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ACQUISITION AND LOSS OF
OWNERSHIP OF GAME

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PREFACE

This working paper has been prepared by the research staff of the Commission to serve as a basis for the Commission's deliberations. The points of view, conclusions and recommendations contained herein should not at this stage be regarded as those of the Commission. The working paper is published in full to provide persons and bodies wishing to comment or make suggestions for the development, improvement, modernisation or reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

Any request to treat comments or parts of comments on the working paper as confidential will be respected. If no request for confidentiality or anonymity is made, the Commission will assume that commentators agree to the Commission's quoting from or referring to comments and attributing comments to commentators.

Any persons or bodies wishing to make oral representations to the Commission should submit to the Commission in writing a brief résumé of their proposed representations, together with a request to be heard by the Commission.

It would be appreciated if written comments, representations or requests, could reach the Commission by 31 August 1989. Anyone who is unable to meet this deadline would be welcome to contact the researcher.

Please refer to page (ii) for the address to which correspondence should be directed. The researcher responsible for the project, who may be contacted for further information, is Adv J H Potgieter. The project leaders are Mr Justice P J J Olivier and Adv G G Smit.

HIERDIE STUK IS OOK IN AFRIKAANS BESKIKBAAR

LIST OF SOURCES AND MODE OF CITATION

Where there is no entry in the left-hand column, the source concerned is not explicitly quoted in the paper.

- | | |
|---|---|
| De Groot <u>Inleidinge</u> | H de Groot <u>Inleidinge tot de Hollandsche rechts-geleerdheid</u> (Translated by R W Lee) Oxford: Clarendon Press 1926 |
| De Groot <u>De iure belli ac pacis</u> | H de Groot <u>De iure belli ac pacis libri tres</u> (Translated by F W Kelsey) Oxford: Clarendon Press 1925 |
| Gaius <u>Institutiones</u> | Gaius <u>Institutionum iuris civilis commentarii</u> (Translated by F de Zulueta) Oxford: Clarendon Press 1936 |
| | P D Glavovic "An introduction to wildlife law" <u>South African Law Journal</u> August 1988 519-532 |
| Groenewegen <u>De legibus abrogatis</u> | S Groenewegen <u>Tractatus de legibus et iniuriam in Hollandia vicinisque regionibus</u> (Translated by B Beinart) Johannesburg: Lex Patria 1974 |
| Hahlo & Kahn <u>Union</u> | H R Hahlo & E Kahn <u>The Union of South Africa: the development of its laws and constitution</u> London: Stevens & Sons Ltd London and Juta 1960 |

- Huber Rechtsgeleertheyt U Huber Heedendaagse Rechtsgeleertheyt (Translated by P Gane) Durban: Butterworth 1939
- P M A Hunt South African criminal law and procedure 2nd edition by J R L Milton Cape Town: Juta 1982
- Klopper C F Klopper "Artikel 36 van Wet No 62 van 1955" Tydskrif vir Hedendaagse Romeins-Hollandse Reg 1969 50-68
- Knobel J C Knobel Eiendomsreg op wilde diere Unpublished LL B dissertation University of Pretoria: 1984
- Lee & Honore Property R W Lee & A M Honore The South African law of property, family, relations and succession Durban: Butterworth 1954
- Lewis C Lewis "How Reck lost the wreck" Businessman's Law 1988 18 16-18
- Digesta T Mommsen & P Krueger The Digest of Justinian (English translation edited by A Watson) Pennsylvania: University of Pennsylvania 1985
- Institutiones Iustiniani J B Moyle The Institutes of Justinian 5th edition Oxford: Clarendon Press 1913
- A Rabie South African environmental legislation Pretoria: Heer Printing Co (Pty) Ltd 1976

- Silberberg & Schoeman
Property
- J Schoeman: Silberberg and Schoeman: the law of property 2nd edition Durban: Butterworth 1983
- Snyman
- C R Snyman Strafreg 2nd edition Durban: Butterworth 1986
- Sonnekus Vonnisbundel
- J C Sonnekus Sakereg vonnisbundel Durban: Butterworth 1980
- Van der Keessel Praelectiones
- D G van der Keessel Praelectiones iuris hodierni ad Hugonis Grotii introductionem ad iurisprudentiam Hollandicam (Translated by H L Gonin) Cape Town: Balkema 1963
- Van der Keessel Theses
- D G van der Keessel Theses selectae (Translated by C A Lorenz) Cape Town: Juta 1884
- Van der Merwe Sakereg
- C G van der Merwe Sakereg Durban: Butterworth 1979
- Van der Merwe & Rabie
- C G van der Merwe & M A Rabie "Eiendom van wilde diere" Tydskrif vir Hedendaagse Romeins-Hollandse Reg 1974 38-48
- Van der Merwe & Rabie
Animals
- C G van der Merwe & M A Rabie "Animals" The law of South Africa Vol 1 Durban: Butterworth 1976 215-254
- Vinnius Ad Institutionem
- A Vinnius In quatuor libros institutionum imperialum commentarius academicus et forensis Amsterdam: 1692

Voet Commentarius

J Voet Commentarius ad pandectas
(Translated by P Gane) Durban:
Butterworth Vol 2 1955; Vol 6, 7, 1957

Young Natura

E Young "Droogtehelp vir wildboere"
Natura 1984 1 19-21

TABLE OF CASES

Breda v Muller 1829 1 Menzies 425
De Villiers v Van Zyl 1880 Foord 77
Dunn v Bowyer 1926 NPD 516
S v Frost, S v Noah 1974 3 SA 466 (C)
Gosani v Kreusch 25 SC 350
Lamont v Heyns 1938 TPD 22
S v Khumalo 1964 1 SA 498 (N)
Langley v Miller 1848 3 Menzies 584
R v Mafohla 1958 2 SA 373 (SR)
R v Maritz 1908 25 SC 787
R v Mathule 1959 2 PHH 234 (GW)
Mills v Reck and others 1988 3 SA 92 (C)
S v Mnomiya 1970 1 SA 66 (N)
Pottie v Kotze 1954 3 SA 719 (A)
S v Reddy 1962 2 SA 343 (N)
Richter v Du Plooy 1921 OPD 117
R v Schonken 1929 AD 36
Theron v Steenkamp 1929 CPD 434
Wright v Ashton 2 Buch AC 240

1. BACKGROUND AND SCOPE OF INVESTIGATION

* Introduction

1.1 On 26 October 1988 the Minister of Justice requested the South African Law Commission to carry out an investigation into the acquisition and loss of ownership of wild animals. This request was inspired by calls from various bodies and persons in recent times for more effective protection of game farmers. The Minister recently, in reply to a question from a member of the House of Assembly during a debate in that House, pointed out that the National Game Committee of the South African Agricultural Union during its first congress in 1982 requested the Department of Justice to solve the problem of control and ownership of game.¹ The necessity of better protection for game farmers is evident from these words of the Minister:²

(N)ew needs have arisen in respect of game farmers' ownership of game. Poaching is increasing, and specifically because a wild animal is res nullius under our common law and because a person may acquire it by owning it - actually by controlling it - certain problems arise in the combating of poaching. The Stock Theft Act contains provisions aimed at the curbing and more effective trial of stock-theft cases. This provides greater protection for farmers. The general impression is that penalties for stock theft are also much higher than for poaching. In the light of prevailing requirements and conditions in respect of game farming, it therefore appears fair and desirable to accord the claims of game farmers the same recognition. Briefly summarised, it comes down to the fact that a farmer's right of ownership of his game does not receive the same protection as would stock if he loses control of his game. The Government has therefore decided, in principle, that our game farmers deserve the sympathy and attention of the legislator.

The State President, Mr P W Botha, during the official opening of the annual congress of the National Game Organisation in 1988, also indicated that he was aware of the fact that game farmers were not afforded the same recognition and protection in law as stock farmers and that the penalties for

1 Debates in the House of Assembly 11 May 1988 col 9653.

2 Ibid.

damage to and theft of game were regarded as insufficient.³ President Botha further indicated that the Government had decided to consider the position of the game farmer in respect of theft and damage.

1.2 Game farming has in recent times developed into a very promising branch of agriculture. In view of the following quotation from a magazine for game farmers, the importance of this industry cannot be underestimated:⁴

Without making use of the numerous subsidies by means of which the Government financially supports other agricultural industries, the game farmer has in an incredibly short space of time developed this new industry to a level where a few years ago the foreign currency that could be earned with venison exports was more than double that earned with exports of fresh, frozen mutton, pork and goat's meat combined.

1.3 One of the things that game farmers have regarded as discriminatory is that they are not entitled to the same financial assistance as that available to other agricultural industries. From the Land Bank's point of view the problem lies in the fact that game, being more difficult to control than stock, constitutes a risk when it comes to providing security for loans. This aspect is closely bound up with the problem experienced by game farmers in proving ownership of game. In addition, other problems regarding the loss of game are widely encountered by game farmers. It was therefore decided to include an investigation into the acquisition and loss of ownership of game in the Commission's programme.

* Survey of problems

1.4 Consultation with various interested parties, amongst whom a number of game farmers, revealed that the greatest single problem encountered by game farmers is the theft of game. In many instances enormous expenses are incurred in purchasing game, fencing off camps or

3 Beeld 26 October 1988 15.

4 E Young Natura 1984 1, 19-21; our translation.

enclosures and providing fodder for game - expenses which are paid by the game farmer himself. By way of example the average prices obtained for a few species of game at auctions in Natal during 1988 may be noted:⁵

White rhinoceros:	R34 714
Roan antelope :	R20 167
Hippopotamus :	R15 722
Sable antelope :	R12 661
Buffalo :	R9 417
Giraffe :	R5 742
Tsessebe :	R4 093
Eland :	R2 306
Kudu :	R913 ⁶

1.5 The nature conservation ordinances of the respective provinces contain various penalties in respect of the unlawful hunting and catching of wild animals.⁷

In the Transvaal the following offences and penalties, inter alia, are found in the ordinance in question:⁸

- (a) Section 16: Hunting of protected game (without permit): a fine not exceeding R1 500 and/or imprisonment for a period not exceeding 18 months;
- (b) Section 17: Hunting of ordinary game (without complying with certain requirements): a fine not exceeding R750 and/or imprisonment for a period not exceeding 9 months;

5 Statistics were supplied by the Natal Parks Board.

6 The highest price paid for a kudu was R3 500.

7 Cf Ord 8 of 1969 (OFS); Ord 19 of 1974 (CP); Ord 4 of 1975 (SWA); Ord 15 of 1974 (Natal); Ord 12 of 1983 (Tvl).

8 Ord 12 of 1983.

- (c) Section 18: Hunting of protected wild animals (without permit or permission): a fine not exceeding R1 500 and/or imprisonment for a period not exceeding 18 months;
- (d) Section 19: Hunting in nature reserves (without permit or permission): a fine not exceeding R1 500 and/or imprisonment for a period not exceeding 18 months;
- (e) Section 25: Catching of game (without permit): a fine not exceeding R1 500 and/or imprisonment for a period not exceeding 18 months;
- (f) Section 26: Leaving or making of openings in certain fences (without permit): a fine not exceeding R1 500 and/or imprisonment for a period not exceeding 18 months.

1.6 Although a court may, in terms of section 300(1)(a) of the Criminal Procedure Act, 51 of 1977, when hearing any offence in which damage to or loss of property belonging to some other person was caused, award compensation upon the application of the injured person or the prosecutor up to an amount of R5 000 (in the case of a magistrate's court) and R20 000 (in the regional court), the ordinances of the various provinces do not include a provision similar to section 15 of the Stock Theft Act.⁹ According to this section the court directs the attention of the owner of stock which has been stolen to the provisions of section 300 of the Criminal Procedure Act and the jurisdiction of the magistrate's court to award compensation to the injured person is raised to R10 000. Only stock farmers, therefore, enjoy the advantage of a raised jurisdiction of the magistrate's court.

1.7 It is evident from the foregoing that in many instances game farmers receive inadequate compensation in respect of losses suffered by them. Even if they were to receive the maximum compensation of R5 000 in terms of the Criminal Procedure Act in the magistrate's court, cases still

9 Act 57 of 1959.

occur where the loss suffered far exceeds the compensation awarded.¹⁰ In addition, many game farmers are apparently not aware of the remedy contained in the aforementioned section 300, and no obligation rests upon the presiding officer to direct the prejudiced person's attention to it (unlike the position with stock farmers).

1.8 Although it is possible for the particular crime to be heard in the regional court, which is competent to award damages up to R20 000 in terms of section 300 of the Criminal Procedure Act, the injured person has no say in the choice of a suitable forum, as the prosecutor exercises this choice.

1.9 From the evidence of game farmers it emerged that in prosecutions for theft of game problems are encountered in proving ownership of or proprietary rights in game. These problems may be ascribed to the common law rules relating to the acquisition and loss of ownership of game.¹¹ It would appear that the commercial industry into which game farming has developed over the past few years is still trapped in a rigid framework, the limits of which are determined by the common law position. It seems unsatisfactory that a white rhinoceros for which an extremely high price was paid at a game auction may, upon breaking through an approved game-proof fence, be regarded as res nullius merely because it is no longer under the physical control of its lawful owner. The implication is that the rhinoceros may become the lawful property of another by occupatio. In case law, and even amongst different common law authors, there is no consensus as to whether one who catches or kills a wild animal contrary to a statutory provision, becomes the owner of that animal. Most writers on this aspect are of the opinion that the unlawful taking into possession of wild animals does in fact result in the acquisition of ownership.¹²

10 Cf the prices of some species of game in par 1.4 above.

11 Cf Van der Merwe & Rabie 44.

12 Cf par 2.37 et seq.

1.10 Bound up with the problem of game theft, there is apparently also the problem of the great shortage of law enforcers, i.e. nature conservators who can enforce the provisions of the nature conservation ordinances, and so prevent the losses and damage suffered by game farmers.¹³ Although the South African Police have the authority to arrest persons who contravene the nature conservation ordinances,¹⁴ and to exercise the powers conferred on nature conservators, game farmers allege that the Police are sometimes hesitant to act. This hesitancy may be ascribed to the fact that action in terms of the nature conservation ordinances requires a specialised knowledge of the ordinances and that nature conservators are better trained in this regard. According to statistics received from the Nature Conservation Division of the Transvaal Provincial Administration, there are at present only 23 nature conservators who are concerned with law enforcement on game farms in the whole of the Transvaal.¹⁵ In contrast, there are approximately 1 100 game farmers in the Transvaal who have obtained exemption in terms of section 47 of the Nature Conservation Ordinance.¹⁶ There are also a number of honorary nature conservators appointed in terms of section 5 of the Ordinance who have powers similar to those of nature conservators, except that these powers are limited. Apparently only a few such appointments have been made.

13 In terms of the different provincial ordinances nature conservators have various powers in respect of the searching of persons and premises; the seizure of exhibits; etc. Cf sec 106 of Ord 12 of 1983 (TVI).

14 The definition of "nature conservator" in sec 1 of Ord 12 of 1983 (TVI) is: "(a) a nature conservator appointed in terms of sec 4; (b) a member of the South African Police".

15 This figure does not include the number of nature conservators working in nature reserves. There are at present 71 such conservators in nature reserves. These figures are as at 11 November 1988.

16 That is exemption to hunt, to catch or to sell game in cases where the Administrator is satisfied that land is fenced in such manner that game on land outside the fence cannot readily gain access to the land which is fenced and that game cannot readily escape from the land which is fenced.

1.11 The consequences of the apparent shortage of persons competent to enforce the respective nature conservation ordinances are obvious. It is, moreover, not unlikely that game thieves are aware of this shortage and that they weigh the possibility of being caught and punished against this.

* Scope of investigation

1.12 In the discussion which follows, ways of countering the above-mentioned problems will be investigated. For this purpose it will be necessary to consider the rules governing the acquisition and loss of ownership of wild animals.

1.13 Attention will also be paid to existing measures aimed at combating the theft of animals, other than wild animals, in order to establish whether analogous measures in respect of wild animals are desirable.

2. THE ACQUISITION AND LOSS OF OWNERSHIP OF WILD ANIMALS

* Introduction

2.1 As the common law position in respect of ownership of wild animals has been taken over in the South African law, the rules as they apply in the Roman and Roman-Dutch law will be discussed below.

* Roman law

(a) The term "wild animals"

2.2 It would appear that in Roman law there was no categorisation of wild animals. Wild animals were defined as "all animals originating from the sea, the land or the air".¹ There are, however, a number of references to particular species of animals, for example wild boars,² bees, doves and peacocks.³

(b) Acquisition of ownership of wild animals

2.3 Wild animals in a condition of natural freedom are regarded as res nullius, that is, things belonging to no one. As these things belong to nobody, no one's right is affected by appropriation thereof and such appropriation or occupatio is therefore justified.⁴ Three requirements are set for occupatio:

- (i) The thing appropriated must be a corporeal thing which, while belonging to no one, is nevertheless susceptible of ownership.

1 Institutiones Iustiniani 2 1 12.

2 Digesta 41 1 55.

3 Gaius Institutiones 2 68.

4 Digesta 4 1 5 5.

- (ii) The occupier must have the intention of appropriating the thing.
- (iii) There must be physical occupation of the thing.⁵

2.4 The occupier of wild animals also becomes the owner of the offspring of those animals, provided that the offspring is born while the mother animal is in the control of the occupier.⁶

2.5 A very important consequence of the common law position is that a person becomes the owner of a wild animal by occupatio even when possession of the animal is taken on someone else's land,⁷ and even if he was prohibited by the owner of the land to hunt or to catch wild animals there.⁸ In the event of someone setting a snare on another's land, he becomes owner of the animal that became entangled in the snare when he takes possession of the animal, despite the fact that he did not have the landowner's permission to set the snare on his land.⁹

(c) Loss of ownership of wild animals

2.6 A person who has taken possession of a wild animal by occupatio remains the owner thereof as long as it is physically under his control. In the event of the animal escaping and regaining its natural freedom, the occupier loses his ownership of that animal.¹⁰ Consequently any person may again become the owner of the escaped wild animal by occupatio.

5 Van der Merwe Sakereg 138.

6 Digesta 41 1 2.

7 Institutiones Iustiniani 2 1 12.

8 Ibid.

9 Digesta 41 1 55.

10 Institutiones Iustiniani 2 1 12.

2.7 Some wild animals have, however, been tamed and are regarded as such as long as they are in the habit of returning to their owners. Therefore loss of ownership of tamed animals (for example doves and bees) takes place only when the animals have lost the habit of returning to their owners, since only at this stage do they become res nullius and consequently liable to be appropriated by occupatio.¹¹ Loss of possession of domestic animals such as sheep, cattle, horses etc, does not, however, result in loss of ownership. Domestic animals which have escaped are therefore not susceptible of appropriation by occupatio.¹²

* Roman-Dutch law

(a) The term "wild animals"

2.8 The term "wild animals" in the Roman-Dutch law does not differ from the same term in the Roman law.¹³ A number of examples, without a discussion of the difference between wild and domestic animals, are dealt with by the authorities.¹⁴

(b) Acquisition of ownership of wild animals

2.9 Acquisition of ownership of wild animals in the Roman-Dutch law also takes place by occupatio.¹⁵ Voet defines occupatio as the taking hold of corporeal things which are common according to the law of nations, when this is done with the intention of becoming the owner thereof, whereby that

11 Cf Van der Merwe 139; Gaius Institutiones 2 68; Institutiones Iustiniani 2 1 15; Digesta 41 1 5 5.

12 Digesta 41 1 5 6.

13 Knobel 9.

14 Eg deer, wild boars, swans, doves, falcons and different kinds of fish.

15 Voet Commentarius 41 1 3; De Groot Inleidinge 41 1 1.

which belongs to no one is vouchsafed by natural reason to the first taker.¹⁶

2.10 De Groot is of the opinion that the owner of a lake possesses the fish in that lake and is therefore also the owner of the fish.¹⁷ The owner of a properly fenced wood is likewise also the owner of animals in that wood.

2.11 Voet, however, expressly differs from De Groot, saying that no one possesses fish in a lake or animals in a fenced wood, since fences are normally used to indicate the boundaries of land and not to detain animals.¹⁸

2.12 An important premise is that a hunter does not become the owner of a wild animal merely by wounding it.¹⁹ If a person wounds a wild animal which is then caught by a second person, the second person becomes the owner thereof since he actually took possession of the animal. His improper conduct does not impair his acquisition of ownership by occupatio.

2.13 The implications of taking possession of a wild animal on another's land, which to a large extent gave rise to this investigation, are also dealt with by the Roman-Dutch authors. They agree that the occupier becomes the owner of the animal even though the landowner forbade the occupier to set foot on his land.²⁰ According to Voet the landowner may institute the actio iniuriarum against someone who, contrary to his prohibition, set foot

16 Voet Commentarius 41 1 2.

17 De Groot De iure belli ac pacis 2 8 2.

18 Voet Commentarius 41 1 5.

19 De Groot Inleidinge 2 4 31; Voet Commentarius 41 1 7; Van der Keessel Praelectiones 2 4 5; Huber Rechtsgeleertheyt 2 4 27.

20 Voet Commentarius 41 1 4; Vinnius Ad Institutionum 2 1 12; Huber Rechtsgeleertheyt 2 4 26.

upon his land.²¹ This action of moral damages only enabled the landowner to claim a nominal amount for intentional personal injury.²²

2.14 Later legislation made it unlawful to hunt on a landowner's land without his permission in writing.²³ The landowner, however, may hunt any species of game on his land.

2.15 The Roman-Dutch authorities are not unanimous in their answer to the question whether a person who takes possession of a wild animal contrary to a law becomes the owner of that animal. De Groot,²⁴ Groenewegen²⁵ and Voet²⁶ are of the opinion that wild animals caught contrary to legal provisions must be handed over to the forester and that the hunter does not become owner thereof.²⁷ Van der Keessel, however, holds the view that these writers wrongly deduced a general rule for the whole of Holland from custom law rules and local laws and that laws prohibiting the taking possession of wild animals do not prevent the acquisition of ownership by the occupier of wild animals captured contrary to those laws.²⁸

(c) Loss of ownership of wild animals

21 Voet Commentarius 41 1 4; Cf also Van der Merwe & Rabie 41.

22 According to Van der Merwe & Rabie 41, early South African case law held that the action of the landowner did not derive from the actio iniuriarum, but from the English law remedy of trespass.

23 Van der Keessel Theses 185-187.

24 De Groot Inleidinge 2 4 7.

25 Groenewegen De legibus abrogatis ad l 2 1 12.

26 Voet Commetarius 41 1 7.

27 Cf also Dunn v Bowyer 1926 NPD 516, where these views are referred to.

28 Van der Keessel Praelectiones 2 4 9.

2.16 According to most Roman-Dutch authorities, loss of possession of wild animals (for example by means of escape) necessarily resulted in loss of ownership. This view was apparently inspired by the fact that it would be difficult to identify an escaped wild animal which has landed amongst other game.²⁹ De Groot points out that wild animals are the only instance where ownership is lost as soon as possession is lost, and that the position is anomalous since it is precisely the possibility of regaining possession of the thing lost that characterises ownership.³⁰ He holds that loss of possession gives rise to certain presumptions, for example that the owner has renounced his ownership in view of the fact that pursuit and identification of his escaped wild animals are normally not possible. This presumption can be rebutted if the owner has made some or other mark of identification on the animal.

2.17 As regards another category of animals, namely tamed animals, it has been pointed out that, according to Roman law, loss of ownership of these animals takes place when they have lost the habit of returning - the consuetudo revertendi - to their owners.³¹ Some Roman-Dutch authorities were influenced by the view held by a group of old French National authors that the owners of tamed wild animals (animalia mansuefacta) remain the owners of the animals even when they have lost the habit of returning.³² This approach was however not generally accepted by the Roman-Dutch writers and was apparently restricted to a few species of animal such as hawks and falcons.

* South African law

(a) The term "wild animals"

29 Cf Van der Merwe & Rabie 40.

30 De Groot De iure belli ac pacis 2 8 3.

31 See par 2.7.

32 Van der Merwe & Rabie 40.

2.18 Van der Merwe³³ indicates that the question whether a particular animal is domestic or wild, depends upon the view held by the community. It would appear that no specific definition of wild animals exists. Apparently the lack of a juridically formulated definition of wild animals as a class does not create problems. As far as could be determined, the South African Courts have never had to decide the question whether a particular animal is a wild animal or not.³⁴

(b) Acquisition of ownership of wild animals

2.19 While in the Roman and Roman-Dutch law ownership of wild animals was acquired mainly by occupatio, other forms of acquisition of ownership are also found today, of which delivery (traditio) as a form of derived acquisition of ownership - in view of the large number of game auctions held annually - is probably the most important.³⁵ Next, we consider the various ways in which ownership of wild animals may be acquired in South African law.

(i) Occupatio

2.20 It is evident from the case law that wild animals belonging to no one may still be appropriated by occupatio.³⁶

2.21 What is important is the requirement that the animal appropriated by occupatio, should physically be taken into possession. Possession presupposes that the occupier should have the subject physically under his

33 Van der Merwe Sakereg 138.

34 Although McGregor J in Richter v Du Plooy 1921 OPD at one stage doubted whether the wildebeest in casu were not perhaps domesticated animals.

35 These other forms of acquisition of ownership were not unknown to the common law, yet wild animals were seldom, if ever, taken into possession otherwise than by occupatio.

36 Richter v Du Plooy 1921 OPD 117; R v Mafohla 1958 2 SA 373 (SR); S v Mnomiya 1970 1 SA 66 (N); Mills v Reck and others 1988 3 SA 92 (C).

control.³⁷ This brings one to the question of what measure of physical control will be sufficient for the occupier to become the owner of a wild animal.

2.22 In Richter v Du Plooy³⁸ wildebeest were bought on a market and reared by hand. Thereafter the animals were released on a farm 800 morgen in extent and a few of these animals strayed to an adjoining farm where two of them were shot and the rest driven away. The "owner" of the animals thereupon instituted an action against the owner of the adjoining farm for the value of six wildebeest, but was unsuccessful. McGregor J says the following:³⁹

One consideration which weighs with me in this enquiry is the size of the enclosure - some 800 morgen. Now though the size of this enclosure does not exclude the idea of confinement of such a character as to make the animals the property (by occupation or otherwise) of their captor or "occupier", yet it has a material bearing on the juristic character of the animals confined in the enclosure.

and further⁴⁰

All that is affirmed here is that the confinement of these animals (having regard at once to the nature of the animal, the extent of the enclosure, the object of preserving the animals and the extent of their susceptibility to the control and management of man) is not sufficient to take them out of the category of wild animals, and if they emerge from their place of detention they become res nullius - liable to be appropriated by the first person who has the acquisitive instinct and the means to gratify it.

2.23 The headnote to the reported decision is however not a true reflection of the judgment, and unfortunately it is precisely the headnote

37 Van der Merwe Sakereg 69.

38 1921 OPD 117.

39 Ibid 118.

40 Ibid 119.

which is referred to in Lamont v Heyns.⁴¹ All that the judge in this decision attempts to show is that the enclosure is not necessarily too large for ownership of game to be established, but that the size of the enclosure has a bearing on the juristic character of the animals. The decision however makes it clear that as soon as animals escape from detention, they become the property of no one and are therefore susceptible to occupatio by another.

2.24 In Lamont v Heyns⁴² blesbuck were confined in a camp of 250 to 300 morgen, enclosed by a fence five and a half feet high with (inter alia) six strands of barbed wire. The defendant set foot in the camp without permission and shot and wounded a number of buck. In an action for damages it was submitted on his behalf that the plaintiff was not the owner of the buck. Tindall J P says the following:⁴³

The Court has been referred to the case of Richter v Du Plooy ... The Court held, according to the headnote, that the camp of 800 morgen was not a sufficiently confined enclosure to render the animals the property of the owner of the farm, by occupation or otherwise, and that therefore he had no claim for damages against the person who destroyed them. Whether or not the owner of the farm has sufficient control over the animals to make him owner of them seems to me to depend on all the circumstances. It is a question of degree. I do not think that the case of Richter v Du Plooy applies to the present case. Here we have a much smaller camp and we have the fact that this small herd of blesbok was bred up from an original number of 30. The correct inference from the evidence, in my opinion, is that the camp in question was used solely, or mainly, for the blesbok and that it is impossible for them to get out. In the present case the animals did not stray from the property as in Richter's case, but unauthorized persons came onto the plaintiff's property, made their way into the camp, and shot the animals in the place where they were confined.

41 See par 2.24 below.

42 1938 TPD 22.

43 Ibid 25.

2.25 The plaintiff consequently succeeded. It appears that the size of the camp played a part in determining whether the plaintiff exercised sufficient control over the animals.

2.26 According to Lamont v Heyns, supra and an author such as Van der Merwe,⁴⁴ the question as to what measure of physical control is required, being a question of fact, depends upon the circumstances of each case. The South African nature conservation ordinances are silent on the question of ownership of game. Section 29(1) of Ordinance 4 of 1975 (SWA) however contains the following provision:

The owner of -

- (a) a farm which is enclosed with a game-proof fence or an adequate fence;
- (b) any piece of land which is not less than one thousand hectares in extent and enclosed with a game-proof fence,

shall, subject to the provisions of this Ordinance, be the owner of all huntable game, huntable game birds and exotic game on such farm or piece of land as long as such huntable game, huntable game birds and exotic game are lawfully on such farm or piece of land and as long as such farm or piece of land remains enclosed in that manner.

2.27 A further requirement for acquisition of ownership by occupatio is that of intention to become the owner.⁴⁵ This requirement does not seem to give rise to problems, since it can hardly be imagined that a person will take permanent possession of a wild animal without the intention of becoming owner thereof. Apparently it is normally accepted that the occupier had the required intention.

2.28 Attention will now be given to some problems relating to occupatio of wild animals.

44 Van der Merwe Sakereg 141.

45 Lee & Honore Property 14.

(aa) Where one person wounds a wild animal and a second person takes possession of the animal.

2.29 A leading decision in this regard is R v Mafohla,⁴⁶ where a kudu was wounded by a person and thereafter taken into possession by others. Initially these other persons were found guilty of theft, but the convictions were set aside on review. The court found that the mere wounding of the animal was not sufficient to establish a transfer of ownership to the plaintiff, but that it was the accused who prima facie obtained ownership of the animal by occupatio of a res nullius.

2.30 In a recent decision, Mills v Reck and Others,⁴⁷ the problem in question again received attention. The applicant, who was engaged in salvage operations on a shipwreck, applied for an interdict to prevent two other parties from removing the parts of the wreck which he sought to recover, and he succeeded. Burger J, having investigated the common law principles in relation to occupatio, says inter alia:⁴⁸

It is significant that amongst the authorities of that time there was already a difference of opinion. It is not clear why it was necessary to make such a rigid choice between the original hunter who wounded the wild animal and the subsequent captor. It would be more logical to say that, if the original wound was mortal or so severe that capture would in all probability have followed and that the original hunter continued in his pursuit, he should have a preferential right. On the other hand, if the wound was not so severe, then the first in time should gain no preferential right.

2.31 The correctness of the foregoing remarks is questioned by Carole Lewis, Professor of Law in the University of the Witwatersrand.⁴⁹ Professor Lewis is right in holding that the common law position is that the first person who succeeds in taking possession of something which is not

46 1958 2 SA 373.

47 1988 3 SA 92 (C).

48 Ibid 96.

49 Lewis 18.

the property of another obtains a title in law in respect thereof. Up to that point the object is available to all. It appears to be incorrect to seek the criterion for the passing of ownership in the degree of severity of the wound inflicted, or to attach preferent rights to it.

(bb) Where more than one person is involved in the occupatio of a wild animal.

2.32 In Langley v Miller⁵⁰ a whale was harpooned by the crew of a boat and thereafter the crew of another boat assisted in killing the animal. From the decision it appears that each person who has contributed to taking possession of an animal is entitled to a pro rata share of that animal or the proceeds thereof. In the event of the court not being able to determine the value of each person's contribution, as was the case in this decision, the animal is awarded in equal shares to the contributory parties.

(cc) Taking possession of wild animals on another's land.

2.33 It was earlier indicated that, according to common law, someone who takes possession of a wild animal on another's land becomes the owner of the animal, even though the landowner prohibited entry upon his land.⁵¹ This principle is still applied in the case law, although it must be admitted that the decisions on the subject⁵² are very old. The result is clearly unsatisfactory.

2.34 Van der Merwe & Rabie say the following:⁵³

South African courts do allow an action for trespass in these cases but have not expressly stated that the action is based on the actio iniuriarum. It seems, however, as if case law is prepared to allow

50 1848 3 Menzies 584.

51 Cf par 2.13.

52 De Villiers v Van Zyl 1880 Foord 77; Breda v Muller 1829 1 Menzies 425; R v Maritz 1908 25 SC 787.

53 Van der Merwe & Rabie Animals 220.

damages on a wider basis in certain circumstances, amounting to the value of the animals captured.

2.35 Various decisions are referred to as corroborant of this view.⁵⁴ An action for damages could be instituted only if the landowner had heard of the entering of his land. According to the Roman-Dutch authors⁵⁵ the base of the action was the actio iniuriarum, being an action for moral damages in terms of which only a nominal amount could be claimed for personal injury. It would appear that the award of damages was not connected to the loss of ownership - in that ownership none the less passed to the hunter who hunted contrary to the landowner's prohibition on the latter's land - but was aimed at the personal injury suffered by the landowner in that someone entered his land (without his consent). In R v Schonken⁵⁶ it was indicated that the hunter who entered land without consent is guilty of crimen iniura. From the South African decisions it appears, however, that the landowner's action was not derived from the actio iniuriarum, but from the English law remedy of trespass. In De Villiers v Van Zyl⁵⁷ Z entered the land of V and drove away a number of young wild ostriches, some of which were appropriated by the defendant. In an action for trespass the court held:⁵⁸

...(T)he Court is not bound to award merely the amount of the pecuniary loss caused by the actual trespass, but may take into consideration all the circumstances of the case, and that therefore, though the ostriches being ferae naturae had not been the property of V, it was justified in making their value the measure of the damages awarded.

54 De Villiers v Van Zyl 1880 Foord 17; Wright v Ashton 2 Buch AC 240 243; Gosani v Kreusch 25 SC 350; Theron v Steenkamp 1929 CPD 434; Cf also Van der Merwe & Rabie 41.

55 Voet Commentarius 41 1 4; Vinnius Ad Institutionum 2 1 12 note 3.

56 1929 AD 36 on 45.

57 1880 Foord 77.

58 Ibid 77.

2.36 In cases where the owner exercises sufficient physical control over wild animals, the intruder does not become owner of such an animal since the animal cannot be said to be res nullius. The owner would in this regard be able to apply the usual remedies available to him under the law of delict and the law of things.⁵⁹

(dd) Unlawful taking possession of wild animals.

2.37 The respective nature conservation ordinances contain various measures aimed at prohibiting taking possession of certain species of wild animals, or taking possession of wild animals at certain times or in certain ways.⁶⁰ Consequently the question arises whether someone who catches or kills a wild animal contrary to the provisions of the ordinances becomes the owner of that animal. It may be mentioned at the outset that conflicting views exist not only in South African law, but also existed in the Roman-Dutch law regarding this subject.

2.38 In Dunn v Bowyer⁶¹ a hippopotamus was shot without a licence. The court relied on the views of De Groot, Groenewegen and Voet that wild animals caught contrary to laws must be handed to the forester and decided that the hunter does not become the owner of wild animals which he so catches or kills.

2.39 In R v Mafohla⁶² Young J obiter voiced the opinion that should a similar set of facts again occur in the case law, the correctness of the decision in Dunn v Bowyer, namely that a hunter does not become owner of the animal which he captures or kills contrary to laws, would probably need

59 Cf Knobel 29.

60 Cf par 1.5 above.

61 1926 NPD 516.

62 1958 2 SA 373 (SR).

reconsideration. In respect of the latter decision Van der Merwe & Rabie⁶³ say:

Judged from a Roman law point of view, it appears, with respect, as if the court in Dunn v Bowyer projects the reprehensibility of the unlawful hunting on the question whether the hunter hunting contrary to a law becomes the owner of the wild animal so hunted; although the hunter is liable to be convicted in terms of the ordinance, this should not affect the fact that he became owner of the animal by occupatio.

2.40 It may be questioned whether acquisition of ownership is not dependent upon a requirement that the cause which gave rise to that acquisition must be lawful (iusta causa). The premise is that where a legal prescription or statutory provision has been contravened for the purpose of acquiring ownership of something, transfer of ownership ought not to be effected since the act which gave rise to the acquisition of property is unlawful. For occupatio as a mode of original acquisition of ownership, however, only the following requirements are set:⁶⁴

- (a) the thing appropriated must be corporeal;
- (b) belong to no one, and;
- (c) be susceptible to ownership;
- (d) the occupier must have the intention of appropriating the thing;
- (e) there must be a physical taking in possession of the thing.

As such things belong to no one, no one's right is affected by appropriation and the appropriation is justified.⁶⁵ This view is also evident from the Digesta:⁶⁶

63 Van der Merwe & Rabie 46; our translation.

64 Cf par 2.3

65 Van der Merwe Sakereg 138.

66 Digesta 41 1 3.

Quod enim nullius est, id ratione naturali occupanti conceditur (That which belongs to no one is awarded by natural reason to the first taker.)

Illuminating, also, is the dictum of J H Steyn J in S v Frost, S v Noah:⁶⁷

In my opinion the question whether the capture of a wild animal or a fish which is res nullius can have legally recognisable and enforceable consequences such as ownership, even though its capture may be controlled or prohibited by legislative enactment, must depend upon the construction of the legislation concerned. The determination of this question, so it seems to me, is governed by principles analogous to those applicable when considering whether the legislature intended also to visit nullity upon a transaction forbidden by a statute. The test in this respect is formulated by Fagan, CJ in Pottie v Kotze 1954 3 SA 719 (AD) at p 726H, thus: "The usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that the recognition of the act by the court will bring about or give legal sanction to the very situation which the legislature wishes to prevent."

2.41 In this case the accused caught fish out of season, and a large part of their catch was forfeited to the State. On appeal against the forfeiture the accused (not being the owners of the boat) submitted that the owner of the boat was the owner of the fish and that the magistrate should therefore first have heard the owner of the boat prior to forfeiture of the fish. After analysing the provisions of section 3(3) of the Sea Fisheries Act⁶⁸ and referring to the verdict in Dunn v Bowyer, Steyn J arrived at the following conclusion:⁶⁹

These provisions in my opinion are inconsistent with a construction that the legislature intended, in addition to visiting a penal sanction and a possible forfeiture, also to alter the ordinary consequences which flow from the capture of a wild animal, viz, that the captor becomes owner of the res nullius. For these reasons I do not propose

67 1974 3 SA 466 (C).

68 Act 10 of 1940.

69 On 472.

to follow the decision in Dunn v Bowyer which, in my view, was wrongly decided.

2.42 The forfeiture order was consequently set aside. The correctness of this decision is questioned by J C Knobel, currently lecturer in Private Law at the University of South Africa.⁷⁰ It would appear that the answer to the question whether a person who catches or kills a wild animal contrary to a statutory provision becomes the owner thereof depends largely upon whether one uses as one's point of departure the view held by Groenewegen, De Groot and Voet on the one hand or that held by Van der Keessel on the other. A few South African writers favour the view that ownership of a wild animal may not be acquired illegally.⁷¹ Most, however, seem to reason that the illegal taking possession of a wild animal does in fact result in acquisition of ownership.⁷²

2.43 It seems unjust that a person may acquire ownership of a wild animal which he obtained unlawfully. By relying on the test laid down in Pottie v Kotze⁷³ for the validity of transactions prohibited by a law, Steyn J in the Frost decision arrives at the conclusion that the intention of the legislature (in the Sea Fisheries Act) does not extend so far as to also amend the ordinary consequences emanating from the capture of a wild animal (viz the acquisition of ownership of a res nullius). Although the respective nature conservation ordinances are silent on the ownership of wild animals caught or killed contrary to the ordinances, the same test in Pottie v Kotze may be applied to conclude that by awarding ownership of a wild animal to the game thief the court awards "legal sanction to the very situation which the legislature wishes to prevent". Despite the fact that most authorities are of the opinion that ownership in these cases does in

70 Knobel 35 and further.

71 Hahlo & Kahn Union 584; Wille Principles 171.

72 Van der Merwe Sakereg 142; Van der Merwe & Rabie Animals 221; Silberberg & Schoeman Property 203 - 205; Sonnekus Vonnisbundel 166.

73 1954 3 SA 719 (A).

fact pass to the person who has taken possession of a wild animal contrary to a statutory provision, there are nevertheless pointers in the Roman-Dutch law - in the works of De Groot, Groenewegen and Voet - to arguments to the contrary, which, with respect, appear to be juridically more sound. In view of conflicting standpoints in the common law, conflicting decisions of the Supreme Court and disagreement among contemporary writers on this aspect, a uniform measure in this regard appears to be necessary. On the grounds of fairness it can be argued that ownership should not pass to a person who catches or kills game contrary to a statutory provision. The ratio of the rule in the law of succession that a murderer may not inherit from the estate of the person whom he murdered is that a person may not benefit from his wrongful act. The same consideration ought to apply to wild animals as well.

(ii) Other modes of acquiring ownership

2.44 Apart from occupatio, other modes of original acquisition of ownership are also found, viz -

- . acquisition of fruits - this implies that the owner of a wild animal also becomes the owner of its offspring;
- . prescription - in theory it should be possible for someone to become the owner of game by means of prescription, but in practice this will probably never occur.

2.45 Furthermore, an inferred mode of acquisition of ownership, viz delivery, exists. The implication is that the acquirer's right is inferred from that of his predecessor in title. The holding of game auctions, where a person may purchase game, serves as an example. Game auctions are common today and delivery is an important mode of transferring and acquiring ownership of a wild animal.

2.46 Ownership of game may also be acquired in a number of special ways, for example by the conclusion of a marriage in community of property, by estoppel and by legislation. These modes are, however, not important to the present investigation.

(c) Loss of ownership of wild animals

2.47 It would appear that loss of possession of game establishes loss of ownership. In Richter v Du Plooy⁷⁴ McGregor J says:

... the confinement of these animals ... is not sufficient to take them out of the category of wild animals, and if they emerge from their place of detention they become res nullius - liable to be appropriated by the first person who has the acquisitive instinct and the means to gratify it.

2.48 It can be inferred from the above that, irrespective of whether the game was acquired by occupatio or by delivery, ownership is lost as soon as the game escapes. The unjust result of such a rule is obvious. A person who has paid R15 000 for a hippopotamus at a game auction would find himself in an unenviable position should his hippopotamus escape and be taken into possession by another. The problem is that it may be difficult for him to prove ownership. The problem of proof may possibly be reduced if he was the only person in the vicinity who owned a hippopotamus, or if he had identified the hippopotamus by a clear mark. Even then, however, it would be possible for the accused to claim that the animal became res nullius and therefore susceptible to being acquired in property by occupatio. This obvious contradiction in the case of ownership of wild animals was already dealt with by the Roman-Dutch authorities.⁷⁵ It is suggested that a measure be implemented in terms of which mere loss of possession does not necessarily establish loss of ownership.

2.49 There are also other modes of losing ownership of game, for example by abandonment, death, insolvency, etc. For the purposes of the present investigation, however, the modes discussed above will suffice.

74 1921 OPD 119.

75 Cf De Groot - par 2.16 above.

3. SUMMARY AND DISCUSSION OF PROBLEM AREAS

3.1 It has been shown that the greatest single problem encountered by game farmers is the theft of game.¹ Theft, unlike the various offences embodied in the nature conservation ordinances, is a common law crime and is defined by Snyman as follows:²

Theft is the unlawful, intentional appropriation of another's movable, corporeal thing, or such appropriation of such thing which belongs to the doer himself, in circumstances in which the possessor has a particular right of possession in the thing.

3.2 It would appear that some game farmers are labouring under the misapprehension that the offences contained in the nature conservation ordinances with regard to hunting, catching or taking possession of wild animals boil down to theft of game.³ As can be inferred from the definition of theft above, the unlawful appropriation should be aimed at "another's movable, corporeal thing", in other words, something in respect of which someone has ownership. In this connection Van der Merwe & Rabie say the following:⁴

As far as the various ordinances on nature conservation are concerned, nothing is expressly stipulated in respect of the ownership of wild animals caught or killed contrary to the provisions of the ordinances. The ordinances do contain provisions that these animals may or must be forfeited, which may indicate that the offender became owner of the animal.

3.3 It must be clearly stated that the various ordinances are aimed primarily at nature conservation, and not the protection of the game farmer's interests. A game farmer should therefore, in seeking a remedy,

1 Cf par 1.4.

2 Snyman Strafreg 511; our translation.

3 Cf par 1.5, where some of these offences are reflected.

4 Van der Merwe & Rabie 46; our translation.

not rely on the nature conservation ordinances if he has suffered a financial loss through theft or damage.

3.4 An adjustment of the relatively low maximum penalties (about which game farmers are dissatisfied) prescribed by the ordinances for various offences can, in view of the foregoing, hardly be regarded as a solution to the problem of the theft of game.

3.5 If, however, a game farmer lays a charge of common law theft, the problem arises that it may be difficult for the State to prove the game farmer's ownership of the stolen game. In the preceding chapter the following problem areas were identified:

- * A general measure which may be applied in determining whether a person exercises sufficient physical control over game in order to be regarded as owner thereof, is lacking.⁵
- * It seems unfair that a game thief may acquire ownership of game which he caught unlawfully.⁶
- * The common law rule that loss of possession of wild animals results in loss of ownership appears to be anomalous and merits consideration.⁷

3.6 It would appear that the common law should be adjusted by legislation to keep pace with present-day needs with regard to the acquisition and loss of ownership of game.

5 Cf par 2.21 and further.

6 Cf par 2.43.

7 Cf par 2.48.

3.7 Van der Merwe & Rabie advocate a system under which ownership of wild animals should in principle be awarded to the State.⁸ The implication of such a system is that wild animals cannot be acquired in property by occupatio, as they are no longer res nullius but belong to the State. The State would then be able to transfer ownership of such animals to persons displaying an exceptional interest in and willingness to conserve wild animals on their land by making use of a permit system.

3.8 It is suggested that such a procedure will, however, render nugatory an important mode of acquisition of ownership of wild animals, viz occupatio. Individuals should in principle still be able to acquire ownership of wild animals in this way, provided that the law is adjusted in such a way that the extent of ownership of game is clearly formulated. Once it is established that a person has ownership of game, he will be able to make use of the traditional private law remedies such as the rei vindicatio (vindicatory action), possessory interdicts or the actio legis Aquiliae (action for damages) in order to protect his property. It is suggested that an amendment of the common law in terms of which ownership of wild animals is not lost in appropriate cases, will produce a result similar to the system advocated by Van der Merwe & Rabie.

3.9 It must however be borne in mind that an amendment of the common law in this regard will not be an aid to game farmers whose farms are not enclosed adequately. It is however unlikely that a farmer who has purchased expensive game at an auction will not take care that his animals are properly enclosed. On many farms game is found in its natural state, and the landowner is free to acquire such game by occupatio. He will then have to do whatever is necessary to gain physical control of the game, and as soon as he has established sufficient control over them, he should benefit by the proposed amendment to the common law. It must also be emphasised that the difficulties which may exist in respect of control and identification of wild animals are not a problem of law but a problem of fact.

8 Van der Merwe & Rabie 47, 48. This is also the case in Zambia where ownership of wild animals vests in the President on behalf of the Republic.

These are problems that must be solved by the game farmer, and not by rules of law.

3.10 A further problem raised by game farmers is the inadequate penalties imposed for the theft of game. It was shown above that the penalties in the nature conservation ordinances are probably misinterpreted by many game farmers as representing the penalties for theft of game. The punitive jurisdiction of the magistrates' courts is set out in section 92 of the Magistrate's Courts Act.⁹ A district court may, according to this section, impose a fine not exceeding R4 000 and imprisonment of twelve months and a regional court a fine not exceeding R40 000 and imprisonment of ten years in respect of crimes such as theft.¹⁰ In view of the high prices paid for game at auctions,¹¹ the regional court would probably constitute a more appropriate forum for hearing cases of theft of game. The regional court furthermore has jurisdiction to impose a compensatory fine to a maximum of R20 000.¹²

3.11 The problem of inadequate penalties may be obviated to a large extent by assigning the trial of cases of game theft to the regional court. The offences created by the nature conservation ordinances will naturally still be heard in the district courts, since these offences are to be distinguished from the theft of game.

3.12 It has been pointed out that there is apparently a shortage of nature conservators to deal with law enforcement.¹³ This shortage undoubtedly contributes to the extensive occurrence of offences under the nature conservation ordinances. Although the ordinances were not passed to protect the interests of game farmers, a reduction in this type of offence

9 Act 32 of 1944.

10 Cf the maximum penalties for offences in terms of Ord 12 of 1983 (TVI) in par 1.5.

11 Cf par 1.4.

12 Sec 300 of the Criminal Procedure Act, No 51 of 1977.

13 Par 1.10.

must necessarily result in a reduction in the theft of game, since the offences are committed not only in nature reserves, but also on the private property of game farmers. By way of example the following statistics received from the Nature Conservation Division of the Transvaal Provincial Administration may be noted:¹⁴

	<u>Number of complaints received</u>	<u>Number of cases heard</u>
Northern region:	3 979	1 110
Eastern region:	2 934	1 413
Western region:	1 974	449

During the same period the following number of firearms and spotlights were declared forfeit to the State:

	<u>Fire arms</u>	<u>Spotlights</u>
Northern region:	38	11
Eastern region:	8	2
Western region:	16	14

3.13 From the above statistics it may be concluded that the number of cases heard in the three regions is significantly less than half of the number of complaints received. In addition, the number of firearms and spotlights confiscated, which were apparently used in connection with the crimes in respect of which complaints were received, is insignificant. Although the relatively small number of tried cases may be ascribed to factors such as a lack of adequate evidence, it would appear that the inadequate number of nature conservators could have a significant effect in this regard.

¹⁴ Transvaal is divided into three regions for purposes of nature conservation: the Northern region, Eastern region and Western region. The statistics reflect offences under Ord 12 of 1983 (Tvl) during the period 1 April 1987 to 31 March 1988.

3.14 The apparent shortage of nature conservators is, however, a problem which cannot be obviated by legal reform. According to a letter handed to the Commission from a game farmer the staff shortage is due to non-competitive salaries received by these officials. A recommendation in this regard is made in paragraph 6.16.

3.15 The question was also raised whether it would not be desirable to enact provisions which would result in vehicles, weapons and other articles used in the commission of theft of game being declared forfeit to the State.

3.16 The powers of searching, seizing and arresting persons and goods in respect of which a reasonable suspicion exists that a crime has been committed, are discussed later.¹⁵ As far as the forfeiture of objects to the State is concerned, attention is directed to the Criminal Procedure Act¹⁶ which contains detailed provisions in this regard. Section 30 of the Criminal Procedure Act prescribes the manner in which a police officer must dispose of an article after seizure thereof. Section 35 enables a court to declare, without notice to any person, a weapon, instrument or other article used in connection with the commission of the particular crime forfeit to the State. The section also contains provisions aimed at the protection of the rights of innocent persons.

3.17 It appears to be unnecessary, therefore, to consider similar measures for the protection of game farmers.

15 Par 4.14.

16 Act 51 of 1977.

4. THE STOCK THEFT ACT

* Introduction

4.1 In the past the question has been raised whether game farmers may not be accommodated by adjusting the provisions of the Stock Theft Act¹ to provide for the theft of game.

4.2 The point to be considered is whether the Act provides better protection for stock farmers than the protection which game farmers, inclusive of existing remedies, enjoy at present and whether game farmers will benefit from inclusion of the theft of game under the Act.

4.3 In the following paragraphs the various offences contained in the Act will be discussed. Where applicable, the remedies available to game farmers under other legislation will also be referred to.

* Provisions of the Act

4.4 Section 2 of the Act makes it a crime to fail to give a satisfactory account of possession of stock or produce in regard to which a reasonable suspicion of theft exists. This section is similar to section 36 of the General Law Amendment Act,² which provides as follows:

Any person who is found in possession of any goods, other than stock or produce as defined in section thirteen of the Stock Theft Act, 1923 (Act No 26 of 1923), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.

1 Act 57 of 1959; hereinafter referred to as "the Act".

2 Act 62 of 1955.

4.5 The only difference between the two sections is that the General Law Amendment Act specifically excludes "stock and produce" since the Stock Theft Act at present provides for that.³ With regard to the two comparable sections the Appellate Division of the Supreme Court decided in R v Ismail⁴ that the elements of the two statutory provisions are the same. Section 2 of the Stock Theft Act therefore creates no new remedy for game farmers.⁵

4.6 Section 3 of the Act contains a penalty provision similar to section 37(1) of the General Law Amendment Act, 1955.⁶ The latter section provides:

Any person who in any manner, otherwise than at a public sale, acquires or receives into his possession from any other person stolen goods, other than stock or produce as defined in section thirteen of the Stock Theft Act, 1923, without having reasonable cause, proof of which shall be on such first-mentioned person, for believing at the time of such acquisition or receipt that the goods are the property of the person from whom he receives them or that such person has been duly authorized by the owner thereof to deal with or to dispose of them, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on conviction of receiving stolen property knowing it to have been stolen except in so far as the imposition of any such penalty may be compulsory.

4.7 The same argument in paragraph 4.5 above in respect of section 2 of the Act therefore also applies to section 3.

4.8 Section 4 of the Act makes the entering of enclosed land or a kraal, shed, stable or other walled place with intent to steal any stock or produce a crime and places the onus upon the accused to prove, in certain

3 Cf also Klopper 50.

4 1958 1 SA 206 (A).

5 Cf also sec 39 of Ord 15 of 1974 (Natal) en sec 37 of Ord 12 of 1983 (Tvl).

6 Cf Snyman 549.

circumstances, that he did not have the said intent. Section 1 of the Trespass Act⁷ provides as follows:

- (1) Any person who without the permission -
 - (a) of the lawful occupier of any land or any building or part of a building; or
 - (b) of the owner or person in charge of any land or any building that is not lawfully occupied by any person;

enters or is upon such land or enters or is in such building or part of a building, shall be guilty of an offence unless he has lawful reason to enter or be upon such land or enter or be in such building or part of a building.

4.9 Section 4 of the Stock Theft Act therefore does not create a remedy available to stock farmers which is not also (in terms of the Trespass Act) available to game farmers.⁸ Besides that, the maximum penalty for an offence in terms of section 4 of the Act is R2 000 or imprisonment of one year, compared with the maximum of R2 000 or imprisonment of two years in terms of the Trespass Act. The only difference is that the onus in the case of the Trespass Act does not rest upon the accused.

4.10 In sections 5, 6, 7 and 8 of the Stock Theft Act provisions are found which are aimed at the reduction of stock theft by laying down prescriptions in regard to the delivery of stock between sunset and sunrise; the furnishing of a document of identification by someone who disposes of stock; the acquisition of stock or produce from persons whose places of residence are unknown; and the driving, conveying or transporting of stock or produce on or along public roads. Non-compliance with the prescriptions in these sections constitutes certain crimes.

7 Act 6 of 1959.

8 Cf also sec 21 of Ord 8 of 1969 (OFS) and sec 24 of Ord 12 of 1983 (TVI).

4.11 The various nature conservation ordinances contain overlapping provisions in this regard.⁹ Applying the Stock Theft Act to game may result in game farmers, who are already subject to the prescriptions of the various nature conservation ordinances, being unreasonably burdened with the alternative requirements set by the Act for stock farmers. In a discussion with the Executive Committee of the Transvaal Game Society it also became evident that game farmers, who are burdened by the numerous requirements of the ordinances, will object to the imposition of additional obligations such as those contained in the Stock Theft Act. The question may be posed whether it would not be feasible to delete the particular sections of the various nature conservation ordinances which overlap the provisions of section 5, 6, 7 and 8 of the Act in order to establish uniform measures that apply to both stock and game farmers. In conjunction with this, the question arises whether the respective nature conservation ordinances which contain divergent provisions in respect of wild animals, should not be consolidated in order to create uniform measures which apply to all four of the provinces.

4.12 It should be borne in mind that different species of game are found in the various provinces. This becomes very clear if one examines the schedules to the respective ordinances which place game into various categories. The categories vary from ordinary game, protected game, specially protected game, protected wild animals and endangered game to specified wild animals. In no two provinces are the species of game set out under the category "ordinary game" the same. It is clear that each

9 Cf (a) in Ord 8 of 1969 (OFS), sec 6: hunting at night and on Sunday prohibited; sec 11: prohibition of sale or purchase of wild animal; sec 12: donation of wild animal; sec 13: conveyance of wild animal; (b) in Ord 15 of 1974 (Natal), sec 49: sale and purchase of game; sec 48: prohibited methods of and time for hunting of game; sec 51: exportation of game; sec 54: falsity; (c) in Ord 19 of 1974 (CP), sec 44: miscellaneous offences in relation to certain wild animals; sec 46: sale of carcasses of wild animals; sec 29: prohibited ways of hunting; (d) in Ord 12 of 1983 (Tvl), sec 20: hunting during the night; sec 32: sale of game; sec 34: purchase of game; sec 38: conveyance of dead game; sec 39: keeping or conveyance of live game; sec 42: exporting or removal of wild animals from the Province; sec 43: prohibited acts with certain live animals; sec 48: prohibited acts; sec 49: written permission.

province drafted its own nature conservation ordinance in order to meet the needs of nature conservation in that particular province as far as possible. To this end crimes and penalties are created in each of the ordinances that must serve as deterrents to the prospective game thief and the person who is not conservation conscious. In the process, therefore, a crime such as the prohibition of hunting game at night is covered in the ordinances of all four provinces. In the Transvaal ordinance "game" is defined as "any protected game, ordinary game or protected wild animal, whether alive or dead, contemplated in section 15." In the Orange Free State "game" means "any species of protected or ordinary game (whether alive or dead) as contemplated in sections 2 and 3". As has been said, the ways in which species of game are set forth in the respective schedules do not agree. Therefore, what may be a crime with regard to a particular species in the Transvaal is not necessarily a crime with regard to that species in the Free State. A consolidation of the offences and other provisions in the ordinances in respect of wild animals will be a major task requiring specialised knowledge of the conservation needs of each province. It must be emphasised again that the ordinances were drafted with the object of conservation, and that this legislation does not offer much in the way of better protection for the game farmer's interests.

4.13 It is suggested that neither a deletion of the sections in the ordinances which overlap sections 5, 6, 7 and 8 of the Stock Theft Act nor a consolidation of the offences contained in the ordinances in respect of wild animals will result in any improvement in the current position regarding theft.

4.14 Section 9(1) of the Act authorises private persons to arrest a person without a warrant upon a reasonable suspicion that that person has committed an offence mentioned in section 2 or 4. Section 9(2) confers upon a justice of the peace, policeman, or owner, lessee or occupier of land the powers of searching, seizing and arresting without warrant persons and goods in respect of which a reasonable suspicion exists that a crime has been committed. Private persons are, however, also authorised in terms of

section 42(1)(a) of the Criminal Procedure Act¹⁰ to arrest someone without a warrant for an alleged offence under section 36 of the General Law Amendment Act,¹¹ as well as for the crime of entering. In terms of the various nature conservation ordinances, nature conservators or officials (as well as police officers) have powers to search vehicles, containers, etc. and to seize goods in respect of which a reasonable suspicion exists that a crime in regard to game or produce has been committed.¹² It would appear that the only shortcoming concerning game farmers is that an owner, lessee or occupier of land lacks the authority to search and seize goods upon a reasonable suspicion that a crime in regard to game or produce has been committed.¹³ The conferment of similar powers upon owners, lessees or occupiers of land concerning crimes in respect of game or produce therefore seems desirable.

4.15 Section 10 of the Act is aimed at restraining persons from malicious arrest and search and contributes little to the welfare of stock farmers. Section 11 indicates which sentences may be imposed upon conviction of a charge of theft of stock or produce, and section 12 provides that the Act is applicable in cases where an accused is charged with theft of stock or produce notwithstanding the fact that the Act is not referred to in the charge.

4.16 Section 13 of the Act grants magistrates' courts a raised jurisdiction regarding the imposition of penalties. It has been pointed out¹⁴ that a district court may at present impose a fine not exceeding R4 000 and

10 Act 51 of 1977.

11 Act 62 of 1955.

12 Sec 213 of Ord 15 of 1974 (Natal); sec 39 of Ord 8 of 1969 (OFS); sec 21 of Ord 19 of 1974 (CP) and sec 106 of Ord 12 of 1983 (Tvl).

13 Cf also sec 22 of the Criminal Procedure Act, 51 of 1977 from which it appears that only a police officer may seize an object without a search warrant.

14 Par 3.10.

imprisonment of 12 months. This jurisdiction however was only introduced with effect from 1 January 1988. Prior to that date the jurisdiction in respect of fines was only R2 000. In terms of section 13 of the Act a magistrate's court is competent to impose, for a first conviction on a charge of theft of stock or produce, imprisonment for a period not exceeding two years, whipping not exceeding ten strokes, both such whipping and imprisonment or a fine not exceeding R4 000, and in the event of a second or subsequent conviction, imprisonment for a period not exceeding three years, whipping not exceeding ten strokes or both such whipping and imprisonment. The Criminal Procedure Act, however, restricts whipping to seven strokes.¹⁵ The Stock Theft Act in its present form therefore does not constitute a significant increase in jurisdiction of the magistrates' courts in regard to stock theft cases after the general increase in jurisdiction as determined by the Magistrates' Courts Act, 1944. The only difference is that these courts are at present, in terms of the Stock Theft Act, empowered to impose a longer period of imprisonment.

4.17 The desirability that cases of theft of game be heard in the regional courts has been mentioned.¹⁶ In addition, a measure similar to section 13 of the Stock Theft Act may be designed for the purpose of granting the district courts a raised jurisdiction in respect of cases of theft of game.

4.18 Section 15 of the Act confers upon the district courts powers to impose a larger compensatory fine than that which section 300 of the Criminal Procedure Act¹⁷ currently provides for. This matter was discussed in paragraphs 1.6 and 3.10. If the rule that cases of theft of game must be heard in the regional courts is accepted, it would be possible to impose a compensatory fine to a maximum of R20 000, compared with the maximum of R10 000 which may presently be imposed by the district courts in stock theft cases. However, there is a shortcoming in that the court,

15 Section 292 (2).

16 Par 3.11.

17 Act 51 of 1977.

when convicting a person of stock theft, must direct the owner's attention to the provisions of section 300 of the Criminal Procedure Act, while the owner of stolen game himself or the prosecutor in a case of theft of game must apply for the award of damages. A disadvantage to game farmers may be that many of them are probably unaware of the existence of the provisions concerning a compensatory fine and accordingly suffer losses if the prosecutor himself does not apply for the award of damages. It seems desirable that a court should, in the case of a conviction of theft of game, also direct the prejudiced person's attention to the provisions of section 300 of the Criminal Procedure Act.

4.19 Here mention should be made of the recently released report by a committee of the Department of Justice which inquired into the extent of stock theft in South Africa and the increase in losses suffered by stock farmers. Contained in the report are recommendations, one of which is that the amounts payable in terms of a compensation order should be raised. This recommendation involves raising the amounts specified in section 15 of the Stock Theft Act, 1959, and section 300 of the Criminal Procedure Act, 1977. It was however recommended that the recommendations in the report should not be referred to the Cabinet, but be brought to the attention of the departments and institutions concerned, which should deal with these matters independently.

* Conclusion

4.20 It would appear that there are only three respects in which the Stock Theft Act affords stock farmers better protection than the protection, including the existing remedies, enjoyed by game farmers at present:

- . Section 9(2) of the Act confers upon an owner, lessee or occupier of land, in addition to a justice of the peace and police officer, the powers, when he reasonably suspects that someone has in or under any receptacle or covering or in or upon any vehicle any stock or produce in regard to which an offence has been committed, to search without warrant such vehicle or receptacle and if he thereupon finds any stock or produce in regard to which he reasonably suspects an offence to have been committed,

he may without warrant arrest such person and seize such vehicle or receptacle.¹⁸ In the case of offences in regard to game or produce only nature conservators and police officers have these powers.

- . Under section 15 of the Act a court may direct the attention of the prejudiced person to the provisions of section 300 of the Criminal Procedure Act in regard to the award of damages. In cases of theft of game the prejudiced person (or prosecutor) must apply for such award himself.¹⁹
- . Section 4 of the Act places the onus on the accused to prove that he had no intent, when entering enclosed land, to steal any stock or produce. The Trespass Act, 1959, does not offer game farmers this advantage.

4.21 It is suggested that, apart from the fact that the Stock Theft Act will not contribute much towards improving the protection afforded the interests of game farmers, the Act is not flexible enough to accommodate the theft of game. The prescriptive provisions of sections 5, 6, 7 and 8 are, as was indicated above,²⁰ not readily reconcilable with the prescriptions contained in the respective nature conservation ordinances in respect of game.

4.22 Since the Stock Theft Act gives a definition of "stock", the desirability of a similar definition of "game" must be investigated.

4.23 In section 1 of the Act "stock" is defined as "any horse, mule, ass, bull, cow, ox, heifer, calf, sheep, goat, pig, poultry, domesticated ostrich, domesticated game or the carcass or portion of the carcass of any

18 Cf par 4.14.

19 Cf par 4.18.

20 Par 4.10 - 4.13.

such skins, hides or horns of stock, and any wool, mohair or ostrich feathers".

4.24 Not all the nature conservation ordinances contain definitions of "game" or "wild animals". Where "game" is actually defined, the definition is merely aimed at the categories of game species, for example ordinary game, protected game or endangered game, which appear in the schedules to the ordinances.²¹

4.25 In section 1 of the nature conservation ordinance of the Cape Province²² "wild animal" is defined as "any live vertebrate or invertebrate animal (including the egg or spawn of any such animal but excluding any ostrich used for farming purposes and the egg thereof) belonging to a non-domestic species and includes any such animal which is kept or has been born in captivity".

4.26 Section 1 of the Transvaal Ordinance²³ defines "wild animal" as "any vertebrate, including a bird and a reptile but excluding a fish, belonging to a species which is not a recognised domestic species and the natural habitat of which is either temporarily or permanently in the Republic, the territory of South West Africa or a territory which was formerly part of the Republic, and includes the carcass, egg, flesh, whether fresh or cured, biltong, hide, skin, thong, tooth, tusk, bone, horn, shell, scale, claw, nail, hoof, paw, tail, ear, hair, feather or any other part of such vertebrate, excluding any part of such vertebrate which has been processed into a final product".

4.27 In section 1 of the Orange Free State's ordinance²⁴ "wild animal" means "any vertebrate (including a bird and a reptile but not a fish) belonging to a non-domestic species whose habitat is either temporarily or

21 See sec 1 of Ord 12 of 1983 (Tvl) and sec 1 of Ord 8 of 1969 (OFS).

22 19 of 1974 (CP).

23 12 of 1983 (Tvl).

24 8 of 1969 (OFS).

permanently in any part of the Republic or the territory of South West Africa, and includes the carcass, egg, meat (fresh or cured) biltong and the unprocessed or partly processed hide, skin, thong, tooth, bone, horn, shell, scale, claw, hoof, paw, tail, hair, feather or any other part of any such vertebrate animal".

4.28 It would appear that some of the ordinances distinguish between "game" and "wild animal" in that the term "game" refers to specific categories of game species, whereas the term "wild animal" relates more to the specific animal which can be accommodated under any of the categories.

4.29 The definition of "stock" in the Stock Theft Act refers to specific animals classified as domesticated animals. In view of the large variety of game species it would probably not be appropriate to include all the animals individually in a definition of "game" or "wild animals". A possibility is to include all the animals deemed to be "game" (for the purposes of a particular Act) in a schedule to the Act. There is a danger, however, that a numerus clausus of wild animals will be created in such a case, which may in certain circumstances be undesirable.

4.30 It is submitted that a complete definition of game or wild animals is unnecessary for purposes of this investigation. The Stock Theft Act, 1959, already determines which animals must for purposes of that Act be regarded as "stock". Therefore, there can be no confusion concerning the question whether a particular animal should be regarded as stock (for purposes of prosecution in terms of the Stock Theft Act) or as game.

5. PRESUMPTIONS IN RESPECT OF THE POSSESSION AND ACQUISITION OF GAME

* Introduction

5.1 The question may be posed whether the possession and acquisition of game and produce¹ should not give rise to a presumption that the offences of theft or receiving stolen property were committed if the possessor is unable to prove lawful acquisition of ownership and possession. It may be argued that by giving effect to such presumptions in the form of a statutory provision prospective game thieves will be discouraged from committing crimes involving game.

* The General Law Amendment Act, 1955

5.2 The existence of provisions in the General Law Amendment Act² in which certain presumptions in respect of the possession and acquisition of goods (other than stock or produce) are included, has already been pointed out.³ The particular provisions concerned have been quoted in full in this document and are therefore not repeated here. The crux of section 36 of the above-mentioned Act is that a person is guilty of an offence if he is unable to give a satisfactory account of goods found in his possession in regard to which there is reasonable suspicion that they have been stolen. Such a person is liable on conviction to the penalties which may be imposed on a conviction of theft. Briefly, section 37 of the same Act provides that a person is guilty of an offence if he receives goods into his possession without having reasonable cause for believing that such goods are the property of the person from whom he receives them or that such person has been duly authorised by the owner thereof to dispose of them. Such a

1 E g meat, skins, horns etc. See also the recommended definition of "game" in clause 1 of the proposed bill in Schedule A.

2 Act 62 of 1955.

3 Par 4.4 and 4.6.

person is liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen.

5.3 It has been shown that the Stock Theft Act,⁴ which contains similar offences,⁵ does not afford stock farmers a remedy which is not also available to game farmers in terms of the General Law Amendment Act.⁶

5.4 Apart from sections 36 and 37 of the General Law Amendment Act, two nature conservation ordinances, viz section 39 of Ordinance 15 of 1977 (Natal) and section 37 of Ordinance 12 of 1983 (Tvl) contain similar provisions. The latter section is basically a consolidation of sections 36 and 37 of the General Law Amendment Act and provides as follows:

(1) Any person who -

- (a) receives dead game knowing that it was not hunted or acquired lawfully;
- (b) is found in possession of dead game in respect of which there is a reasonable suspicion that it was not hunted or acquired lawfully and is unable to give a satisfactory account of such possession;
- (c) in any manner acquires or receives into his possession or handles dead game without having reasonable cause, proof of which shall be on him for believing at the time of such acquisition, receipt or handling that such game was hunted or acquired lawfully,

shall be guilty of an offence.

(2) For the purposes of subsection (1) "dead game" shall not include dead game purchased at a public sale.

5.5 Although not all the nature conservation ordinances contain a provision similar to the Transvaal Ordinance, this ordinance affords no

4 Act 57 of 1959.

5 Sections 2 and 3.

6 See par 4.5 and 4.7.

remedy which is not also available to game farmers in other provinces in terms of the General Law Amendment Act.

5.6 Consideration can now be given to the question whether the phrase "reasonable suspicion" should not be omitted from a redrafted penalty provision in order to give such a provision greater deterrent effect. The effect of such a provision would be that each person who is unable to prove lawful acquisition of ownership and possession of game (or produce), even in the absence of a reasonable suspicion that the goods are stolen, may be arrested and be put to trial where he will be afforded the opportunity of proving his innocence.

5.7 The presence of the phrase "reasonable suspicion" in section 36 is clearly a precaution aimed at the prevention of arbitrary action on the part of persons who have the power to arrest. From case law it is evident that the test to determine whether the suspicion was reasonable is objective.⁷ It does not matter, therefore, what the arresting person thought subjectively, but the question is whether the reasonable man in the shoes of the arresting person would also suspect the goods to be stolen. If the State is unable to prove that the accused was arrested on the strength of a reasonable suspicion of the possession of stolen property, the accused is entitled to his acquittal. In R v Mathule⁸ the accused pleaded guilty to an offence under section 36. As the court was of the opinion that the State did not prove a reasonable suspicion, the conviction was set aside despite the fact that the accused gave no account of his possession.

5.8 As was mentioned, the omission of the requirement that a reasonable suspicion must exist that the goods (or game, in this case) were stolen will have the effect that any person who is unable to prove lawful acquisition of ownership or possession may be arrested. Thus persons lawfully in possession of game or produce, for example the taxidermist or the game farmer himself, will in the absence of concrete proof of lawful

7 The State v Reddy 1962 2 SA 343 (N); S v Khumalo 1964 1 SA 498 (N).

8 1959 2 PH H 234 (GW).

possession (in the form of a permit or other documentation) be deemed to be guilty of an offence until the contrary is proved in court. In order to prevent persons lawfully in possession of game from being accused of a crime where they can be expected to prove their innocence in a court, a number of exceptions to such a suspicion will have to be created. While the implementation of such a provision will probably lead to a reduction in the number of offences involving game, it would seem that this advantage is outweighed by the dangers involved.

5.9 In view of the foregoing, commentators are specifically requested to comment on the following aspects:

- (i) The desirability of implementing a provision that a presumption of theft of game or produce exists if a person is unable to prove lawful acquisition of ownership and possession, although a reasonable suspicion that the game or produce were stolen does not necessarily exist. If this alternative is preferred, commentators are also requested to air their views as to the exceptions, if any, that should be created in order to prevent innocent persons from having to prove their innocence in court.
- (ii) The desirability of provisions similar to sections 36 and 37 of the General Law Amendment Act, 1955, and sections 2 and 3 of the Stock Theft Act, 1959, which specifically provide for game.
- (iii) The retention of the existing position (on the assumption that sections 36 and 37 of the General Law Amendment Act, 1955 afford game farmers sufficient protection at present.)

6. EVALUATION AND RECOMMENDATIONS

* Introduction

6.1 It appears from the foregoing that the interests of game farmers are in need of better protection. If ownership of game is clearly defined, game farmers should also achieve more success in cases of theft of game. It is probably desirable to retain occupatio as a mode of acquisition of ownership, as there are numerous farms on which game is found in its natural state and is acquired in property in this fashion.

6.2 It has been shown that the common law position in regard to ownership of wild animals should be amended in the following respects:¹

- (a) A general measure should be laid down that can be applied to determine whether a person exercises sufficient physical control over game in order to be regarded as owner thereof.
- (b) Game thieves should not be able to establish ownership of game unlawfully caught.
- (c) Loss of possession of wild animals upon which ownership has been established should not result in loss of ownership.

6.3 In order to accommodate the suggestions above, it is suggested that the common law be amended by legislation and that express provision be made to determine when ownership of wild animals is established.

6.4 It has been shown that the provisions of the Stock Theft Act are apparently not flexible enough for game theft to be included thereunder.²

1 Cf par 3.5 and 3.6.

2 Par 4.21.

6.5 However, owners of game appear to be in need of a provision similar to section 9(2) of the Act, under which the owner, lessee or occupier of land is granted powers to search and seize in certain circumstances.

6.6 In section 4 of the Act, which prohibits the entering of enclosed land, the onus is expressly placed on the accused to prove that he had no intent to steal stock or produce. A similar measure in respect of the theft of game appears to be desirable.

6.7 Game farmers should furthermore enjoy the same advantage of a raised jurisdiction of the district courts in respect of sentence in cases relating to the theft of game.³ It also seems desirable that the court should, in cases of theft of game, direct the prejudiced person's attention to the provisions of section 300 of the Criminal Procedure Act, 1977, and that the jurisdiction of district courts to award damages to the prejudiced person should from time to time be determined by the Minister (in view of the increasing prices of game) in the Government Gazette.

* Proposed bill

6.8 Schedule A contains a draft bill in which provision has been made for the recommendations mentioned above.

6.9 In clause 1 it is indicated that "game" includes the meat, skin, horns, carcass or any portion of the carcass of game. It has been pointed out that there seems to be no need of a complete, formulated definition of "game".⁴

6.10 Clause 2 contains the suggested amendments to the common law. The provisions of the clause are aimed at (a) providing a measure for determining whether a person exercises sufficient physical control over

3 Par 4.16.

4 Cf par 2.18 and 4.30.

game; (b) awarding ownership to a person who exercises the required measure of physical control over game; (c) preventing ownership of game from passing to the person who unlawfully obtains game; and (d) preventing mere loss of possession of game from resulting in loss of ownership.

6.11 As regards laying down a measure for determining whether a person exercises sufficient physical control over game for him be regarded as the owner thereof, it has been pointed out that the extent of the land played a significant part when the courts considered the present question.⁵ Clause 2(1)(a) constitutes a departure from the extent of land as an additional determining factor. The premise is that the nature of the enclosure is decisive in determining the question whether sufficient physical control was exercised. Whether the same fence encloses an area of 400 hectares or 4 000 hectares should make no difference. The test is whether the enclosure is of such a nature that game cannot readily and spontaneously escape from that land. Comment is specifically requested on this aspect. Commentators are further requested to consider the desirability of the terms "keeps" and "holds" as they appear in clauses 2(1)(b) and 2(1)(d). It is not the intention that these terms should create an idea of temporary detention.

6.12 Clause 3 is similar to section 4 of the Stock Theft Act, 1959, but creates a presumption that the accused entered land with intent to steal, hunt or disperse game on that land. If the State has proved that the land was entered unlawfully, the accused will have to rebut this presumption.

6.13 Clause 4 is similar to section 9 of the Stock Theft Act and grants the owner or occupier of agricultural land powers to search, seize and arrest in certain circumstances. In order to prevent the abuse of these powers, clause 5 provides that a person found guilty of such abuse is punishable. The penalty is the same as that which the Stock Theft Act provides for a similar offence.

⁵ Cf par 2.22 and further. Also see Lamont v Heyns 1938 TPD 22; Richter v Du Plooy 1921 OPD 117.

6.14 Clauses 6 and 7 are aimed at affording game farmers similar advantages in regard to a raised jurisdiction of the district courts to those which stock farmers have enjoyed in the past. The maximum sentence which a magistrate's court may impose for a conviction in terms of this clause is tentatively fixed at a fine not exceeding R12 000 and imprisonment for a period not exceeding five years. The jurisdiction of the regional court is increased to R75 000 in respect of the imposition of fines in cases of theft of game. As the regional courts at present have jurisdiction to impose imprisonment for a period of ten years, the jurisdiction of these courts is not also increased as far as these powers are concerned. It seems unlikely that imprisonment for a period exceeding ten years will be imposed in a case of game theft. Commentators are requested to deal specifically with the suggested jurisdiction of the magistrate's court and the regional court in their comment. In the application of clause 7 the court will have to direct the prejudiced person's attention to the existence of the provisions of section 300 of the Criminal Procedure Act, 1977, and so obviate possible instances of game farmers being unaware of this remedy.

Miscellaneous recommendations

6.15 It was suggested that cases of game theft should be tried in the regional courts. This would make it possible to eliminate the problem of insufficient penalties and compensatory fines. The deterrent value of a trial in the regional court is probably also beneficial to the interests of game farmers. It will not, however, serve the interests of the administration of justice to try all cases of game theft in the regional courts, since the relatively low pecuniary value of game species such as the impala is not likely to necessitate a forum other than the district court for the hearing of cases of theft of such game. It is suggested, therefore, that the Attorneys-General of the various territories in respect of which they have been appointed, should direct to all the public prosecutors within those territories an instruction in terms of which cases relating to the theft of game should in appropriate instances be tried in the regional courts.

6.16 The apparent shortage of nature conservation officials concerned with law enforcement has been referred to.⁶ This problem can probably be alleviated to a large extent if the salary benefits of these officials are made more attractive. It is therefore suggested that the institutions concerned with this matter be requested to consider the problem.

6 Par 1.10, 3.12 and 3.14.

SCHEDULE A

DRAFT BILL

To regulate the acquisition and loss of ownership of game in certain instances; to make entry upon enclosed land punishable in certain instances; to provide for presumptions in certain charges; to regulate arrest and search in respect of crimes relating to game; to increase the jurisdiction of magistrates' courts in respect of sentences in certain crimes in respect of game; to increase the compensation that may be awarded by a magistrate's court for loss of or damage to game; and to provide for matters incidental thereto.

Introduced by the Minister of Justice

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:

Definitions

1. In this Act, unless the context otherwise indicates -

"game" includes the meat, skin, horns, carcass or any portion of the carcass of game;

"land" means land which is enclosed as provided in section 2.

Ownership of game

2. (1) Notwithstanding the provisions of any other law or the common law -

- (a) game shall not be deemed to be res nullius if that game be kept on land which is enclosed in such a manner that the game cannot readily and spontaneously escape from that land;
- (b) any person who keeps or holds game or on behalf of whom game is kept or held on land shall, subject to paragraph (c), be the owner of that game;
- (c) ownership of game shall not vest in any person who unlawfully appropriates game which belongs to another;
- (d) a person shall not lose ownership of game which he keeps in accordance with paragraph (a) merely because that game has escaped from land which is enclosed in such manner.

(2) In the application of subsection (1) a natural boundary through or over which game will not ordinarily pass shall be deemed to form part of an enclosure as contemplated in that section.

Entering enclosed land with intent to steal game

3. (1) Any person who enters land upon which there is game with intent to steal, to hunt or to disperse game on that land shall be guilty of an offence.

(2) If it is proved in a prosecution in terms of subsection (1) that an accused entered the land unlawfully, it shall be presumed that he did so with intent to steal, to hunt or to disperse game on that land.

Arrest and search

4. (1) Any justice of the peace, peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977), or owner or lawful occupier of agricultural land may, without warrant, arrest any other person upon reasonable suspicion that such other person has committed the offence of theft of game or a contravention of section 3.

(2) Whenever any justice of the peace, peace officer referred to subsection (1) or owner or occupier of agricultural land reasonably suspects that any person has in or under any receptacle or covering or in or upon any vehicle any game which has been stolen, such justice of the peace, peace officer, owner or occupier of land may without warrant search such receptacle or vehicle and remove such covering, and if he thereupon finds any game in regard to which he reasonably suspects that it has been stolen, he may without warrant arrest such person and seize such vehicle, receptacle or covering and shall as soon as possible convey such person and the vehicle, receptacle or covering so seized to a police station or charge office.

Malicious arrest and search

5. (1) Any person who under colour of this Act wrongfully and maliciously arrests any other person or effects any search shall be guilty of an offence and liable on conviction to a fine not exceeding R2 000 or to imprisonment for a period not exceeding twelve months.

(2) On any charge under subsection (1) it shall be presumed that the search or arrest was malicious.

(3) Nothing in this section contained shall be construed as taking away or diminishing any civil right or liability in respect of a wrongful or malicious arrest.

Jurisdiction of magistrates' courts in respect of sentence

6. Notwithstanding the provisions of any other law, magistrates' courts shall have jurisdiction to impose, in respect of the theft of game or a contravention of section 36 or 37 of the General Law Amendment Act, 1955, where the goods involved in such an offence are game, or a contravention of section 3 -

(a) in the case of a magistrate's court which is not a regional court, a fine not exceeding R12 000 or imprisonment not exceeding five years or both such fine and such imprisonment;

(b) in the case of a regional court, a fine not exceeding R75 000 or

imprisonment not exceeding ten years or both such fine and such imprisonment.

Compensation for damage to or loss of game

7. Whenever any court convicts any person of the theft of game or of malicious damage to property where the property is game -

(a) the court shall direct the attention of the owner of the game, if present in court, to the provisions of section 300 of the Criminal Procedure Act, 1977 (Act No 51 of 1977);

(b) the court, in the case of a magistrate's court, may, notwithstanding the provisions of paragraph (a) of the proviso to subsection (1) of the said section 300, make in accordance with the provisions of the said section 300 an award not exceeding R10 000 or such amount as the Minister may from time to time determine by notice in the Gazette.

Short title

8. This Act shall be called the Combating of Game Theft Act, 19..

