's kitchen.<sup>200</sup> Venison was supposed only to be obtained through the Company. The 1657 *Placaat* decreed that all shooting of birds and game animals was prohibited.<sup>201</sup>

Ivory trading was already a thriving concern. By September 1658 Van Riebeeck's Council was already trying to control the ivory trade. It was ordered that "tusks, horns and feathers" be sold directly to the Company only.<sup>202</sup>

By 1661, however, restrictions had been done away with and a *Placaat* said that every person should be allowed to shoot and trap as much game as was required for "household needs", with the only stipulation being that this not be done on privately owned land.<sup>203</sup> The effects of this

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<sup>198</sup> *Ibid.*

<sup>199</sup> Rabie *op cit* at 53.

<sup>200</sup> H H Curson & J M Hugo 'Preservation of Game in South Africa' in *South African Journal of Science* 21 (1924) 400 at 403.

<sup>201</sup> Pringle *op cit* at 23-26.

<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid* at 28.



policy were apparent within a few years, with very little game being left in the area of the Cape Colony.

In 1680 Governor Simon van der Stel introduced what Rabie calls 'the first comprehensive criminal prohibition on the unlawful hunting of wildlife'. In terms of this legislation, a licensing system was introduced and the hunting season was restricted to two months of the year. This introduced the first penalties against illegal hunting. Punishments included fines, confiscation of weapons and corporal punishment.<sup>204</sup>

The various governors (both Dutch and English) lamented the 'wanton' destruction of game. Penalties were increased - fines were doubled, corporal punishment introduced and then retained, forfeiture of rifles ordered, provisions continually enacted to curtail hunting by slaves and servants, muzzling of dogs ordered, and the purchase and sale of game meat were prohibited. Wide powers were given to officials to enforce these provisions.<sup>205</sup> "Unless steps are taken immediately," wrote Governor van der Stel, "there will be nothing left of the indigenous species as these will all be destroyed or driven away and the area ruined."<sup>206</sup>

Over the next two hundred years, the authorities (first Dutch and then British) made feeble attempts to curtail hunting and to restrict the destruction of wildlife. Their efforts were, however, always too little and too late. Enforcement was not effective and many legal restrictions were

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<sup>204</sup> *Ibid.*

<sup>205</sup> Rabie *op cit* at 53-54.

<sup>206</sup> Pringle *op cit* at 28.

enacted only after the animals they were designed to protect had already been driven out of the area or hunted into actual or virtual extinction. And the destruction continued.

The threat of fines had done nothing to prevent the smuggling of ivory from the Cape, and in 1753 new laws were published. These contained far harsher penalties. Persons found disposing of ivory other than through the Company itself were liable to banishment from the Cape. This applied to purchaser as well as to vendors. And petty officers or soldiers who negligently allowed ivory to bypass the Company's purchasers were liable to branding, flogging and lengthy periods in chains.<sup>207</sup>

Many of these measures will seem familiar to us from the chapter on poaching laws in England. And they had as little effect on the attitudes of those subject to them as did the English laws.

Governors Tulbagh, Van Plettenberg and Rhenius in the second half of the eighteenth century repeated van der Stel's warning, and asserted over and over that they would stamp out illegal hunting.<sup>208</sup> Despite this 'sound and fury', the illegal slaughter of game continued. The Dutch East India Company's concern, however, must be seen as motivated less by conservationist concerns than by concern for their own profit margins. By the close of the eighteenth century, the Company was virtually bankrupt - driven that way by its increasingly bureaucratic administration, competition from English, Danish and Chinese merchants, the cost of territorial rule in the East,

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<sup>207</sup> *Ibid* at 29.

<sup>208</sup> *Ibid*.

and the cost of the fourth Anglo-Dutch war (1780-1784).<sup>209</sup> And soon the administration of the Cape Colony was in English hands.

The first major piece of British colonial legislation in respect of game was a proclamation by Lord Charles Somerset in 1822. The preamble to this proclamation lamented that it was 'necessary to guard against the total destruction of game in this colony'.<sup>210</sup> The idea of the 'close season' was first introduced in this proclamation. Mostly, though, the Colonial administration simply repeated the *Placaaten* of the Dutch East India Company, which measures had already proved ineffective.

In 1822 the hippopotamus, the bontebok and the elephant were proclaimed "royal game" - they could be hunted only with a special permit from the governor. This was the first time that such a distinction had been made in South Africa. Again, nobody could hunt on private land without the owner's permission. And a licence was needed for hunting. A "close season" of five months was put in place. Hunting on Sundays was forbidden and slaves were not permitted to hunt.<sup>211</sup>

However, much of the apparent strictness of these provisions was rendered nugatory by a clause which stated that bona fide travellers beyond the Hottentots Holland Mountains, who were in need of food for their own consumption, were exempted.<sup>212</sup>

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<sup>209</sup> R Ross 'The Rise of the Cape Gentry' in *Journal of Southern African Studies* Vol.9, No.2, April 1983, 193 at 198.

<sup>210</sup> J M Mackenzie *op cit* at 202-203; Trapido *op cit* at 2-3..

<sup>211</sup> Pringle *op cit* at 35-36; Curson & Hugo *op cit* at 403.

<sup>212</sup> *Ibid; ibid.*

‘Lord Charles Somerset with his regency connections,’ comments Trapido, ‘must have thought himself in familiar territory ...,’ “... it is found,” one of his proclamations read, “that many idle and disorderly persons, of inferior classes of life, who ought to be dependent upon their industry, waste and misspend their time destroying Game.”<sup>213</sup>

Certain measures were taken, however, which can be seen as progressive toward eventual conservation legislation. In 1828, for example, an ordinance was enacted abolishing the system of paying rewards for the destruction of noxious animals.<sup>214</sup> Probably, though, this was due in large part to the paucity even of animals deemed ‘noxious’!

Gradually, conservation oriented ideas did begin to emerge at the Cape. Grove has argued that this followed a ‘global’ rise of environmental concern, influenced particularly by Darwinian theory in the decade 1863-1873. He argues further that conservation ideas grew out of new understandings of biodiversity, of evolutionary processes in plants and of recognition of the potential value of the Cape’s unique biota.<sup>215</sup>

MacKenzie, however, has argued strongly that early and mid-nineteenth century Cape

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<sup>213</sup> Trapido *op cit* at 2-3.

<sup>214</sup> Ordinance 45, 31<sup>st</sup> March 1828: “Whereas it is deemed unnecessary any longer to continue the rewards heretofore payable from the several district treasuries for the destruction of noxious animals: Be it therefore enacted, by His Honour the Lieutenant-Governor in Council, that from and after the passing of this Ordinance, the payment of all rewards heretofore granted and made payable by any law or ordinance for the destruction of noxious animals, of any kind or description, shall cease and determine.” By Authority *Statute Law of the Cape of Good Hope* (1862) 126-127.

<sup>215</sup> R Grove ‘Scottish Missionaries, Evangelical Discourses and the Origins of Conservation Thinking in Southern Africa 1820-1900’ in *Journal of Southern African Studies* Vol.15, No.2, January 1989, 163 at 175-177 and fn 59.

conservation measures stemmed from the desire of the ruling elite to arrogate hunting rights to themselves.<sup>216</sup> Certainly, the very early laws had been concerned with the well being of the Dutch East India Company, and with the interests of powerful private individuals, with no record of any concern beyond that of self-interest. ‘The ethics of conservation,’ comments Pringle, ‘were a luxury reserved for later generations.’<sup>217</sup>

### 2.1.2 *Property rights to game*

In the Cape Colony, rich farmers had begun to assert themselves in the face of the waning strength of the Dutch East India Company, and to restructure class relations so that they started to form a ‘gentry’, with control over labour, land, public works and natural resources.<sup>218</sup>

A point of interest is that South Africa preceded England in granting property rights to game on private lands - proprietors and occupiers being given the right to “kill, destroy and drive forth” game from cultivated land.<sup>219</sup> But this is not really that surprising. In Roman-Dutch law the person who captures or controls a wild animal becomes its owner (at least until it escapes). The Normans had taken this right away from the Anglo-Saxons.

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<sup>216</sup> *Ibid* at 177; and see Mackenzie *op cit* generally.

<sup>217</sup> Pringle *op cit* at 23-26.

<sup>218</sup> Ross *op cit* at 193-197.

<sup>219</sup> Mackenzie *op cit* at 203.

### 2.1.3 *Expansion and philosophy*

It is important to keep in mind an awareness of the expansionist philosophy of, especially, the English. From the earliest days (the 1830s onward) of expansion, there was an awareness that only certain people should be allowed to shoot game, even though the early explorers and writers enthused continually about how boundless it was. This shows either an awareness that the game was not boundless,<sup>220</sup> or the idea, perhaps imported from Britain, that only certain classes should be allowed to hunt. Trapido suggests that profit and glory were to be retained for the ruling class - he says that the other contenders for the right were the Afrikaners of the Zuid Afrikaanse Republiek (ZAR) and certain African chiefs.<sup>221</sup> In fact, there was also the African populace as a whole, who were often blamed for the destruction of game even though they did little damage by comparison to the British or the Boers.

### 2.1.4 *Later game legislation*

Conservation concerns did not die at the Cape as the game diminished in the nineteenth century. In the 1850s and 1860s there were debates, commissions and concerns raised about such facets of conservation as overgrazing, protection of forests, irrigation and rights of access to water.<sup>222</sup> However, until fairly late into the 1800s, there was little activity in game protection laws in the

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<sup>220</sup> Trapido *op cit* at 4.

<sup>221</sup> *Ibid.*

<sup>222</sup> W Beinart 'Men, Science, Travel and Nature in the Eighteenth and Nineteenth-Century Cape' in *Journal of Southern African Studies* Vol.24, No.4, December 1998, 775 at 797.

Cape. By the time of the next important statute, the Act for the Better Preservation of Game 1886, there was very little wildlife left in the Cape.<sup>223</sup> However, this Act (in one of the first examples of that great South African tradition of misnaming Acts) actually extended the rights of landowners to shoot game, stating that “[n]o landowner shall require a game licence for the purpose of shooting game on his own land.”<sup>224</sup>

This despite the fact that the ZAR and the Orange Free State had introduced game laws in the middle of the century.<sup>225</sup>

By the time of the 1886 Act, there was precious little game left in the vicinity of Cape Town. Hares and game birds represented about all that sportsmen could expect to find. Nevertheless, the 1886 Act gave special protection to such species as hippo, buffalo, zebra, quagga and wildebeest. In any case, quaggas were no more, the nearest hippos were 600 kilometres away in the Orange River and the few remaining buffalo were hiding in the densest bush they could find.<sup>226</sup>

Of interest was a provision which intruded somewhat on the common law status of game as *res nullius*: “7. No person shall at any time, either with or without a game licence, kill, catch, capture, pursue, hunt or shoot at any game or with gun or dog trespass on any lands within this Colony, without the permission of the owner of such lands, if private property, under the penalty of any

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<sup>223</sup> Mackenzie *op cit* at 204. Act No. 36 of 1886.

<sup>224</sup> *Ibid.* Section 16.

<sup>225</sup> *Ibid* at 204.

<sup>226</sup> Pringle *op cit* at 63.

sum not exceeding five pounds sterling for the first offence ...”<sup>227</sup> .

The Act functioned therefore to bring the legal position somewhat closer in line with English law.

The idea of the license was entrenched: “4. No person shall, save as is hereinafter provided, kill, catch, capture, pursue, hunt, or shoot at, sell, hawk, or expose for sale, game in any part of this Colony, without having previously obtained a game licence, ...”<sup>228</sup>

The Act stated that: “7. ... no penalty under this section shall in any case be enforced unless notice and warning shall have been given, either personally or by letter, or in the *Gazette*, or in a local newspaper by the owner that he is desirous to preserve the game thereon.”<sup>229</sup> No mention is made in the Act of confiscation of the carcass of an animal killed in contravention of the section and the common law position therefore persisted in this regard - the hunter retaining his ownership acquired by *occupatio*.

It can be argued that the British Colonial authorities were attempting to meld their own anti-poaching techniques, and ideas of restrictions on access to game, with the Roman-Dutch common law - direct overruling of which would have been too politically sensitive.

Curiously, after the 1886 Act there was a ‘flurry of legislative activity’ in the Cape.<sup>230</sup> In 1891, for

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<sup>227</sup> Act No. 36 of 1886 - H Tennant & E M Jackson (eds) *Statutes of the Cape of Good Hope 1652-1895 Vol.II, 1872-1886* (1895) 2421.

<sup>228</sup> Act No. 36 of 1886 *supra* at 2420.

<sup>229</sup> *Ibid* at 2421.

<sup>230</sup> Mackenzie *op cit* at 204.



instance, the Game Law Amendment Act increased the penalties laid down in the earlier Act. 'Landed gentry' were, however, still catered for. Farmers were still permitted to shoot elephant on their own land, even though there were hardly any elephants left: "1. ... landed proprietors and persons authorised by them shall, without having such special permission, be at liberty to shoot elephant upon the property of such landed proprietors."<sup>231</sup>

And from the 1890s many of the principles first laid down in the Cape Acts spread to the other colonies.<sup>232</sup>

In Natal, for instance, where Game Laws were introduced in 1890, 1891 and 1906. African hunting techniques were prohibited in 1891 - these usually involving 'engines' such as nets, springs, snares, traps and sticks. As in the Cape, landowners' rights were affirmed. A close season was established.<sup>233</sup>

The close season idea had never really taken root in England - although there were intimations of it, such as the not hunting of certain animals in certain conditions.<sup>234</sup> There were also certain informal, and occasionally quaint, curtailments - like the beliefs of poachers that one ought not to hunt rabbits in months without an 'r'!

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<sup>231</sup> Act No. 38 of 1891 - H Tennant & E M Jackson (eds) *Cape of Good Hope Acts of Parliament* (1896) 2943-2944.

<sup>232</sup> Mackenzie *op cit* at 204.

<sup>233</sup> *Ibid* at 204-205.

<sup>234</sup> See *supra* page 9, fn 39.

By the 1906 Act, special permission had to be obtained to shoot game which was attacking crops. And some animals were not subject to such permission - including springbok, eland, roan, elephant and white rhinoceros.<sup>235</sup> And the 'schedule' idea came into vogue - the idea of dividing animals into classes for protective purposes. Also in 1906, a prohibition was laid down on employing natives to hunt game, which effectively ended the system of 'subcontracting' that had been used in Natal for several decades.<sup>236</sup>

#### 2.1.5 *Later Cape Colony legislation, German influence, and the London Convention*

With certain additions and amendments by Acts in 1891, 1899 and 1908, the 1886 Act remained in force in the Cape until 1909, when it was replaced by the Game Act, 11 of 1909.<sup>237</sup>

Curiously, the British chose to be markedly influenced by the Germans (via East Africa) in their choices in regard to conservation measures in the 1890s.<sup>238</sup>

The conclusion of this acceleration of conservation measures in British and German territories in the 1890s was the 1900 London Convention. This emerged from a German proposed Conference and suggested that all colonial powers should introduce game regulations. Most parties never ratified the Convention, but the Germans and British did so enthusiastically.<sup>239</sup> In most British

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<sup>235</sup> Mackenzie *op cit* at 204-205.

<sup>236</sup> *Ibid.*

<sup>237</sup> Curson & Hugo *op cit* at 403-404.

<sup>238</sup> Mackenzie *op cit* at 205.

<sup>239</sup> *Ibid* at 207-209.

colonies, Africans were excluded from hunting and Europeans were divided into different categories for the issuing of hunting licences.<sup>240</sup> As always, private land was exempted from the provisions of the Convention.<sup>241</sup>

It seems that the ideas of class and privilege are never far from game legislation.

In 1908 the Gordonia-Kuruman Game Reserve was formed, but about two-thirds of the original area was shortly afterwards deproclaimed and used for farmland. It was never in any case a reserve easy to protect from poachers, as its boundaries were ill-defined and it had no proper rangers, relying instead on police patrols for its protection.<sup>242</sup>

## 2.2 Africans before colonisation: - philosophies of hunting, poaching, and game use

Before Europeans arrived in South Africa, the indigenous peoples do not seem to have made too much of an impact on the numbers of wildlife. 'Even as hunter-gatherers,' says Glavovic, 'the impact of humans on their natural surroundings was minimal.'<sup>243</sup> It has been suggested that this was because, even though humans hunted from the earliest days, the sheer numbers of animals, the primitive weapons available, and the lack of a steady market (except for ivory), prevented them from destroying wildlife on a grand scale.<sup>244</sup> But they certainly supplemented their agro-

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<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid* at 217-218.

<sup>242</sup> Curson & Hugo *op cit* at 405.

<sup>243</sup> P D Glavovic 'An Introduction to Wildlife Law' in (1988) 105 *South African Law Journal* 519 at 523.

<sup>244</sup> E J Carruthers & U de V. Pienaar 'Wildbewing in die Transvaal 1846-1898 en proklamasie van die Sabie-wildreservaat' in U de V. Pienaar (ed) *Neem Uit die Verlede* (1990) 320 at 320.

pastoral activities with hunting.<sup>245</sup>

Hunting methods were 'primitive' - involving the use of traps, spears, poisons and so forth.<sup>246</sup>

This was certainly the view of early European conservationists. Stevenson-Hamilton wrote, for example, of African tribes north of the Olifants, such as the Amagwamba and ba-Venda, which held great game drives and forced more animals than they needed into pits, leaving the unwanted animals at the bottom of the pit to die slowly. "They are seldom cruel of purpose," he wrote, "but they are shockingly callous to pain in other human beings and in the lower animals."<sup>247</sup>

It has, however, been suggested that modern ecological and conservationist science sometimes bears greater resemblance in its conclusions to African rural thinking than to technocratic modern Western ideas.<sup>248</sup> Further, that pre-colonial ecological patterns were almost totally displaced by conquest, and the 'biological ancien regime' shattered.<sup>249</sup> But there is only fragmentary evidence for 'articulated protectionist structures' and the concepts of preservation and 'wise-use' do not seem to have been much in evidence.<sup>250</sup>

Hunting was probably an important part of the pre-colonial African economy, but lessened in

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<sup>245</sup> *Ibid.*

<sup>246</sup> E J Carruthers *Game Protection in the Transvaal 1846 to 1926* (1995) 7.

<sup>247</sup> J Stevenson-Hamilton *The Low-Veld: Its Wild Life and Its People* (1929) 200.

<sup>248</sup> W Beinart 'Introduction: The politics of Colonial Conservation' in *Journal of Southern African Studies* Vol.15, No.2, January 1989, 143 at 146.

<sup>249</sup> *Ibid* at 146-147.

<sup>250</sup> Carruthers *Game Protection* (1995) *op cit* at 7.

importance as African peoples became increasingly agricultural, game legislation was imposed and human settlements became separated from wildlife.<sup>251</sup> This, however, should not obscure the importance of hunting to the African economy in the past, before the full impact of colonisation was felt.<sup>252</sup> The meat of almost all wild animals was eaten, certain predators even, and formed an important supplement to peoples' diet.<sup>253</sup>

Although there doesn't seem to have been much of a protectionist ethos, Trapido suggests that it has been convincingly argued that chiefs did much to ensure centralisation of and control of game - declaring many species to be 'royal game'. Some preservationist regimes were even established which must be said to be amongst the first ever in Africa.<sup>254</sup> Certain animals became associated with chieftainship and some were even the perquisites of chiefs.<sup>255</sup>

It has been suggested also that, as to African perceptions of game, wildlife was there to be used, it could not possibly run out, and therefore the need for protection was not endorsed.<sup>256</sup> Indigenous law in South Africa does sometimes contain sanctions to prevent damage to private or communally owned animals or plants, but this cannot be said to be part of an advanced conservationist policy.<sup>257</sup>

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<sup>251</sup> Mackenzie *op cit* at 55.

<sup>252</sup> *Ibid* at 68.

<sup>253</sup> J M T Labuschagne & C C Boonzaier 'African Perceptions and Legal Rules Concerning Nature Conservation' in (1998) 5 *South African Journal of Environmental Law and Policy* 53 at 59.

<sup>254</sup> Trapido *op cit* at 7.

<sup>255</sup> *Ibid*.

<sup>256</sup> Labuschagne & Boonzaier *op cit* at 63-64.

<sup>257</sup> *Ibid* at 69-70.

Poachers in the African community are regarded as hunters and not as thieves. As such, they enjoy a relatively high degree of esteem in their communities.<sup>258</sup> In fact, Steele suggests that there is no Zulu word for 'poacher' and that captured poachers did not see themselves as poachers in the Western sense of the word. They were frustrated sportsmen taking what had always been there for the taking.<sup>259</sup>

So what we see is a similar ethos to that of the Anglo-Saxons, with wild animals having the status of *res nullius*.

Mackenzie suggests that hunting was a product of necessity, sometimes even the main resource in an area - but that it represented also an elite preference for pleasure, profit and patronage. In fact, that its importance might even lie in this wide range.<sup>260</sup>

## 2.3 Colonial expansion

### 2.3.1 *The destruction of game*

As with the American frontier, the hunter became the distinctive figure. There was little in the way of authority, and what there was (by way of Bastard or African political systems) could be easily

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<sup>258</sup> *Ibid* at 59.

<sup>259</sup> N Steele *Poachers in the Hills: Norman Deane's Life in Hluhluwe Game Reserve* (1992) 28.

<sup>260</sup> Mackenzie *op cit* at 79-81.

flouted.<sup>261</sup> In both places, the wildlife was simply and wastefully shot out. Perhaps partly, in both countries, as a reaction to the restrictions on hunting and owning weapons in England.

Hunting was a vital, crucial, support for expansion. Exploration and hunting went hand in hand. Hunting supported Europeans by paying labour, enabling them to support themselves, and encouraging trade. Without hunting, colonisation would have been far more difficult.<sup>262</sup> Trade in particular - as it always seemed to be ivory hunters who led the way, with expansion occurring in the wake of the retreat of the elephants. And ivory underpinned missionary activity, prospecting, commercial expansion and even settlement.<sup>263</sup>

‘The game was simply worked out,’ says Mackenzie, ‘like a mineral seam.’<sup>264</sup> By the 1890s the wildlife of the four South African colonies had been almost entirely ‘mined’. Between 1860 and 1885 game disappeared from Natal almost entirely. By the 1880s there was almost no game between Kimberley and Pretoria. The Orange Free State wiped its game out in about twenty years.<sup>265</sup> As Stevenson-Hamilton put it, “[f]rom the early ‘seventies onwards, the game gradually receded more and more to the east, until, by 1899, south of the Pretoria-Delagoa Bay Railway, and west of the Selati line, the larger types had practically been exterminated, and elsewhere were confined to a comparatively narrow strip abutting on the Portuguese Border.”<sup>266</sup>

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<sup>261</sup> *Ibid* at 50, 89.

<sup>262</sup> *Ibid* at 116-117.

<sup>263</sup> *Ibid* at 121.

<sup>264</sup> *Ibid* at 116.

<sup>265</sup> *Ibid* at 110-111.

<sup>266</sup> Stevenson-Hamilton *op-cit* at 62.

### 2.3.2 *Colonials and Africans: conflict and cooperation over game*

Delius argues that the *Voortrekkers* in the Transvaal were not trying to escape from the world economy but to forge independent links with it. Hunting, and ivory trading in particular, was vital to this. Ivory was vital to the attempts to establish a trading link with Delagoa Bay in Mozambique and for the procurement by trade of many necessities, such as arms and ammunition.<sup>267</sup>

On arriving in the Transvaal, the *Voortrekkers* suffered from a labour shortage - in the Cape they had had a large pool of labour from which to draw, by way of slavery, 'clientage' and indenture. There was no equivalent supply in the Transvaal.<sup>268</sup>

The Boer economies relied heavily on the products of hunting, but true profit would not have been possible in the absence of African collaboration. Close relationships with black communities were established in this regard. 'Tribute', for example, 'was often paid to the Boer states by black clients in the form of ivory and game products.'<sup>269</sup> And Boer communities began to train and include in their hunting parties black auxiliaries ('*zwarteskutters*')<sup>270</sup> - as had happened in England, where gentry with the qualifications to hunt had operated a system of patronage and tribute with non-qualified persons.

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<sup>267</sup> P Delius *The Land Belongs To Us: The Pedi Polity, the Boers and the British in the Nineteenth-Century Transvaal* (1983) 33-34.

<sup>268</sup> *Ibid* at 34.

<sup>269</sup> Carruthers *Game Protection* (1995) *op cit* at 20.

<sup>270</sup> *Ibid* at 20-21.



'Zwarteskutters' also operated independently, bringing in elephants and hippos for paltry rewards. Whites became heavily dependent on these independent expeditions (whites not liking to hunt on foot, to enter malaria-risk areas or to be away from home for long periods) despite being perpetually worried about giving firearms into black hands.<sup>271</sup>

The Africans actually turned out to be more efficient hunters, much of the time, and white trade boomed. But Africans, suggests Mackenzie, began to win back control of the hunting resource by dint of scarpering with many of the firearms they were given.<sup>272</sup>

It seems, writes Carruthers, that there had been no strong indigenous hunting ethic prior to colonial expansion - Africans hunted with great enthusiasm and much wastage when they acquired firearms.<sup>273</sup>

### 2.3.3 *The need for hunting to underpin expansion*

Hunters provided much information about new areas, the people there and the resources. And ivory and rhinoceros horn acted as an important subsidy to expansion.<sup>274</sup> Meat was no less significant, although a less direct subsidy.<sup>275</sup>

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<sup>271</sup> *Ibid.*

<sup>272</sup> Mackenzie *op cit* 109-110.

<sup>273</sup> Carruthers *Game Protection* (1995) *op cit* at 22.

<sup>274</sup> Mackenzie *op cit* at 130.

<sup>275</sup> *Ibid* at 298.

The Boer 'trek-farmers' were largely self-sufficient but needed ready money for certain 'necessities', which were expensive because of the distances they had to be brought. And the products of hunting brought in their only ready money.<sup>276</sup>

But as time went on so the killing of animals began to lose economic and to assume ritual significance. And legislation focused on preserving animals for a specific purpose, rather than for preservation's own sake. Declining resources were almost always blamed on African hunters and much legislation focused on preventing African access to wildlife.<sup>277</sup>

#### 2.3.4 *Early colonial hunters: no legislation!*

William Cornwallis Harris visited the Transvaal in 1836, and abandoned completely the 'well-established hunting ethics of Europe which were upheld by his own class of English gentleman'. His hunting forays took on the proportions of shooting orgies during which he killed hundreds of animals, frequently leaving their carcasses ...<sup>278</sup>

The principal attraction of the Transvaal was the lack of legislative restraint. There were no customary restraints either. There were no gamekeepers and no landowners. In short, there were no hunting restrictions at all.<sup>279</sup>

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<sup>276</sup> A P Cartwright & N Cowan *The Old Transvaal 1834-1899* (1978) 14.

<sup>277</sup> Mackenzie *op cit* at 298.

<sup>278</sup> Carruthers *Game Protection* (1995) *op cit* at 15. (I am not certain what Carruthers means here - although the concept of the 'grand battue' came later, the English upper-class was hardly renowned for its restraint in shooting game.)

<sup>279</sup> *Ibid.*

‘Into this scene came blithely wandering a new character, in the person of W.C. Harris: an Indian Army officer with nothing better to do than while away his time in shooting animals.’<sup>280</sup> And this he did with great enthusiasm, the slaughter tempered only by his desire to record accurately and paint the animals he killed. By the time he left Cape Town to return to Bombay in December 1837, eleven months after his first safari ended, he had lived beyond his wildest fantasy, and was to create them for others. His art and his adventures popularised and set the standard for future safaris.<sup>281</sup>

With Harris’s bloodthirsty attitude, but without his artistic talent, followed Roualeyn Gordon Cumming. Inspired by Harris’s accounts, Cumming resigned his army commission and launched himself on what may well be the longest safari ever undertaken, spending five years (1844-1849) tracking and killing.<sup>282</sup> Making full use of his Scots ancestry to ingratiate himself with Dutch farmers and African chieftains alike, Cumming rampaged through the bush in a kilt, his long red beard flowing, in an orgy of slaughter.<sup>283</sup>

For Harris, Cumming and others like them, such as Adulph Delegorgue in Natal, Africa was an escape from the rigid social regimentation and the control of metropolitan society at home.<sup>284</sup> And they were merely the precursors of an extraordinary number of hunters, both Dutch and British, who pushed the game frontier ever deeper into the continent,<sup>285</sup> illustrating as they went just how

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<sup>280</sup> T V Bulpin *Lost Trails of the Transvaal* (1956) 63.

<sup>281</sup> B Bull *Safari: A Chronicle of Adventure* (1988) 47.

<sup>282</sup> *Ibid* at 52.

<sup>283</sup> *Ibid* at 54.

<sup>284</sup> Beinart ‘Introduction: The Politics of Colonial Conservation’ *op cit* at 149.

<sup>285</sup> J M Mackenzie *Empires of Nature and the Nature of Empires: Imperialism, Scotland and the Environment*

rapacious settler hunting could be.

## 2.4 Settlement in the interior

### 2.4.1 *Earliest Voortrekker legislation*

There is some evidence of very early protectionist policy by the *Voortrekkers*. In 1837 Piet Retief tried to impose fines on those who killed game unnecessarily.<sup>286</sup> But there was not much more done than this.

In 1846 the *Voortrekkers* under Andries Ohrigstad passed the first legal instrument in the Transvaal in regard to wild animals, but in contrast with the Cape legislation (which was designed to protect game for certain groups, albeit with major concessions to landowners) this *Volksraad* resolution was essentially designed to enable a maximum number of people to benefit from a diminishing resource. The resolution was concerned solely with preventing waste and enjoined hunters to kill only what they needed (but this amount was not defined).<sup>287</sup>

A second resolution prohibited foreigners from hunting in the Ohrigstad area.<sup>288</sup> Neither of these resolutions was enforced with any vigour.<sup>289</sup>

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(1997) 47.

<sup>286</sup> Carruthers *Game Protection* (1995) *op cit* at 16.

<sup>287</sup> *Ibid* at 17.

<sup>288</sup> *Ibid* at 17-18.

<sup>289</sup> *Ibid* at 19.

These were measures which can be said to have reflected the particular circumstances of the Transvaal then. They were not alien policies. The teeming herds of wildlife, of course, appeared inexhaustible.<sup>290</sup>

For the indigenous populations, not a lot changed initially. Eventually, however, the introduction of 'modern' firearms was to change everything.<sup>291</sup>

The methods used by early legislation tended to concern issuing ordinances prohibiting people from hunting, or putting limitations on the types of animals that could be hunted, or putting close seasons in place.<sup>292</sup>

Coming from the Cape, the *Voortrekkers* were obviously well used to game legislation and soon put their own in place. Large areas were still under black control, though, and this legislation was of dubious effect.<sup>293</sup> Interestingly, though, Carruthers and Pienaar comment that it must be remembered that the Transvaal communities of the time were egalitarian in nature. That they did not have, as in Europe, a tradition of a landed aristocracy with the power to enclose lands and put gamekeepers in place and pass laws to keep others out.<sup>294</sup>

Carruthers suggests, however, that 'although the prevention of waste of a valuable commercial

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<sup>290</sup> *Ibid* at 11.

<sup>291</sup> J H Eloff 'n Nuwe Orde: swart indringing en kolonisasie van die Laeveld' in U de V. Pienaar (ed) *Neem Uit die Verlede* (1990) 45 at 45.

<sup>292</sup> Carruthers & Pienaar *op cit* at 321.

<sup>293</sup> *Ibid*.

<sup>294</sup> *Ibid*.

resource was one reason for the introduction of early game protective legislation in 1846 and 1858, there was a concurrent desire to restrict access to that resource to the group which wielded the most political and economic power.<sup>295</sup>

#### 2.4.2 *Mid-century legislation in the Transvaal*

The 1846 legislation was specifically put in place to prevent people from outside of the colony from dipping into an important natural resource.<sup>296</sup> But in practice the law proved impossible to operate. Many Boer hunters depended on trade with the British. And many were actually financed by British traders.<sup>297</sup>

Trapido suggests, on the other hand, that Boer hunters far outnumbered British and that the mid-century legislation (1858) was aimed at preventing the Boers from destroying their own resource.<sup>298</sup> Subsistence needs were intended to determine quantities, but this proved entirely impossible to enforce.<sup>299</sup>

The 1858 law aimed also at controlling 'zwarteskutters' - by requiring them to have white overseers, not to be out at night, to be registered with a magistrate, and for each white not to employ more than two. But these laws were never enforced - partly because local officials were

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<sup>295</sup> E J Carruthers 'Creating a National Park, 1910 to 1926' in *Journal of Southern African Studies* Vol.15, No.2, January 1989, 188 at 190.

<sup>296</sup> Carruthers & Pienaar *op cit* at 321.

<sup>297</sup> Trapido *op cit* at 7-8.

<sup>298</sup> *Ibid.*

<sup>299</sup> *Ibid.*

themselves hunters, and partly because the 'zwarteskutters' were becoming less dependent.<sup>300</sup>

The hunting legislation had arisen from a public meeting in March 1857 in Schoemansdal, and its purpose appeared to be humanitarian - consideration for the white population. Elephant hunting was forbidden during the seven warmest months of the year, when malaria was at its height, although subsistence hunting and salt-collecting were still allowed in the hunting grounds and so the law was impossible to enforce. Carruthers comments that the second main reason for the legislation was related specifically to the decline of wildlife species. She writes that in an attempt to combat this problem, the 'age-old device of reserving the commodity in short supply to the ruling classes was implemented. Most of the 1858 law thus related to preventing blacks having easy access to marketable wild animals, and game was set on its way towards becoming a resource for the exclusive use of whites.'<sup>301</sup>

The law proved, however, to be ineffective - as usual with early South African game legislation. Fines were heavy, but administration was weak and detection and punishment not enforced. The most important reason for the failure of the law was probably, though, the simple fact that the economy was at the time still heavily reliant on wildlife products, and without the continual slaughter of wildlife and the arming of black auxiliaries the 'peripheral settlements' of the Transvaal could not have sustained themselves.<sup>302</sup> In 1865 the Transvaal civil war was over and an attempt was made to enforce the hunting law and collect fines under its provisions. A group from

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<sup>300</sup> *Ibid.*

<sup>301</sup> Carruthers *Game Protection* (1995) *op cit* at 26.

<sup>302</sup> *Ibid* at 28.

Schoemansdal illustrated the general attitude to the law by claiming that they did not know that it was still in force, for it had never been applied in the past and that if it were now to be applied it would cause great hardship.<sup>303</sup>

#### 2.4.3 Attempts to enforce the mid-century legislation

It was obvious by the late 1860s that the 1858 legislation had not been successful. Additions to the game law were therefore proposed, and in 1870 these proposals were published in the *Staatscourant*. An interesting point is that one of the proposals was to make it an offence for anyone knowing of an infringement of the game laws, and not bringing it to the attention of the authorities, to be guilty of an offence. This suggests strongly that a blind collective eye was being turned by the Transvaal citizenry to abuses of the game law; probably because, as Carruthers suggests, the killing of wild animals 'did not carry the opprobrium of a crime'.<sup>304</sup>

Curson and Hugo reach a different conclusion, however. They suggest that because the same penalties were imposed in Act 10 of 1870 as had been imposed by the 1858 game law, game must still have been abundant.<sup>305</sup>

In 1874, however, an important amendment was introduced to the law of 1870, putting into place

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<sup>303</sup> *Ibid* at 29.

<sup>304</sup> *Ibid* at 34.

<sup>305</sup> Curson & Hugo *op cit* at 417.



a close season - unless a permit was obtained.<sup>306</sup> In 1891 a new game law repealed former game laws, and made the holding of a licence mandatory for all species of game and birds, while forbidding entirely the hunting of elephants and hippopotami.<sup>307</sup> However, many established ideas remained in place - such as the 'single wagonload' for 'own consumption'.<sup>308</sup>

In 1893 a further law added to this list of prohibited animals buffalo, eland, giraffe and rhinoceros.<sup>309</sup> In 1894 this prohibition was repeated and strengthened. Ostriches (including their eggs) were added to the list of animals given complete protection.<sup>310</sup>

#### 2.4.4 Voortrekkers and Africans: cooperation and conflict

Bulpin comments ironically on the Sekhororo tribe watching the whites anxiously - having already made a character judgement and fearing being put to work!<sup>311</sup>

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<sup>306</sup> *Ibid* at 417-418.

<sup>307</sup> *Ibid* at 417-418. See H J Coster (reg.) *De Locale Wetten en Volksraadsbesluiten der Zuid-Afr. Republiek Gedurende de Jaren 1890, 1891, 1892 en 1893* (1894) 148-151. "Wet No. 6, 1891 (Zijnde wijziging van Wet No. 10, 1870) Tot Betere Regeling der Jacht op Alle Soorten Wild en Gevogelte in de Zuid-Afrikaansche Republiek. ... 1. Het jagen, dooden of vernielen, op welke wijze ook, van olifanten en zeekoeien, is geheel verboden in de Zuid-Afrikaansche Republiek. ... 2. Niemand zal gerechtigd zijn eenig wild en gevogelte te dooden, te vangen of te vernielen, tenzij hij voorzien is van eene licentie voor het jagen in de Zuid-Afrikaansche Republiek ...".

<sup>308</sup> *Ibid* at 149 (Wet No. 6, 1891) "... 5. Niemand zal gerechtigd zijn meer wild op eenige wijze te dooden, dan hij volstrekt tot zijne consumptie noodig heeft, of op een wagen kan laden, of wild te dooden alleen tot het verkrijgen der vellen, terwijl men het vleesch met opzet in het veld laat liggen."

<sup>309</sup> Wet No. 13, 1893. H J Coster (reg.) *supra*. See Curson & Hugo *op cit* at 417-418.

<sup>310</sup> Wet No. 5, 1894 "(Zijnde wijziging van Wet No. 6, 1891) Regellende de Jacht op Wild, Enz. ... 1. Het jagen, dooden of vernielen, op welke wijze ook, van olifanten, zeekoeien, buffels, elanden, kameelen, rhenosters en struisvogels, is geheel verboden in de Zuid-Afrikaansche Republiek". H J Coster (reg.) *De Locale Wetten en Volksraadsbesluiten der Zuid-Afr. Republiek 1894* (1895) 49.

<sup>311</sup> Bulpin *op cit* at 75.

There was conflict over resources, especially with the Vendas.<sup>312</sup> And there was conflict when 'zwarteskutters' did not return guns.<sup>313</sup> And the *Volksraad* (Ohrigstad) began (1858) to try to control 'zwarteskutters' more firmly. To control the trade in arms and ammunition to blacks. To register them with the *landdrost*. To have them supervised.<sup>314</sup> The trouble was that the game was dwindling, and fingers were always pointed first at the blacks as easy scapegoats.<sup>315</sup>

Every year more and more heavy elephant guns were handed out and not returned. The powerful Venda tribe became well armed and expert shots.<sup>316</sup> 'The demise of the community of Schoemansdal,' writes Carruthers, 'finally came at the hands of the Venda who had acquired firearms in the course of their collaboration with the whites in hunting activities' - both because of African resistance to white domination and expansion, and because of African domination of hunting.<sup>317</sup>

Thirteen of nineteen articles in the 1858 game law referred to black auxiliaries, including prohibitions on their hunting alone unless they were "trusted servants" and in possession of documents ("passes"), reducing their numbers to two per white hunter, and registering of their details with the *Landdrost*.<sup>318</sup> Provisions such as these show something perhaps of the fear of

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<sup>312</sup> Carruthers & Pienaar *op cit* at 322.

<sup>313</sup> *Ibid.*

<sup>314</sup> *Ibid.*

<sup>315</sup> *Ibid.*

<sup>316</sup> Bulpin *op cit* at 151.

<sup>317</sup> Carruthers *Game Protection* (1995) *op cit* at 31.

<sup>318</sup> *Ibid* at 26. See F Jeppe & J G Kotze *De Locale Wetten der Zuid Afrikaansche Republiek 1849-1885* (1887) 106-109 "Wet: Tot Betere Regeling der Jagt op Olifanten en ander Wild in de Zuid Afrikaansche Republiek 1858 ... 3. Dat niemand geregtigd zal zijn een jagtkaffer of andere zwart persoon mede te nemen op olfantsjagten, zonder dat hij behoorlijk bij den Landdrost geboekt is, ... 8. Dat de Landdrost een behoorlijk register zal houden van alle

white settlers and the importance of the possession of firearms on a turbulent frontier.

The 1858 law is yet another example of reserving the commodity in short supply to the ruling class. Most of the law was related to preventing blacks from having access to marketable wild animals. So the law was designed more to control hunting by blacks than to prevent overexploitation by whites.<sup>319</sup> But there was no way to enforce the law.

There was, however, also cooperation. There were petitioners to the *Volksraad* who wanted to take black hunters into service.<sup>320</sup> 'Zwarteskutters' would go off into the bush for many unpleasant months and come home with ivory and skins, at minimal cost to the Boers.<sup>321</sup> And the larger the numbers of blacks assisting in the hunt (sometimes as many as two or three hundred per white hunter) the greater the number of wild animals that could be 'harvested'. Because of this, restraints on the numbers of black assistants allowed were never going to be universally popular with whites.<sup>322</sup>

Incredible quantities of elephants were killed - some many hundreds of miles from home, and in inaccessible places. This brought Schoemansdal, for example, its prosperity and the whites owed this in large measure to the black hunters.<sup>323</sup>

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zoodanige gekleurde schutters ... 13. Niemand zal aan een Kaffer of anderen kleurling in een kraal wondende, vuurwapen of ammunitie, van welken aard ook, mogen verkoopen, ...".

<sup>319</sup> Carruthers *Game Protection* (1995) *op cit* at 26.

<sup>320</sup> Carruthers & Pienaar *op cit* at 322.

<sup>321</sup> Bulpin *op cit* at 150.

<sup>322</sup> Carruthers *Game Protection* (1995) *op cit* at 28.

<sup>323</sup> Bulpin *op cit* at 150.

In the game law of 1891 the *Volksraad* considered it necessary to repeat many of the extant provisions restricting black hunting. In fact, to attempt to strengthen these - providing even that blacks found hunting with the requisite passes be apprehended and taken to the nearest magistrate, there to justify their hunting.<sup>324</sup>

#### 2.4.5 *The shift away from an economy based on hunting*

‘No exertion was necessary,’ remark Curson and Hugo, ‘to make ends meet in those far off days; a buck was sufficient to provide many a meal, while the hide could be manufactured into apparel, footwear, etc. If necessaries such as powder and lead were required, hides, “*rieme*” or “*voorslae*” would be used for bartering purposes.’<sup>325</sup>

However, trade in ivory and other hunting products began to decline, from as early as the 1850s and 1860s in fact. Cattle and sheep farming became more popular.<sup>326</sup> People lived very simple farming lives - they were, in Bulpin’s words, ‘the greatest land-owning peasants in the world.’<sup>327</sup> And they weaned themselves away from a reliance on hunting.

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<sup>324</sup> Wet No. 6, 1891 “... 14. Alle kaffers of ander kleurlingen binnen de districten van vuurwapens voorzien, op wild gevogelte jagende, met of zonder pas, zullen, indien mogelijk, geapprehendeerd (gevat) en voor den naastbijzijnden rechter bezorgd worden, om rekenschap van zichzelf te geven. ... 15. Niemand zal aan een kaffer of anderen kleurling in een kraal wonende, vuurwapens of ammunitie van welken aard ook, ten geschenke, in gebruik of in bewaring geven, om wild te jagen of te doden, of op eenige andere wijze in diens bezit brengen of laten, ...”.

<sup>325</sup> Curson & Hugo *op cit* at 401.

<sup>326</sup> Delius *op cit* at 126-127.

<sup>327</sup> Bulpin *op cit* at 109.

#### 2.4.6 Increased legislation

Wildlife continued to decline and, in 1870, the Volksraad appointed 'jagopsieners' to attempt law enforcement.<sup>328</sup> Before this, in the 1860s, landowners began to issue statements that they would no longer permit hunting on their lands - Trapido comments on this that where previously the right of the poor to hunt for food had not been challenged, the process of reconstituting wildlife as private property had now begun.<sup>329</sup>

The Soutpansberg law had been pretty ineffective, but was consolidated in 1870 setting out close seasons, placing limitations on black hunters, admonishing against waste, prohibiting more than one wagon-load being collected.<sup>330</sup> (Many provisions were unchanged from the 1858 law.) But at this early stage there was no particular legislative direction, and laws were made on an ad hoc basis and intended to give everyone (which meant every white person) equal access to what was still seen as a natural resource.<sup>331</sup> And without authorities to enforce them, laws meant little. Putting close seasons in place was all very well, but these did not count on private land.<sup>332</sup>

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<sup>328</sup> Trapido *op cit* at 8.

<sup>329</sup> *Ibid.*

<sup>330</sup> Carruthers & Pienaar *op cit* at 323. F Jeppe & J G Kotze *De Locale Wetten der Zuid Afrikaansche Republiek 1849-1885* (1887) 387-391. "Wet No.10, 1870 Tot het Beter Regelen der Jagt op Olifanten en Ander Wild in de Zuid-Afrikaansche Republiek: ... 1. Dat het jagten op olifanten wordt opengezet van den 15den Junij tot den 15den dag van October in elk jaar, ... 2. Dat niemand eenigen zwarte, van welke soort of natie ook, op olifantsjagten zal uitzenden, zonder bijzijn van ene blanke, ... 3. Dat niemand geregtigd zal zijn een jagtkaffer of ander zwart persoon mede to nemen op olifantsjagten, zonder dat hij behoorlijk bij den Landdrost geboekt is, ... 5. Dat niemand geregtigd zal zijn meer dan twee zwarte schutters met zich op een olifantsjagt mede to nemen, ... 7. Dat niemand geregtigd zal zijn, meer wild op eenige wijze te dooden dan hij volstrakt tot zijne consumptie nodig heeft, of op een wagen kan laden, of wild te dooden alleen tot het verkrijgen van de vellen, ...".

<sup>331</sup> *Ibid.*

<sup>332</sup> *Ibid.*

## 2.5 Game reserves begin to appear

### 2.5.1 Paul Kruger's concern for wildlife

“As ons hierdie klein deeltjie van die Laeveld nie sluit nie, sal ons kleinkinders nie weet hoe ‘n koedoe, ‘n eland of ‘n leeu lyk nie.”<sup>333</sup> That is the conventional view of the contribution of Paul Kruger, President of the Transvaal Republic, to conservation in Southern Africa.<sup>334</sup> In a history of the Kruger National Park, Labuschagne was to write of Kruger that ‘... [with] remarkable courage, conviction and foresight ... [i]n all the debates ... he emerged as a fanatical conservationist ...’.<sup>335</sup>

And Grobler points out that a great stumbling block confronting pro-conservationists was always that of the question of private ownership. Private owners had the right to hunt in their own land without licences, albeit in the open season only. Kruger, writes Grobler, argued in favour of all hunters being required to possess licences.<sup>336</sup>

Carruthers, however, points out that Kruger had argued that game was the property of the person

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<sup>333</sup> D Tattersall ‘Wildbewing in die Laeveld’ in C Barnard (Red) *Die Transvaalse Laeveld: Kamee van ‘n Kontrei* (1975) 70.

<sup>334</sup> Stephanus Johannes Paulus Kruger (1825-1904), President of the Transvaal Republic from 1883 to 1899.

<sup>335</sup> E J Carruthers ‘Dissecting the Myth: Paul Kruger and the Kruger National Park’ in *Journal of Southern African Studies* Vol.20, No.2, June 1994, 263 at 265. Carruthers incorrectly attributes this quote to former Prime Minister of South Africa, B.J. Vorster. The quote is from R J Labuschagne *The Kruger Park and Other National Parks* (19- Undated) 11-12, to which Vorster contributed a foreword.

<sup>336</sup> H Grobler ‘Dissecting the Kruger Myth With Blunt Instruments: a Rebuttal of Jane Carruthers’s View’ in *Journal of Southern African Studies* Vol.22, No.3, September 1996, 455 at 466.

‘whose grass provided that animal with fodder’, although Kruger did admit that “property” was not quite the correct word.<sup>337</sup>

Carruthers in fact shows fairly clearly that Kruger was not the “fanatical conservationist” he has been portrayed as. Kruger himself wrote of his early years that “[d]uring the first years of our settlement, as well as during our wanderings, it was our task to clear the recently-acquired land of wild animals, which had hitherto roamed about, unrestrained, side by side with the wild races, and thus protect our pastures. Every Boer took an active part in this work, and the rising youth ... did a great deal in this way to make the country habitable.”<sup>338</sup>

Kruger is also found, in 1884, opposing efforts to have hunting laws made more stringent.<sup>339</sup> It was J.L. van Wijk, representing Krugersdorp, and R.K. Loveday, representing the predominantly English-speaking mining constituency of Barberton, who argued most fervently for increased protection of wildlife.<sup>340</sup> Kruger is renowned, of course, for having signed the Act which legislated into existence the Sabie Game Reserve, eventually to become the Kruger National Park.

Carruthers, however, argues strongly that his name was used as a political tool in 1926 to garner support for efforts to have the reserve given national park status.<sup>341</sup>

This certainly seems to be the more accurate perspective. James Stevenson-Hamilton, warden of

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<sup>337</sup> E J Carruthers ‘Defending Kruger’s Honour? A Reply to Professor Hennie Grobler’ in *Journal of Southern African Studies* Vol.22, No.3 September 1996, 473 at 478.

<sup>338</sup> Carruthers ‘Dissecting the Myth’ (1994) *op cit* at 266.

<sup>339</sup> *Ibid* at 267.

<sup>340</sup> *Ibid.*

<sup>341</sup> Carruthers ‘Creating a National Park’ (1989) *op cit* at 209.

the Sabie Game Reserve, wrote in a letter at the time: ““The man who really was responsible was R.K.Loveday ... but the “Kruger stunt” is I think of priceless value to us, and I would not for the world do aught but whisper otherwise. ... I wonder what the old man, who never in his life thought of wild animals except as biltong, and who, with the idea that it did not matter much one way or the other, and in any case would not affect any one except the town sportsmen, gave way under strong pressure exercised by Loveday and one or two others and allowed the reserve to be declared. I wonder, I repeat, what he would say could he see himself depicted as the “Saviour of the South African game!!!””<sup>342</sup>

‘Kruger was not a particularly keen conservationist,’ writes Carruthers, ‘ ... but invoking the name of the republican president certainly touched the right emotional chord at the right time.’<sup>343</sup>

### 2.5.2 *The first game reserves begin to appear*

‘Reference has been made,’ write Curson and Hugo, ‘to the establishment of game reserves but their institution may be said to commence with the adoption of article 1244 by the *Volksraad* on 2/8/89, when hunting of game was forbidden on certain Government lands. Law 6 of 1891 forbade the hunting of game on Government lands, but it was not until 1894 that the Pongola Reserve was defined.’<sup>344</sup>

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<sup>342</sup> *Ibid.*

<sup>343</sup> *Ibid* at 210.

<sup>344</sup> Curson & Hugo *op cit* at 419.



In 1894 the Pongola Game Reserve was proclaimed, followed by two very small game reserves near Pretoria in 1895. A ranger, H.F. van Ordt, was appointed and he immediately took to destroying dogs, eliminating and summarily fining poachers.<sup>345</sup> His salary was ten pounds per month and his duty was to implement the following regulations: "Within this boundary one and all are prohibited from hunting, shooting, searching for, or in any manner taking possession of or trying to take possession of, chasing, driving away, or disturbing game in any manner whatsoever. Persons contravening these provisions will be punished by seizure of all carcasses as well as shooting and hunting equipment in their possession together with a fine not exceeding one hundred pounds sterling. In default of payment imprisonment will be imposed for a period not exceeding one year."<sup>346</sup>

In 1891 the *Volksraad* considered as a question whether landowners should be allowed to hunt on their own land at all times of the year. And also the question of whether wild animals belonged to the State, to the individual landowner, or had the status of *res nullius*.<sup>347</sup>

In 1892 a new law was promulgated which held that licences were necessary before wild animals could be hunted - even on private land (although licences were not necessary on private land in the open season). The Act otherwise basically repeated many provisions of the 1870 Act, without the references to 'zwarteskutters'.<sup>348</sup>

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<sup>345</sup> Carruther & Pienaar *op cit* at 326; Mackenzie *op cit* at 229.

<sup>346</sup> Pringle *op cit* at 51. The provision for seizure of carcasses marks an interesting inroad into the common law.

<sup>347</sup> Carruthers & Pienaar *op cit* at 327.

<sup>348</sup> *Ibid* at 328.

In the laws of the early 1890s, a range of public attitudes - not all of them protectionist - can be seen. Many groups, it seems, did espouse protectionism of some kind, but appear not to have been keen to practice what they preached. 'Each group,' comments Carruthers, 'considered it the task of some other section of the population to cease hunting and blame for diminishing game numbers was thus laid at various doors.'<sup>349</sup>

More investigations were undertaken in 1894 after many petitions were received. The biggest unanswered question still being that of ownership of wildlife on private land.<sup>350</sup>

And blacks were still being used as scapegoats . The aspect of racial discrimination visible in earlier legislation did not change and in 1894 blacks continued to be denied the right to hunt wild animals.<sup>351</sup> In 1895 some *Volksraad* members, debating the possible Sabie<sup>352</sup> Reserve, objected that it was 'not right'<sup>353</sup> to limit the rights of whites to hunt while allowing blacks to do so at will.<sup>354</sup>

The preservationist lobby was becoming more and more powerful. Debates went back and forth, featuring much emotional language about disadvantaging the poor. The only popular legislation was that of 1891 which forbade Africans to own hunting dogs. The ZAR had no real means to

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<sup>349</sup> Carruthers *Game Protection* (1995) *op cit* at 75.

<sup>350</sup> Carruthers & Pienaar *op cit* at 330.

<sup>351</sup> Carruthers *Game Protection* (1995) *op cit* at 74.

<sup>352</sup> The modern spelling is 'Sabie', but 'Sabi' is used as an alternative - particularly in older texts.

<sup>353</sup> "Onregverdig". 'Unjust' might be a better translation.

<sup>354</sup> Carruthers & Pienaar *op cit* at 333. The objection was made that it was '... onregverdig ... om blanke burgers se jaggeleenthede te beperk terwyl swartes ongehinderd toegelaat word om wild in hulle gebiede uit te roei.'

enforce conservation legislation anyway.<sup>355</sup> But the second Anglo-Boer War which began in 1899, while hastening the destruction of wildlife (the pathetic state of wildlife can be seen by the fact that when 7 hippos arrived in the Pongola Reserve in 1899, they had to be specially guarded<sup>356</sup>), provided the framework of administrative coercion necessary for British influenced conservation measures eventually to flourish.<sup>357</sup>

Carruthers argues that the final years of the existence of the South African Republic saw 'a shift in emphasis from game saving throughout the entire country by means of legislation to the protection of game in certain special sanctuaries created for this purpose.' This, she argues, represented 'a move away from the conservationist principles of sustainable yield to rigorous preservation in areas from which man's influence was excluded.'<sup>358</sup>

In the Cape, meanwhile, existing game laws were being revised and provision being made for the defining of certain areas as reserves. However, it was only when the war was over that the first was proclaimed. In 1903 the Namaqualand Game Reserve was proclaimed - 102 000 hectares, principally for the protection of gemsbok and wild ostriches. In 1909 the reserve was increased in size to 141 280 hectares. However, during the sixteen years that this reserve was to exist, no funds were ever voted for its development. No ranger was ever appointed and it was left to irregular patrols by mounted policemen to prevent poaching.<sup>359</sup>

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<sup>355</sup> Trapido *op cit* at 9-10.

<sup>356</sup> Carruthers & Pienaar *op cit* at 334.

<sup>357</sup> Trapido *op cit* at 9-10.

<sup>358</sup> Carruthers *Game Protection* (1995) *op cit* at 90.

<sup>359</sup> Pringle *op cit* at 69-70.

Also in the Cape, in 1908 the Gordonia Game Reserve was proclaimed - covering an area of 23 900 square kilometres it was at the time probably the largest reserve of its kind anywhere. However, it was deproclaimed almost as fast when a number of applicants claimed that there were prospects of finding water within its boundaries.<sup>360</sup>

Carruthers comments on the rise and proclaiming of national parks that the process concerns 'the allocation of natural resources and for this reason is a political, social and economic issue more than a moral one.' 'What was accomplished [by] the mid 1920s in South Africa,' she goes on, 'was not so much the acceptance that the principle of a national park was morally correct, as the acceptance by white South Africans of the philosophy that the viewing and studying of game animals constituted a legitimate, and financially viable, form of land use and that the state should provide land for this purpose.'<sup>361</sup>

### 2.5.3 *Game reserves and Africans*

When the Sabie Reserve began, it was full of Africans with old guns, dogs and snares of every description and the new authorities set about clearing up. 'Their task,' writes Mackenzie, 'was of course to transform these hunters into "poachers" in order to frustrate their activities.'<sup>362</sup>

There had been drought and the people who were left were living mainly on game meat. There

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<sup>360</sup> *Ibid* at 74.

<sup>361</sup> Carruthers 'Creating a National Park' (1989) *op cit* at 188.

<sup>362</sup> Mackenzie *The Empire of Nature* (1988) *op cit* at 68.

were some violent anti-poaching campaigns and those who remained in the reserve or near it were 'to be prevented at all costs from poaching, whatever other employment they found to do.'<sup>363</sup> The new authorities were fighting against black hunters still in the area, white hunters who were opposed to the reserve, and an administration with a pretty poor grasp of what conservation meant.<sup>364</sup> The new rangers' attitude to the Africans in the reserve was that they were 'nomadic' and had never really been a settled population anyway.<sup>365</sup>

Africans, however, seem never to have been as destructive as the authorities appear to have thought. In 1920, for example, it was discovered that about sixty African settlers had moved back into the Pongola Game Reserve - the administration of which had been extremely lax for years. It was discovered, however, that these residents had minimal effect on the numbers of animals living in the reserve. 'This appears,' comments Carruthers, 'to have been true for the Sabi and Singwitsi'<sup>366</sup> Game Reserves as well. Although poaching was mentioned in every annual report of these reserves, it seems that this activity was not responsible for very much game destruction.<sup>367</sup>

#### 2.5.4 *Enforcing the game laws against Africans and Boers*

After the second Anglo-Boer War ended in 1902, Major James Stevenson-Hamilton was sent, by Sir Godfrey Lagdon, the Secretary for Native Affairs, to take over the Sabie Game reserve.

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<sup>363</sup> *Ibid* at 229.

<sup>364</sup> S C J Joubert 'Die Vroeë Ontwikkelingsgeskiedenis van die Sabie- en Shingwedzi-reservaat en die Nasionale Krugerwildtuin, 1898 tot 1946' in U de V. Pienaar (ed) *Neem Uit die Verlede* (1990) 470 at 470.

<sup>365</sup> *Ibid* at 472.

<sup>366</sup> The more usual modern spelling is 'Shingwedzi'.

<sup>367</sup> Carruthers 'Creating a National Park' (1989) *op cit* at 200-201.

Neither of the two, comments Joubert, had much idea of what direction nature conservation was going to take in the future. Stevenson-Hamilton enquired as to his role, and was told just to make himself “generally disagreeable”<sup>368</sup>

In the closing years of the previous century, hunters, both black and white, had taken a heavy toll of wildlife.<sup>369</sup>

Stevenson-Hamilton described all game laws as being worthless paper to the Boer hunters, who ‘have no sporting instincts and no sense of honour.’<sup>370</sup> Stevenson-Hamilton also said that the damage done by Africans in a year would not equal that done by ‘a few Boers in a week.’<sup>371</sup> And he wrote, of one Arthur Glynn ... “[o]f course like most South Africans, he was pure butcher without the instincts of a sportsman. Hence the disappearance of the game. There is little or nothing to choose between Dutch and British in this respect of the country.”<sup>372</sup> Stevenson-Hamilton cleared out of the area 2000-3000 Natives in less than a year,<sup>373</sup> and according to popular legend earning in the process the Shangaan nickname “*Skukuza*” - ‘he who sweeps clean’.

The Transvaal put the new reserve under the Department of Native Affairs - probably because the idea of depriving blacks of their poaching livelihood was attractive at a time when the authorities

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<sup>368</sup> Joubert *op cit* at 474-475.

<sup>369</sup> *Ibid* at 474.

<sup>370</sup> J Stevenson-Hamilton *Transvaal Annual Reports (for 13 October 1903)*.

<sup>371</sup> Trapido *op cit* at 13-14.

<sup>372</sup> Carruthers *Game Protection (1995) op cit* at 123.

<sup>373</sup> Stevenson-Hamilton *Transvaal Annual Reports (for 13 October 1903)*.

wanted to force migrant labour to the mines, and also because of the usual hysteria about the devastating effects of African hunting (this promoted by increasingly powerful preservationist lobbies).<sup>374</sup> It was the Secretary of the Department of Native Affairs who had appointed Stevenson-Hamilton, and who had ordered him to go and make himself “generally disagreeable”.

The magistrate at Barberton wrote that “[t]here is a large Native population in the Reserve [and the] Natives by traps, with arms and dogs, slaughter large numbers of game. If the Native population is allowed to remain in the Reserve it is almost idle to talk of preserving the game.”<sup>375</sup>

Carruthers writes that “[t]he activities of Africans seem to have been abhorred by game reserve officials not so much because of the danger they presented to wildlife, but because they resented freedom of action on the part of Africans and therefore a corresponding lack of white supremacy.”<sup>376</sup>

After depriving Africans of a livelihood by hunting, anti-poaching legislation now threatened Africans’ livelihood again by prohibiting them from attacking the animals which threatened their crops. This has to have been an unintended consequence, though.<sup>377</sup> There was some African resistance - mostly in the Sabie Reserve.<sup>378</sup>

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<sup>374</sup> Trapido *op cit* at 10-11.

<sup>375</sup> *Ibid* at 11-12.

<sup>376</sup> Carruthers ‘Creating a National Park’ (1989) *op cit* at 201.

<sup>377</sup> Trapido *op cit* at 11.

<sup>378</sup> *Ibid*.

Stevenson-Hamilton had a big problem with professional hunters - the country was terribly difficult to police and, as he put it, all they could really do was catch offenders now and then and try to make examples of them.<sup>379</sup> Part of the problem was that these hunters still regarded the country as theirs and the game as being there for the taking.<sup>380</sup>

Mostly, though, the authorities still concentrated on African poaching - often because of the complaints by white 'sportsmen'.<sup>381</sup> The picture was complex, though, and there were those who took the African side and argued that their hunting destroyed very little game, while their crops were devastated.<sup>382</sup> And there were some admissions that Africans did little damage, especially to the carnivora and the larger animals, except to those animals that destroyed crops.

Where there were claims that wildlife was being destroyed, this was usually blamed on Africans - even where it could be shown that these reports were exaggerated, false, or that the damage was the work of white hunters.<sup>383</sup> In fact, Carruthers suggests that 'Game Reserve officials were pleasantly surprised at how little game was killed by Africans resident in the reserves.' This was no doubt due in part to the fear the Africans must have had of losing their land. Even by 1913, when 'desiccation of the land was so severe that many resident Africans were dying of starvation',<sup>384</sup> they do not appear to have resorted to poaching on a large scale. Africans living outside of the reserve on the southern banks of the Crocodile River and Africans from

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<sup>379</sup> Joubert *op cit* at 472.

<sup>380</sup> Tattersall *op cit* at 76.

<sup>381</sup> Trapido *op cit* at 14.

<sup>382</sup> *Ibid* at 16.

<sup>383</sup> *Ibid* at 17.

<sup>384</sup> Carruthers 'Creating a National Park' (1989) *op cit* at 198.



Mozambique, on the other hand, poached far more regularly.<sup>385</sup>

For some reason, the reserve was not placed under Union jurisdiction in 1910, remaining under Transvaal provincial control.<sup>386</sup>

By the end of the century game was seriously depleted and conservation measures seemed necessary.<sup>387</sup> Pressure groups became very active, but the realities of the Empire shaped their suggested measures: access to be restricted to the elite, wildlife to be classed according to sporting considerations, and separation between human and animal settlements to be effected. This was game preservation, suggests Mackenzie, for sport, rather than true conservation.<sup>388</sup> Property rights in game, as a concept, arrived in Africa, and these rights were vested in the elite.<sup>389</sup>

‘Seldom,’ says Mackenzie, ‘can legislation have performed such a continuing role in the management of a resource.’<sup>390</sup> This is reminiscent of Trench suggesting, of game legislation in England, that ‘seldom can legislation have been passed so specifically in the interests of the ruling class’.

Another idea familiar to us from English law-makers crops up here - that it was only idle and

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<sup>385</sup> *Ibid* at 198-199.

<sup>386</sup> Mackenzie *The Empire of Nature* (1988) *op cit* at 231.

<sup>387</sup> *Ibid* at 201.

<sup>388</sup> *Ibid*.

<sup>389</sup> *Ibid* at 201-202.

<sup>390</sup> *Ibid*.

indolent Natives (and poor Boers) who would rather hunt than accept paid labour.<sup>391</sup>

Another comment by Carruthers might be useful to conclude this chapter - '[i]n their search for common ground whites excluded Africans and the establishment of national parks can be seen as part of the process of the systematic domination of Africans by whites. National parks constitute yet another strand in the consolidation of white interests over black, and in the struggle between black and white over land and labour. The function that Africans had earlier played in the Transvaal as hunting partners of whites was in this way completely overshadowed by their new roles as "poachers" or "labourers"'.<sup>392</sup>

#### 2.5.5 *A specific problem: dogs*

The authorities found another way to restrict black hunting by curtailing the use of dogs. Again reminiscent of the English. For centuries, hunters have used dogs and 'African blacks,' as Carruthers writes, 'were no exception.'<sup>393</sup> Before the second Anglo-Boer War, the Transvaal *Volksraad* had attempted to prevent blacks from owning dogs by taxing dogs at ten shillings each. Whites were subject to this tax only on additional dogs, being allowed to keep one free of the levy.<sup>394</sup>

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<sup>391</sup> Trapido *op cit* at 13.

<sup>392</sup> Carruthers 'Creating a National Park' (1989) *op cit* at 189-190.

<sup>393</sup> Carruthers *Game Protection* (1995) *op cit* at 79.

<sup>394</sup> *Ibid.*

The Transvaal Game Protection Association pointed out that many dogs had run wild during the War, and pushed for extra taxes on bitches, greyhound-type dogs and for a reduction in the number of dogs owned by blacks. In 1907 the Control of Dogs Act was passed and many dogs were destroyed by the police in terms of this legislation.<sup>395</sup>

#### 2.5.6 *Preservationist pressure*

Much of the legislative activity can be seen as a response to the London Convention of 1900, which was essentially a 'preservationist' document,<sup>396</sup> and to the concerns which led up to the Conference.

In the 1890s a lobby group of influential landowners and mining entrepreneurs began to secure successes in their fight for tighter protection and legislation, including game reserves. Their motivation initially appears to have been to preserve hunting as a 'socially exclusive pleasure pursuit', as Beinart puts it.<sup>397</sup> Africans and poorer whites were increasingly excluded from hunting. 'Trespass onto private land to hunt animals, which still in law belonged to no-one, became poaching,' writes Beinart.<sup>398</sup>

Carruthers writes that the Transvaal Game Protection Association was 'sport-oriented in its

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<sup>395</sup> Pringle *op cit* at 83.

<sup>396</sup> Mackenzie *The Empire of Nature* (1988) *op cit* at 202.

<sup>397</sup> Beinart 'The Politics of Colonial Conservation' *op cit* at 149-150.

<sup>398</sup> *Ibid.*

outlook, not even pretending to advance scientific or aesthetic concerns'.<sup>399</sup> The TGPA was the first truly successful wildlife protection movement in the country, having begun in 1902.<sup>400</sup>

The *zeitgeist* in the ruling classes was that securing meat by hunting was the mark of primitiveness. Meat, it was felt, should be obtained from domestic animals and hunting reserved for sport. It was this contrast, writes Mackenzie, 'between the symbolic and in many respects quasi-medieval dominance of the landscape through the chase and the humble utilitarian needs of people living within it that came to be enshrined in the hunting law of the period.'<sup>401</sup>

## 2.6 *The other provinces*

### 2.6.1 *The Orange Free State*

When William Cornwallis Harris 'blithely' roamed through what was to become the Orange Free State, it had seemed impossible that the vast herds of wildlife could be obliterated. Yet only six months later, in 1837, trekboer leader Piet Retief felt it necessary to take measures for the protection of the game. He ordered that his field commandants "investigate any unnecessary killing of game and ... impose a fine irrespective of the person, on anyone found guilty of this offence, of not less than ten or more than one hundred rixdollars according to the judgement of

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<sup>399</sup> Carruthers *Game Protection* (1995) *op cit* at 105.

<sup>400</sup> Pringle *op cit* at 107.

<sup>401</sup> Mackenzie *Empires of Nature and the Nature of Empires* (1997) *op cit* at 49.

the presiding authorities and the circumstances of the case.”<sup>402</sup> Pringle describes this as the first awareness expressed by the Boer leaders of the ‘fast approaching destruction of the game’.<sup>403</sup>

During the term of office of President Boshoff (1855-64), various attempts were made to curtail the slaughter. In 1858 the first game law in the Orange Free State was passed. Only two years later, however, what is often described as ‘the greatest hunt in history’ occurred - the slaughter of thousands of animals in one day to celebrate the visit of the sixteen year old Prince Alfred of England, son of Queen Victoria.<sup>404</sup>

In 1891 the Orange Free State echoed the Cape Colony’s 1886 Act for the Better Preservation of game, providing landowners with some rights not conferred at common law, providing that nobody was to hunt or shoot game inside private boundaries without the permission of the owner. Criminal penalties by way of fines and prison terms applied, but as in the Cape no mention was made of confiscation of carcasses and these still became the property of the hunter.<sup>405</sup>

Only in 1898 was a comprehensive Game Protection Law passed, repealing the fragmented

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<sup>402</sup> Pringle *op cit* at 38.

<sup>403</sup> *Ibid* at 43.

<sup>404</sup> *Ibid* at 38.

<sup>405</sup> Uitg. Op Gezag van den HEd. Volksraad *Wetboek van den Oranjevrijstaat 1891* (1892) 814-815. “Hoofstuk CXXXV. Over Struisvogels en het Wild. ...9. Niemand mag eenig wild, als namelijk wildebeesten (ngu), blesbokken, springbokken, of andere wilde bokken, jagen of schieten of door honden laten vangen, noch mag iemand eenig wild gevogelte als daar zijn struisvogels, korhanen, faisanten, patrijzen, wilde hoenders, wilde ganzen, eenden of andere watervogels, sprinkhaanvogels en secretarisvogels, schieten of doen schieten, of op enige andere wijze doden of doen doden, binnen de grenspalen van eenige plaats, zonder verlof van den eigenaar of bewoner van zoodanige plaats, onder verbeurte eener boete van niet minder dan vijf pond sterling en niet te boven gaande vijftien pond sterling, of bij wanbetaling gevangenisstraf van niet minder dan drie maanden, en niet te boven gaande zes maanden.”

previous provisions. This provided for a general close season for six months of the year.<sup>406</sup> Further ordinances repeated this in 1905 and 1914, with the close season being increased to eight months. However, occupiers of cultivated land were exempted during the close season and owners and lessees of land were exempted from the requirement of taking out hunting licences.<sup>407</sup> The concept of 'Royal Game' was used, but the pitiful state of wildlife in the province can be seen from the fact that this meant hartebeest, kudu and eland, instead of elephant, rhinoceros and hippopotamus.

Restrictions on methods of hunting were also put in place - 'passive' forms of hunting, such as the use of nets, snares, sticks, traps and poison, were banned.<sup>408</sup>

### 2.6.2 *The Transkeian Territories*

Only in 1887 were the Cape Colony's Game Laws extended to apply also in the Transkeian territories and then to the whole of the Transkei. By early in the twentieth century, however, it was clear that there was virtually no game to be found there - with the exception of a few klipspringer and oribi in mountainous regions.<sup>409</sup>

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<sup>406</sup> Curson & Hugo *op cit* at 407-408.

<sup>407</sup> *Ibid.*

<sup>408</sup> *Ibid.*

<sup>409</sup> *Ibid* at 406-407.

### 2.6.3 Natal (including Zululand)

In 1824 a small group of British traders arrived from the Cape Colony and established a trading post and base at Port Natal. They initiated a system of recruitment of black hunters from nearby tribes and hunted for ivory and skins with industry.<sup>410</sup>

This led to the usual scenario as the animals began to thin out, either being shot or drifting away in search of less 'leaden' pastures. As early as 1840, when the 'Raad' of the new Republic of Natal met in Pietermaritzburg, a resolution was passed prohibiting the 'wasteful destruction of game'.<sup>411</sup> Hunting of game on private farms was also forbidden, unless permission were obtained from the owner.<sup>412</sup>

Natal became a British colony in 1843, but it was not until 1866 that the first proper Game Law was passed. This provided for a close season and for the special protection of certain species.<sup>413</sup> The first wildlife law passed in 1866, however, was the Noxious Animals Act, which empowered magistrates to reward those who destroyed certain species - essentially predators which might prey on farmers' livestock.<sup>414</sup> Certain other laws had an impact, though, such as an 1848 law prohibiting the sale of gunpowder to Africans.<sup>415</sup>

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<sup>410</sup> B Ellis 'The impact of White settlers on the natural environment of Natal, 1845-1870' in B Guest & J M Sellers (eds) *Enterprise and Exploration in a Victorian Colony* (1985) 71 at 72.

<sup>411</sup> Pringle *op cit* at 43.

<sup>412</sup> Curson & Hugo *op cit* at 408-409.

<sup>413</sup> *Ibid.*

<sup>414</sup> Ellis *op cit* at 78-79.

<sup>415</sup> *Ibid* at 78.

Species no longer seen in Natal by 1870 were the lion, the elephant and the rhinoceros, while sightings of eland, hartebeest, ostrich, leopard, buffalo and hippopotamus would have been rare. As usual, the game law had come too late to preserve Natal's fauna.<sup>416</sup>

Soon Natal was in a state of environmental crisis. The 'peak year of trade', writes Pringle, 'had been 1877, when 19 350 kg of ivory left Natal. By 1895 the trade had dwindled to 30 kg.'<sup>417</sup> In 1873, 62 000 wildebeest and zebra skins were exported. In 1883 the number was 7 000.<sup>418</sup>

In 1889 a commission was appointed to consider game legislation. The recommendations of this three-man committee included familiar provisions such as a close season and prohibitions on trespassing and on the usage of snares, poisons and traps. These passed into law in 1890, but were suspended in 1891.<sup>419</sup> A new Game Law was passed in that year and operated unchanged until 1904.

It was only in 1906 that a consolidating Act was passed in order to bring Natal and Zululand under the same Game Laws.<sup>420</sup>

A problematic aspect of Natal's efforts to protect game was continual tension between game laws of a protective nature and those which had the opposite effect, being concerned with game

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<sup>416</sup> *Ibid* at 92.

<sup>417</sup> Pringle *op cit* at 10-11.

<sup>418</sup> *Ibid*.

<sup>419</sup> Curson & Hugo *op cit* at 409-410.

<sup>420</sup> *Ibid* at 412.



eradication in order to control sleeping sickness and nagana.<sup>421</sup>

The protective side of legislation had a familiar look about it. The Game Ordinance of 1912 provided, inter alia, for licences, close seasons, the prohibition of certain hunting methods such as traps, nets, pitfalls and poison, and a prohibition on Africans hunting with dogs.<sup>422</sup>

Non-protective legislation included measures taken in 1913 to 'outlaw ... kudu, reedbuck, bushbuck, duiker, mountain reedbuck and steenbuck within a distance of half a mile on either side of certain sections of roads'.<sup>423</sup> Measures taken in Ubombo in 1917 permitted the destruction of all game animals except nyala, hippopotamus and rhinoceros. Hunters killed over 25 000 wildebeest alone in the area in the space of twelve months.<sup>424</sup>

#### 2.6.4 *Summary of provinces*

The story was the same in each province. As fast as new laws were passed, so record hunting bags were recorded leaving the country through Cape Town and Durban Bay.<sup>425</sup>

Similar measures were passed in each province, including the defining of close seasons, the

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<sup>421</sup> *Ibid* at 410. (Sleeping sickness or *trypanosomiasis* is a disease fatal to humans caused by a parasite transmitted via the tsetse fly. Nagana is the same disease, as it affects cattle. It was believed that by destroying game the tsetse fly could be starved and eliminated.)

<sup>422</sup> *Ibid* at 412-413.

<sup>423</sup> *Ibid* at 414-415.

<sup>424</sup> *Ibid*.

<sup>425</sup> Pringle *op cit* at 43.

requirement of licences for hunting, greater protection being given to rarer species and the establishment of sanctuaries, suggested Curson and Hugo in 1924.<sup>426</sup> One could add prohibitions on certain hunting methods, largely aimed at curtailing African ability to undertake subsistence hunting.

## 2.7 Toward a new era

### 2.7.1 *General game preservation against poachers*

All the legislative activity seems to have been more effective, partly because better enforced, against African poachers than against white poachers.<sup>427</sup> The removal of African guns was the most effective curtailment measure.<sup>428</sup>

Problems with the legislation were that it was exceptionally complex, there were no adequate game departments to enforce it, exported trophies were no indication of the actual numbers of animals shot, exemptions granted to elite parties set bad examples, prosecutions of Europeans were very rare, and close seasons seem not to have been effective.<sup>429</sup> Game legislation clearly did little to restrain the depredations of well-armed white hunters.<sup>430</sup>

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<sup>426</sup> Curson & Hugo *op cit* at 423.

<sup>427</sup> Mackenzie *The Empire of Nature* (1988) *op cit* at 218-219.

<sup>428</sup> *Ibid* at 220-221.

<sup>429</sup> *Ibid* at 218-219.

<sup>430</sup> *Ibid* at 220-221.

The Colonial Secretary became, as Carruthers notes, increasingly concerned by the disparity in sentences handed down by magistrates to blacks and whites - blacks being treated far more harshly. At the same time, however, the TGPA continued to complain that these punishments were not severe enough.<sup>431</sup>

There is, though, evidence that in many places Africans were able to avoid game legislation and the picture is a complex one.<sup>432</sup> Generally, the greater the extent of white settlement the more complete would be the frustration of African hunting.<sup>433</sup> The majority of the acts of poaching committed by Africans seem to have concerned smaller species of game, and only rarely big game species or mass killings.<sup>434</sup>

Trapido comments that by about 1928 enmity between poacher and ranger 'had reached a pitch where original objectives were forgotten in an increasingly desperate vendetta waged by poachers against African rangers who, in their turn, were forced into a defence of an institution increasingly valued by white South Africa but which gave them little in return, not even trust.'<sup>435</sup>

### 2.7.2 *Migrant labour to mines*

'From the very beginning of mining in South Africa,' writes Bulpin, 'in the wild days of the first

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<sup>431</sup> Carruthers *Game Protection* (1995) *op cit* at 117.

<sup>432</sup> Mackenzie *The Empire of Nature* (1988) *op cit* at 220-221.

<sup>433</sup> *Ibid.*

<sup>434</sup> Carruthers *Game Protection* (1995) *op cit* at 117.

<sup>435</sup> Trapido *op cit* at 23.

access to game through the operation of strict laws against the possession of firearms.<sup>447</sup>

In East Africa the settlers, suggests Mackenzie, 'were, in many cases, of higher social standing than in the south, and consequently more interested in preservation for the purposes of the hunt.'<sup>448</sup> Again, according to Mackenzie, 'the transformation of hunting into the elite Hunt, ... was effected by the exclusion of Africans from access to the chase.'<sup>449</sup>

Quoting Mackenzie further: '[a]lthough hunting had been crucial for survival, as subsistence and financial subsidy, to Europeans in the recent past, it had become primarily a source of sport with its own elaborate code. In the space of a few decades it had made the transition from economic necessity to ethical luxury. Nowhere was this truer than in East Africa. The development of European sensibilities towards animals has to be seen in this light. So has the development of conservationist policies in the twentieth century.'<sup>450</sup>

And Mackenzie again: '[t]he story of Indian conservation activities down to modern times provides an interesting contrast with the African precedent. In India hunting was a crucial part of imperial display, military training, and intelligence. There the Hunt was so restricted in social access - apart from the guarding of crops from pigs, antelope and deer - that conservation measures were not deemed necessary until well into the twentieth century.'<sup>451</sup> 'In both India and

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<sup>447</sup> Mackenzie *The Empire of Nature* (1988) *op cit* at 138-139.

<sup>448</sup> *Ibid* at 149.

<sup>449</sup> *Ibid* at 163.

<sup>450</sup> *Ibid* at 164.

<sup>451</sup> *Ibid* at 291.

reflects the manner in which the first phase at least of the conservation movement marked the shift from practical hunting to the Hunt, essentially a perquisite of the elite.<sup>443</sup>

#### 2.7.4 *The position in the Transvaal in 1924*

As late as 1924, the position in regard to hunting on private land had improved but was still unsatisfactory, from a game protection point of view. Permits were required for the hunting of buck. However, it was possible for owners to obtain permits to hunt buck on farmland, whether fenced or unfenced, and whether such buck were protected or not and whether the hunting was to occur in or out of the ordinary close season.<sup>444</sup>

#### 2.7.5 *North of the border*

In Rhodesia, game laws were taken over from the Cape Colony when Rhodesia was founded and provided protection on paper. Supposedly, the British East Africa Company established laws, including a close season, as early as 1893.<sup>445</sup> In reality, protection of wildlife was weak and game reserves only properly instituted in the 1930s.<sup>446</sup> The other similarity with the Cape was that the laws were introduced mainly after the relevant species had already been harried into near-extinction. Game laws, too, were largely irrelevant to Africans. Africans were, however, denied

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<sup>443</sup> *Ibid* at 255.

<sup>444</sup> Curson & Hugo *op cit* at 419.

<sup>445</sup> Pringle *op cit* at 66.

<sup>446</sup> Beinart 'The Politics of Colonial Conservation' *op cit* at 150-151.

In Natal, the colonial economy, writes Lambert, 'was considerably altered by the development of the gold-mining industry on the Witwatersrand. Prior to the 1890s, the majority of Africans in Natal had become small peasant producers contributing to the white economy in a limited degree by producing a surplus for the market, selling stock and providing occasional labour.' 'After 1897,' he continues, 'when the white agricultural sector gained more effective governmental control, legislation was aimed more specifically at destroying the independence of the black peasantry and forcing it to provide the additional labour required to sustain the increasing commercialisation of White farming operations.'<sup>439</sup>

### 2.7.3 Increase of game reserves

The realisation that game legislation had been and was still pretty ineffective, at most only a partial success, led the conservation lobby to demand more game reserves.<sup>440</sup> But these faced many problems.<sup>441</sup>

Interestingly, South Africa looked to American game reserves (national parks) for a lot of guidance. There was considerable interaction.<sup>442</sup>

'The fact,' argues Mackenzie, 'that preservationists were almost always distinguished hunters

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<sup>439</sup> J Lambert 'The impoverishment of the Natal peasantry' in B Guest & J M Sellers (eds) *Enterprise and Exploitation in a Victorian Colony* (Undated 19-) 286 at 286.

<sup>440</sup> Mackenzie *The Empire of Nature* (1988) *op cit* at 226-227.

<sup>441</sup> *Ibid.*

<sup>442</sup> *Ibid* at 262-267.

great rush to Kimberley, an insatiable demand had arisen for African labour. In the course of years, the migrant labour system developed; and tribesmen tramped for thousands of miles along the paths, through all manner of perils and hardships, so that they could reach a place of work and there earn a trifling amount of cash.' 'With the discovery of gold in the Transvaal,' he continues, 'the demand for labour reached fantastic proportions.'<sup>436</sup>

It is not easy to ascertain to what extent the turning of Africans from subsistence hunters into poachers, deprived of traditional access to an important food resource, can be said ever to have been a deliberate policy to drive them into being 'subsistence labourers'. However, it is clear that the authorities in charge of game reserves cooperated to a great extent with such organisations as the Witwatersrand Native Labour Association, facilitating movement through game reserves and the provision of labour to the mines.<sup>437</sup>

'Hunting legislation,' writes Carruthers, 'had definite results in increasing state control over rural blacks and facilitating their proletarianisation as a labour force.' 'At the time,' she goes on, 'the warden of the government game reserves was but one of many whites who felt that depriving blacks of access to game, "had by no means, as was in some quarters predicted, the effect of causing the natives to starve, but, on the contrary, by forcing them to go out to work and earn the high wages which the Kaffir almost invariably receives in the Transvaal, actually raised their standard of living considerably."<sup>438</sup>

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<sup>436</sup> T V Bulpin *The Ivory Trail* (1954) 157-158.

<sup>437</sup> Carruthers 'Creating a National Park' (1989) *op cit* at 201.

<sup>438</sup> Carruthers *Game Protection* (1995) *op cit* at 110.

Africa,' he continues, 'indigenous hunters were transformed by the end of the century into "poachers". This was achieved through game and forest laws, gun laws, administrative action, and the separation of human and animal habitats.'<sup>452</sup>

## 2.8 Property rights

As early as 1860, landowners began to place notices in the *Staatscourant* forbidding hunters from trespassing on their farms. Trespassing was in any case illegal, but animals on farmland did not automatically become the property of the owner or occupier, and should a trespasser kill game the owner's only recourse was to institute an action for trespass. Carruthers notes that between 1867 and 1881 some two hundred such notices were placed in the *Staatscourant*.<sup>453</sup>

Carruthers goes on to comment that 'it was clear that a link was being made between the crimes of trespassing and poaching.'<sup>454</sup> Game, she writes, was 'increasingly being withheld from the poorer classes of society, both black and white.'<sup>455</sup>

The right of access to game on private property was a contentious issue worldwide. In 1871 the British Government tried to establish whether game was recognised as the property of the state or of individuals in a number of countries. The position turned out to be confusing. In Switzerland

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<sup>452</sup> *Ibid* at 298.

<sup>453</sup> Carruthers *Game Protection* (1995) *op cit* at 33.

<sup>454</sup> *Ibid* at 34.

<sup>455</sup> *Ibid*.



the state was the owner. In Italy, Bavaria, Denmark and Sweden the game was not owned by the landowner, but he was free to use it while it was on his land. In Prussia, Russia, The Netherlands, Belgium and Austria-Hungary, the landowner was the owner.<sup>456</sup>

The fact that game had the legal status of *res nullius* necessarily drew a link between trespassing and poaching in South Africa. It is in this regard, suggests Carruthers, that 'class relationships [were] influenced by Transvaal game protection. After a short partnership between whites and Africans in commercial hunting activities, whites became powerful enough to withhold game from Africans whether the latter were occupiers of land or not.'<sup>457</sup>

Trapido suggests also that the British administration promoted the cause of, and even saw as necessary, the large landholders who had previously dominated the social order of the Transvaal. 'This,' he writes, 'was both because of [these landowners'] continued capacity to resist the new state's incursion upon (or neglect of) their interests, and because these landowners were seen as necessary in containing the proletariat emerging from within the white as well as the black peasantry.'<sup>458</sup>

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<sup>456</sup> *Ibid* at 34 fn 59.

<sup>457</sup> Carruthers 'Creating a National Park' (1989) *op cit* at 190-191.

<sup>458</sup> S Trapido 'Landlord and Tenant in a Colonial Economy: the Transvaal 1880-1910' in *Journal of Southern African Studies* Vol.5, No.1, October 1978, 26 at 26-27.

## 2.9 *In conclusion*

The evolution of game laws and the transformation of hunters into poachers in South Africa followed many of the same tenets as in England. An increasingly scarce resource was increasingly arrogated to the sole use of the dominant political group.

When the transition period of expansion and settlement began to slow, game legislation followed. Initially, this exempted many people - such as travellers, police, soldiers, landowners, administrators - but soon social access became a concern and lower class whites began to find their access to game restricted. Africans, of course, found their access severely restricted. And as time went on, and the legislation became more refined, so hunting became more and more a perquisite of the elite. The elite were the larger landowners, rich tourists and important officials.<sup>459</sup> The same process as in England, although of course England since 1066 did not ever have the *laissez faire* 'shoot-what-you-like' period which the colonies enjoyed.

'Even in the mid-1850s,' suggests Carruthers, 'wildlife had become a political issue in the Transvaal.' 'If any coherent philosophy,' she continues, 'underpinned the hunting legislation of the Transvaal, it must have included as its major tenets the security of the Boer settlement, the supremacy of humans over animals and the evaluation of animals in terms of their usefulness to man.'<sup>460</sup>

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<sup>459</sup> *Ibid* at 121.

<sup>460</sup> Carruthers *Game Protection* (1995) *op cit* at 27.

‘No British sporting visitor,’ writes Carruthers, ‘[in the 1870s] would ever admit to being a member of the lower or even the middle classes. Economic and social tradition in Britain determined that sportsmen were gentlemen.’<sup>461</sup> Ironically, Carruthers goes on to comment that ‘in general, the mining activities of the Transvaal had not attracted the landed gentry of Britain, but rather the lower echelons of that society.’<sup>462</sup> However, ‘in a process long familiar to South African history such people soon became members of the elite.’ And ‘[i]t might be that the origins of many of the members of the Transvaal Game Protection Association account for their extreme dedication to the narrow protectionist cause, symbolic as it was of landed wealth and power.’<sup>463</sup>

Justification was easy to find. As Europeans began to realise that Africa was no longer a paradise of teeming herds, so the conviction developed, as Mackenzie puts it, that ‘the decline in African game resulted from African subsistence hunting, together with hunting for export stimulated by European traders and gun providers.’<sup>464</sup> A ‘barrage of legislation was erected,’ designed to exclude indigenous hunting.<sup>465</sup> African techniques of hunting were increasingly forbidden, not conforming to the new sporting code which insisted on the clean kill, with an advanced rifle.<sup>466</sup>

Largely, a new philosophy was needed, suggests Mackenzie, in order to exclude a new under-class, Africans and Asians, from hunting.<sup>467</sup> This new ‘code’ included ‘restricted access, increasing

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<sup>461</sup> *Ibid* at 40.

<sup>462</sup> *Ibid* at 106.

<sup>463</sup> *Ibid*.

<sup>464</sup> Mackenzie *Empires of Nature and the Nature of Empires* (1997) *op cit* at 50.

<sup>465</sup> *Ibid*.

<sup>466</sup> *Ibid*.

<sup>467</sup> Mackenzie *The Empire of Nature* (1988) *op cit* at 27.

categorisation and regulation, “preservation” on the European aristocratic model, and the exclusion of local hunters.’<sup>468</sup>

The “clean kill” became the prime provision of the code - and so ‘older’ hunting methods like snares and traps and poisons came to be regarded as ‘unsporting’.<sup>469</sup>

The emergence of new technology and the changing economic face of Empire had a lot to do with the emergence of this new code.<sup>470</sup>

This sporting code, suggests Mackenzie, ‘had been impossible in the days of the musket and it figures barely at all in the works of Harris, Cumming and others. It was an invention of the late nineteenth century affected [] not so much by developing sensibilities as by improving technology and the transfer of the class relationships of land ruler, land owner, sportsman and poacher to Africa.’<sup>471</sup>

Grove argues somewhat differently, seeing conservation ideas as emerging ‘as part of a complex mental and physical programme to reassert control amid the shifting sands of a debate about a crisis in belief, God, descent, origins, time and desiccation.’ ‘Progressively,’ he argues, ‘in the late years of the nineteenth century, the much-trumpeted universality of conservation was legitimated

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<sup>468</sup> *Ibid* at 299.

<sup>469</sup> *Ibid* at 300.

<sup>470</sup> *Ibid* at 302.

<sup>471</sup> *Ibid*.

by reference to an international scientific community. It was this, in particular, that allowed the colonial state to use the righteous language of conservation and to confine and regulate the activities of peasant farmers in the marginal lands to which they were becoming increasingly restricted.<sup>472</sup>

Beinart points out, however, that '[t]he practice of science, [] while requiring particular rational processes, was socially embedded.' 'As networks of natural science emerged at the Cape,' he writes, 'they did so [] within a hegemonic culture and masculinity, which prioritised military conquest, settler rule, and colonial development. Both in Britain and at the Cape natural sciences became linked in complicated ways to racial thinking.'<sup>473</sup>

None of these suggestions is too far, though, from Carruthers's comment that 'game protectionist strategies pursued in the past in the Transvaal have comprised a medley of attitudes and motives - commercial, moralistic, political and nostalgic. [W]hat is generally regarded as being of worth in the light of modern ecological concerns, came into existence for a variety of reasons - among them white self-interest, Afrikaner nationalism, ineffectual legislation, elitism, capitalism, and the exploitation of blacks - all unrelated to moral virtue.'<sup>474</sup>

'Resource allocation in the South African context,' suggests Carruthers, 'cannot be discussed

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<sup>472</sup> Grove *op cit* at 187.

<sup>473</sup> W Beinart 'Men, Science, Travel and Nature in the Eighteenth and Nineteenth-Century Cape' in *Journal of Southern African Studies* Vol.24, No.4, December 1998, 775 at 799.

<sup>474</sup> Carruthers *Game Protection* (1995) *op cit* at 179.

without referring to the involvement of blacks. This majority group was eventually not only denied access to game by every possible means, but was also prevented from inhabiting those portions of land which were designated as game reserves. Even when post-Union legislation had confined blacks to a small portion of South Africa and the Singwitsi Game Reserve had been earmarked for black settlement, white recreational interests superseded this intention. Game protection was therefore one of the methods by which blacks were dispossessed of land and its resources.<sup>475</sup>

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<sup>475</sup> *Ibid* at 182.

## 2.10 *Comment*

‘The South African Dutch,’ wrote Adulph Delegorgue in the early 1840s, ‘have [] invented a method aimed at preventing [an elephant] from escaping. I have never witnessed the use of this method, but its effectiveness is attested to by various reports which leave me in no doubt that it has been put into practice.’<sup>476</sup>

‘When a Boer lives close to wooded country where there is a network of elephant paths, this is his method of proceeding. The first thing he does is to forge about forty harpoon heads which, together with the shaft, will measure forty-five centimetres. Next, he will choose some trees whose circumference is slightly larger than an elephant’s foot. These trees provide him with stumps, forty centimetres high, in the centre of which the shaft of the harpoon will be firmly implanted. These preparations made, there remains only to discover the path which the elephants habitually use, and the rest of the business can be attended to, during daylight hours, by one man alone. In fact, all that has to be done, is to dig holes in the centre of the narrow pathway, which are capable of accommodating the harpoon sockets and, when these are in position, to cover them with grass and then with earth, which is carefully levelled.’<sup>477</sup>

‘These animals walk in single file and if the leader is fortunate enough to avoid stepping on the invisible spikes, one of the next in line will inevitably find himself nailed, while his misadventure

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<sup>476</sup> Delegorgue *Travels in Southern Africa: Volume 1* (1990) 82.

<sup>477</sup> *Ibid* at 82-83.

will not even serve as a warning to those behind. The animal finds himself attached to a heel which is forty centimetres higher than his other feet. The efforts which he makes with his trunk to remove the obstacle are in vain, and serve only to augment the pain; as a result, he is finally forced to abandon the futile attempt. He is now in the position of being unable to escape because of the inequality of the length of his legs. The hunter, arriving the next day, finds the imprints of the wooden shoe, follows them and comes upon the animal which is in no position to avoid the fatal shot.<sup>478</sup>

The concept of the 'clean and sporting kill' does not seem to have been inherent in the Dutch *Voortrekker*, but a later construct - influenced perhaps by English ideas of class division. From fairly early on in English society, the idea was present that '... the primary characteristic of a poacher was simply that he was not a sportsman ...'<sup>479</sup> and as the British Empire grew so the 'code' of the 'clean kill' became ever more entrenched. Indigenous hunters found themselves increasingly excluded from access to wildlife on the ground that their hunting methods, such as the use of traps, poisons and large dog packs, were 'unsporting'.<sup>480</sup>

It is not always easy to discern between influence and parallel development. It can be argued that the course of history in every country has always seen elite groups arrogating access to natural resources to themselves, as these resources become scarcer.

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<sup>478</sup> *Ibid* at 83.

<sup>479</sup> Munsche *op cit* at 53. See page 26, fn 120, *supra*.

<sup>480</sup> See page 56, fn 246-247, *supra*.



Another similarity of English and South African justifications for laws which turned hunters into poachers is the idea that such laws stood between the lower classes and moral degeneracy by forcing these classes to work for a living. Early English aristocrats and gentlemen believed that the game laws helped to prevent, as Hay puts it, ‘... persons of inferior rank, from squandering that time, which their station in life requireth to be more profitably employed.’<sup>481</sup>

This idea arrived in the Cape Colony almost as soon as the British administration did. Lord Somerset, for example, suggesting that ‘... idle and disorderly persons, of inferior classes of life, who ought to be dependent upon their industry, waste and misspend their time destroying game.’<sup>482</sup>

This justification for laws preventing hunting was present too in the South African colonies at the end of the nineteenth, and the beginning of the twentieth, centuries. Enhanced, of course, by the attractiveness of forcing Africans into labour in white service, on farms and as mineworkers.<sup>483</sup> As Carruthers writes: ‘[o]ne of Stevenson-Hamilton’s first actions [in the Sabie Game Reserve] was to remove African residents forcibly from the area of the original republican reserve in 1902. Similar removals did not take place either in the Sabi extension or the Singwitsi because it soon came to be appreciated that wildlife protection needed labour and income. As squatters on crown lands, African tenants were obliged to deliver. No Africans became partners in the protectionist enterprise: they were tolerated either as squatters or “courageous and loyal native rangers”’ or

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<sup>481</sup> D Hay ‘Poaching and the Game Laws on Cannock Chase’ *op cit* at 189. See page 13, fn 58, *supra*.

<sup>482</sup> See page 48, fn 213, *supra*.

<sup>483</sup> See pages 82-87, 95-97, *supra*.

they were cast in the role of “evil, cruel poachers” who avoided wage labour by living off the land.’<sup>484</sup>

As had happened in England, however, members of the upper classes frequently assisted the ‘inferior classes’ in breaching the laws - *vide* the use of ‘*zwarteskutters*’ in the Transvaal and ‘subcontract hunters’ in Natal.<sup>485</sup> This happened, of course, where the privileged themselves gained a benefit and shows that concern for the morals of the lower classes was not the real rationale behind poaching laws. The laws were set in place to benefit the class which passed the laws, and moral considerations depended on convenience.

The true object of laws against poaching, game laws which turned hunters into poachers, was never the preservation of game for moral or ecological reasons. The crux of the history of game laws in both England and South Africa can be found in the words of Thompson: ‘[i]t is astonishing [how much] wealth can be extracted from [the] territories of the poor, during the phase of capital accumulation, provided that the predatory elite are limited in number, and provided that the state and the law smooth the way of exploitation.’<sup>486</sup>

Both South Africa and England, then, followed a progression from a *laissez faire* approach regarding use of wildlife resources to an approach of strict control. There were, however, some important differences.

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<sup>484</sup> Carruthers ‘Dissecting the Myth’ (1994) *op cit* at 271-272.

<sup>485</sup> See pages 60-61, 91, *supra*.

<sup>486</sup> Thompson *op cit* at 245. See page 22, fn 102, *supra*.

It is ironic that although the English in South Africa tried to reserve wildlife resources in ways that reflected the position in England, one of the biggest obstacles to this was that the common law in South Africa was much as it had been in Anglo-Saxon England before the Norman conquerors imposed their *foresta* system.

The inviolability of the common law concept of *res nullius* must be at least a partial explanation for why the death penalty was never attached to poaching offences in South Africa, despite being imposed for other offences.

Another difference was that in South Africa there were two separate 'underclasses' - the indigenous African peoples and the Dutch settlers, including the *Voortrekkers* and their descendants. This latter class became subject to restrictions imposed by the English and was susceptible to English influence, but was at the same time 'responsible' for the Roman-Dutch common law position - the existence of which forced the creation of strained justifications for poaching laws. And those Dutch who were not co-opted into the privileged elite never truly accepted that the English could regulate their taking of a resource which according to their common law had the status of *res nullius*.

Yet at the same time, the Dutch had themselves beaten a similar path to that followed by the English upper classes, and by the Normans before that. The Dutch had increasingly reserved to themselves scarce wildlife resources, denying access to Africans. Irony, then, upon irony.

The *Voortrekkers* moved from a society that was egalitarian in nature, a society without a tradition of a landed aristocracy, gamekeepers and the enclosure of land,<sup>487</sup> to a society in which hunting was a perquisite of a new elite.<sup>488</sup>

The centuries of repressive poaching laws in England had another consequence - in reaction perhaps to the savagery of these laws, the first English settlers in South Africa engaged in a liberal orgy of slaughter.<sup>489</sup> In alliance in this regard with the Dutch and the Africans, once the latter gained access to firearms, the various population groupings reduced the 'teeming herds of game' to a vulnerable and threatened resource. And from this environmental disaster ideas of preservation came eventually to dominate thinking in regard to wildlife.

The attitudes of lawmakers in respect to game protection have always reflected the desires and interests of the ruling classes. And, as happened in England, this proved to be the case in South Africa. The common law position was increasingly qualified by restrictions on the rights of the social underclasses to utilise wildlife resources - in other words: by the transformation of hunters into poachers.

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<sup>487</sup> Carruthers & Pienaar *op cit* at 321. See page 65, fn 294, *supra*.

<sup>488</sup> Mackenzie *The Empire of Nature* (1988) *op cit* at 138-139. See page 101, fn 458, *supra*.

<sup>489</sup> It can be argued that a similar process occurred in North America. Freed from the restrictions of Europe and faced with a seemingly endless supply of wildlife, colonial settlers drove many species into extinction or to the brink of it.

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