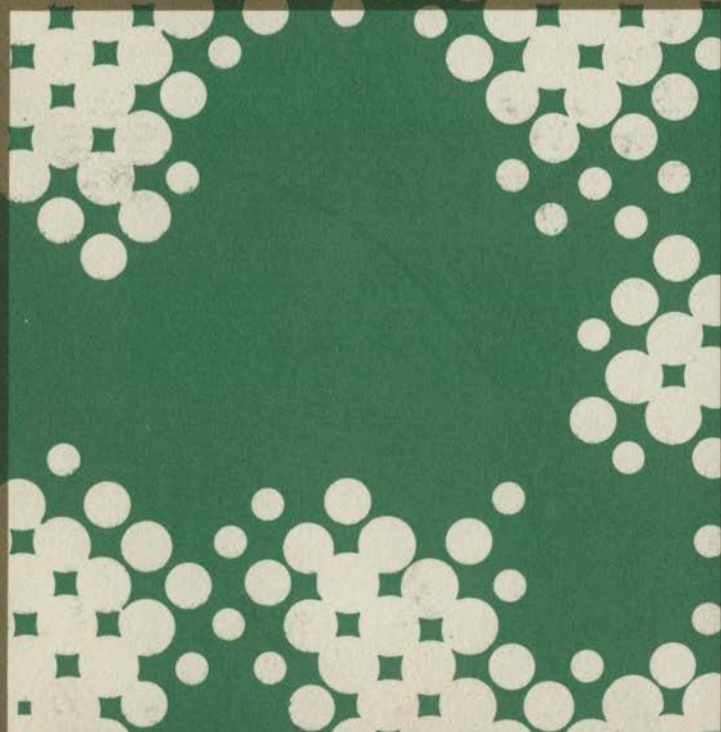


Peter G. Sack **Land Between  
Two Laws**

Early European Land  
Acquisitions in New Guinea





This book penetrates the facade of colonial law to consider European land acquisitions in the context of a complex historical process. Its context is land, but it is fundamentally a legal study of the problems arising out of the dichotomy between traditional New Guinea law and imposed Prussian law. Though these problems arose out of events that took place more than fifty years ago, they are of immediate relevance for New Guinea in the 1970s. They are mostly still unsolved and are only now emerging from under the layers of political compromise that have concealed them.

Dr Sack emphasises the differences between traditional and introduced law in New Guinea in order to investigate the chances of a synthesis between them. He offers no panacea, but points up clearly the tasks which must be accomplished before the 'land between two laws' can become a truly independent state. This is an essential work for anthropologists, lawyers and all those concerned with the emergence of a stable, unified Papua New Guinea.



Dr Peter Sack was trained as a lawyer at the Universities of Goettingen and Kiel. In 1967 he began his work on European land acquisitions in New Guinea, the results of which are presented here. His research has involved several field trips to New Guinea and the study of many hitherto unpublished sources. He is at present Research Fellow in Papua New Guinea Law at the Australian National University.

This book was published by ANU Press between 1965–1991.

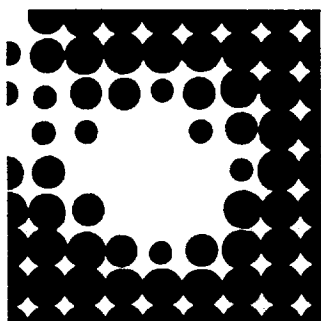
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# **Land Between Two Laws**

**Land Between  
Two Laws Early  
European Land  
Acquisitions in  
New Guinea**

Peter G. Sack



Australian National University Press Canberra 1973

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Printed and manufactured in Australia  
Registered in Australia for transmission  
by post as a book

Library of Congress Catalog

Card no. 72-80330

National Library of Australia Card no.  
and ISBN 0 7081 0700 1

# Preface

This study is the abbreviated and amended version of a thesis submitted to the Australian National University which in turn was the abbreviated and amended version of a series of progressively longer manuscripts. It is hoped that the repeated trimming made the end product more palatable. On the other hand, it is certain that the arguments became in the process increasingly apodictic and that the documentation of the factual accounts correspondingly decreased. Those who are interested might find that the thesis, which is held by the University Library in Canberra, will assist them in filling some of the many gaps.

In the interest of the reader all non-English quotations have been translated. No claim is made that the translations are as literal as possible.

Instead of German currency or measurements their Australian equivalents have been used. The conversions are based on the rough equations: 1 Mark equals \$0.10, and 1 hectare equals 2.5 acres.

Regarding proper names and their spelling (which have changed and will change frequently) no firm rules have been followed. The term 'New Guinea' is used in its political sense. It refers to the Territory of New Guinea, which comprises the north-eastern part of New Guinea, the islands of the Bismarck Archipelago and, as well as Buka and Bougainville, the northernmost islands of the Solomon Group.

Peter G. Sack  
Canberra 1972



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# Abbreviations

Annual Report	See References, under Germany 1899- and Neu Guinea Kompagnie 1885-
C.A.	Commonwealth Archives Office Canberra
Custodian	Custodian of Expropriated Property
D.O.	District Office
D.H.P.G.	Deutsche Handels- und Plantagen Gesellschaft (German Trading and Plantation Company)
D.K.B.L.	<i>Deutsches Kolonialblatt</i> (Official Gazette for the German Colonies)
D.K.G.	<i>Deutsche Kolonialgesetzgebung</i> (Collection of German Colonial Legislation)
D.K.P.	<i>Die Deutsche Kolonialpolitik</i> (Collection of Documents on German Colonial Policy)
D.K.Z.	<i>Deutsche Kolonialzeitung</i> (Organ of the German Colonial Society)
G.	Gericht (Court)
H.M.S.	Her Majesty's [Queen of England] Ship
H.S.A.G.	Hamburgische Suedsee Aktiengesellschaft (South Sea Company of Hamburg)
K.M.	<i>Kirchliche Mitteilungen</i> (Organ of the Neuendettelsau Mission Society)
L.T.C.	Land Titles Commission
M.	<i>Monatshefte</i> (Organ of the Sacred Heart Mission Society)
n.d.	no date
N.K.W.L.	<i>Nachrichten fuer und ueber Kaiser Wilhelmsland und den Bismarckarchipel</i> (Organ of the Neu Guinea Kompagnie)
N.L.C.	Native Land Commission
O.G.	Obergericht (Court of Appeal)
P.R.	Patrol Report
S.D.O.	Sub-District Office
S.M.S.	Seiner Majestaet Schiff (His Majesty's [Emperor of Germany] Ship)
Z.A.	Deutsches Zentralarchiv, Potsdam
Z.f.E.	<i>Zeitschrift fuer Ethnologie</i>
Z.f.K.	<i>Zeitschrift fuer Kolonialpolitik</i>

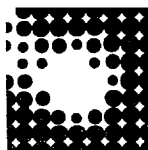
# Introduction

In Western states the acquisition of land is essentially a legal matter. Laws determine under which circumstances an acquisition of rights to land is legally valid and, in case a particular acquisition is disputed, courts can make a final decision which is then backed by the authority of the state. A study dealing with the acquisition of land can concentrate on analysing the existing system of land law, taking the rule of law for granted. In a colony the situation is different. Behind the façade of colonial law, a study of legal problems must revolve around the questions whether and to what extent this colony is ruled by law.

In New Guinea the establishing of law and order is, even today, by no means completed. Present land acquisitions by Europeans are still not regarded as an essentially legal matter. There are still separate systems of law for natives and Europeans which are, at least in practice, not held together by a set of conflict norms, but by a series of political compromises which are far from being final. This study is concerned with land acquisitions which, according to the colonial law, took place more than fifty years ago; yet it deals with living history. The problems caused by the early European land acquisitions are very much part of the present, and their solution is still largely a question of the future. To appreciate these problems, they must be seen against the background of wider issues. They are part of the problems arising out of the confrontation of primitive law and Western law, a confrontation which must be understood as a historical process reaching from pre-colonial into post-colonial days.

## Primitive Law and Western Law

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The first legal anthropologists were concerned with the early stages in the development of their own legal systems or with the legal systems of ancient cultures. When attention turned to contemporary primitive societies about a hundred years ago, they continued to study primitive law as legal historians. This was due to a theory of the evolution of human culture that gained predominance after a theory of evolution had triumphed in the field of biology. If the development of *homo sapiens* as a species was the result of evolution, the same process had to determine the history of this species: Western civilisation was the climax of human culture as *homo sapiens* was the ultimate in biological development. Looking at the speed with which European domination expanded around the globe, eliminating all alternatives, one could easily get the impression that there was only one universal culture, which had developed unilineally, culminating in modern Western civilisation; whereas primitive or half-civilised contemporary societies were more or less retarded members of the family of mankind.

This theory of a unilineal development of human culture made it possible to study history, so to speak, horizontally on the level of space, as well as vertically on the level of time. The various contemporary societies living in different parts of the world could be taken to represent nearly all possible steps in the development of this universal culture. The first legal anthropologists applied this theory to the area of law. Their object was to collect material for a universal history of law. They wanted to trace the development of legal institutions back to their origins, which they believed to have found in the law of contemporary primitive societies. Or, as their critics saw it later on, 'they wasted their efforts upon the task of proving that Morgan's theories were correct' (Malinowski, 1940, 3).

This first, historical school of legal anthropology dominated the field until World War I. By then the theory of unilineal evolution had lost ground to other theories or, at least, to more critical and less speculative methods. The historical school of jurisprudence had made way for more sociological schools—and the anthropologist had become a serious rival of the lawyer in the study of primitive law.

Most of the lawyers of the historical school had little or no first-hand knowledge of primitive societies and depended for their analysis on data gathered by early amateur ethnographers. They were aware that the information available to them was inadequate, but thought they could remedy this unsatisfactory state of affairs without having to go into the field themselves. Instead they compiled longer and longer lists of questions which were sent to officials, missionaries, traders and planters throughout the colonies. Information gained this way had to be, as a rule, inferior to that collected by trained specialists during systematic fieldwork. On the other hand, trained specialists would not be satisfied with supplying the lawyers with information but would analyse it themselves. As modern anthropology developed, legal anthropology was bound to develop from a branch of legal history into a branch of social anthropology.

One of the first and most influential studies in this new genre was Malinowski's *Crime and Custom in Savage Society*. When published in 1926 it was 'welcomed with enthusiasm by legal philosophers who had long felt the need for an authoritative statement on primitive law' (Goodhart, 1955, xiv). Malinowski and even more so his followers did not aim at writing a universal history of law, but were interested in the way law functioned in the primitive societies they studied. They understood primitive law as a social phenomenon and were not anxious to subject it to legal analysis. On the contrary, legal analysis was to them a procrustean method and a lawyer incapable of understanding primitive societies. Primitive law, they thought, could not be described in terms of legal concepts but only in terms of human behaviour.

It is not surprising that the lawyers' original enthusiasm gave way to mixed feelings: 'Few anthropologists have understood as well as Malinowski the motivating forces of primitive social behaviour', but he 'is a peril to jurists' (Seagle, 1937, 275, 289-90). The anti-functionalists did not open a counterattack to recapture the field of legal anthropology but concentrated on holding their own lines. They took the defensive view that primitive law was not law at

all, but custom. Law was a phenomenon restricted to sophisticated societies and the domain of the lawyer. Among primitive societies things were entirely different; there 'custom was king' and this was the domain of the anthropologist.

Not all lawyers shared the fears of Malinowski's critics and not all anthropologists his reservations about lawyers. In America the legal realists even formed a shortlived alliance with the anthropologists. Its main fruit, Llewellyn and Hoebel's *Cheyenne Way* (published in 1941), marked the beginning of a third phase in legal anthropology. Seduced by the ideas of functionalism, the lawyers embraced the anthropologists, infecting them in turn with the ideas of Western jurisprudence—and it is indeed an open question whether Malinowski is as great a peril to jurists as Hohfeld is to anthropologists.

The alliance between legal realists and anthropologists resulted on the surface in nothing but a change in the method of investigating primitive law. Llewellyn and Hoebel claimed to replace the 'ideological' method (associated with the legal-historical school) and the 'descriptive' method (associated with the social-anthropological school) with the 'trouble case' method (Hoebel, 1954, 29ff.). But the 'trouble case' method was not merely a different method of investigating primitive law; Llewellyn and Hoebel investigated a type of law different from that investigated by their predecessors. The legal-historical school had been interested in the rules which should be observed, but they were interested in the rules which were enforced when these ideal (or 'pretend') rules were broken. Moreover, the 'trouble case' method was not employed because it was, as a method of investigating primitive law, superior to others, but because it was the only method they could employ, since law to the legal realist is made up of the rules enforced in case of trouble.

At this point the irony of the alliance between legal realists and anthropologists became visible. The identification of law and court being the very basis of legal realism, its theories could not be applied to primitive societies in which no courts existed. There was only one way out. Instead of having to play the game 'what is law?', the anthropologists were advised to accept the definition of the legal realists and to play the game 'where is the court?' which, they were assured, could be won in 'almost every system at any time' (Radin, 1938, 1145, n.11). But the spell was broken. The behaviouristic approach to law, allying the legal realists with the anthropologists, caused their alliance to end in disenchantment. At the same time it

brought to light one of the basic difficulties in the study of primitive law: a jurisprudential system designed to explain the law of one kind of society cannot explain the law of another.

This does not mean that law is not a universal phenomenon existing in every kind of society or that 'the province of the lawyer and that of the social anthropologist are once for all different' (Bohannon, 1957, v). It suggests, however, that primitive law cannot, at least not yet, be studied as a part of a universal legal history but only as a branch of comparative law. The legal anthropologist must stop seeing primitive law as either something non-legal or as their own law *in statu nascendi* and start to study the legal systems of primitive people as legal systems in their own right.

Such a comparative approach creates a difficulty which existed neither for the legal-historical nor, for other reasons, for the social-functional school. This difficulty Llewellyn and Hoebel tried to circumnavigate by 'moving the technical side of law out of the central position' (1941, 42). It becomes necessary to develop an analytical method suitable for the analysis of primitive as well as Western law. Whereas it appeared possible for the legal historical school to understand primitive law in terms of a Western legal system (which was regarded as a more highly developed form of the one universal system of law), a Western legal system now becomes what Bohannon termed a 'folk' system and cannot be directly used for the analysis of a different primitive 'folk' system.

This is the academic side of legal anthropology, but primitive law ceased to be a matter of mere academic interest (to Europeans) when Western states began to establish colonies in countries inhabited by primitive people. What was to happen to the rights of the native population and what to their laws? Should their rights be disregarded or should they be 'translated' into the laws of the colonising state? Should their laws be preserved or should they be replaced by the laws of the colonising state? Should their laws be developed to fit the new colonial conditions, should the laws of the colonising state be adapted to these conditions, or should an attempt be made to find a synthesis between the traditional laws and the laws of the colonising state? Should there be one set of colonial laws, or one set for Europeans and another one for natives? Should the traditional laws in the former case at least be taken into consideration when, for instance, sentencing a native for an offence committed according to the colonial

laws? What should in the latter case apply when, for instance, a European bought land from a native? Should the traditional laws within a colony be unified? Should they be codified? Should the administration of the traditional laws be left to the natives, or should they be administered by European courts?

Primitive law had to be an important factor in colonial politics, whichever view the colonial administration took, unless the native population was exterminated or completely disregarded. A practical branch of legal anthropology had to develop which regarded primitive law as part of the colonial law, or understood legal anthropology as a kind of auxiliary science within the general framework of colonial administration.

By the time New Guinea entered into the colonial phase of its history, it had become a widely accepted principle that the native inhabitants of a colony should remain governed by their traditional laws until they had 'advanced' enough to live under the metropolitan laws of the colonising power. Even for this traditional period, however, one important qualification was usually made: the traditional laws became invalid in so far as they contradicted 'generally acknowledged principles of justice and equity'. It was thus in the end up to a European judge to decide whether to apply the traditional laws or whether to decide the case according to his personal views on justice and equity. Still, it remained the prime aim of the practical branch of legal anthropology to discover the rules of primitive law. This corresponded with the aim of the legal-historical school of academic legal anthropology and was very different from that of the social-functional school and especially from that of the followers of the 'trouble case' method. Primitive law was to colonial lawyers or administrators neither a system of social control nor what was done in case of trouble. On the contrary, they had come to establish 'law and order'. They had taken over the job of law enforcement. Custom had ceased to be king. Instead Pax Britannica (or another 'Pax') was to rule. The traditional 'legal realism' in the form of blood feud, sorcery, anarchy or tyranny was to be stamped out. The colonial administration and the colonial courts were there to make sure that the natives did from now on what they ought to do according to their traditional laws. The white man's machinery of law enforcement was set up to enforce the black man's substantive law.

There is another reason for the similar attitude of the colonial lawyers and legal historians towards primitive law. Even today



colonies still breed their own club-brand of a theory of evolution. A popularised version of Darwinism and Morganism seems to make it easier and more natural to carry the 'white man's burden'. The crux is that the colonial lawyers cannot do without some kind of evolutionism, if only in the form of a legal fiction. They cannot analyse primitive law *in vacuo*, they have to treat it as part of the colonial law. If, for instance, a colonial land ordinance distinguishes between owned and ownerless land, a colonial lawyer cannot say that the concept of ownership of land is alien to the traditional land law and leave it at that. He has to 'translate' from one legal system into the other in order to do his job. He has to treat primitive law and Western law as part of the same 'folk' system. He cannot be satisfied with an analytical system enabling him to understand primitive law as well as Western law. He has to look for some kind of legal dictionary telling him the equivalents in these different systems, since he has to apply both of them. He has to clutch at every straw in order to find a common denominator and the old-fashioned idea of unilineal evolution, which might be long dead for academics, is still most convenient.

What is 'law'? The discussion of this question has flourished since the beginning of jurisprudence and continues despite recent attempts to kill it as 'a silly word battle' (Frank, 1949, vi). Three main factions in this battle can be distinguished: those who hold that there is one 'true' definition of 'law' (Goodhart, 1951, 106), those who hold that one can define 'law' as one wishes (see *ibid.*), and those who hold that 'law' cannot be grasped by a single definition (Gluckman, 1955, 346).

As in most battles of this kind all views are partly justified; the first because it takes into account that the defining of analytical concepts is not a matter of logic. Logic begins where concepts have been defined. Logic rules the relation between defined concepts, so that it is impossible to give a definition of 'law' which is logically right or wrong. But this does not leave complete freedom in how to define 'law'. If 'law' is seen as a part of reality it is not invented by defining it—the definition describes something already existing.

This is the basis of the second view. If 'law' is a given part of reality, it can have only one 'true' definition. But reality does not consist of separate phenomena waiting to be labelled, it is one big lump which has to be divided up for the purpose of analysis. All lines drawn for this purpose are imaginary although they can follow

divisions which exist in reality. What is divided is not reality but an imaginary world of concepts reflecting reality. Moreover, only few real divisions can be followed when defining analytical concepts, and they obviously do not exist in the case of 'law'. How can 'law' be defined as a concept, if 'law' as a social phenomenon is not separated from other social phenomena? Should an artificial line be drawn and if so, where should it be placed?

In assessing the view that 'law' cannot be grasped by a single definition, logic gives again some indirect assistance. If taken to mean that more than one definition is needed to grasp 'law', logic says that this cannot be so. Although the defining of concepts is not a matter of logic, it is logically wrong to give more than one definition for the same phenomenon. Each definition describes a different segment of reality. If more than one definition of 'law' is given, each defines (at best) various phenomena within the area of 'law' which itself remains undefined.

Those who hold that 'law' cannot be grasped by a single definition regard the ambiguity of the word 'law' as the root of the controversy (Gluckman, 1965b, 178ff.). The valid basis of this argument is that language is not only a tool for analysis but also part of reality and thus necessarily ambiguous. But it does not help any further to blame language for its ambiguity if it is used as a tool for analysing reality. If the ambiguity of the word 'law' were indeed the problem, there would be some justification in calling the whole controversy a 'silly word battle'. But this is not the case. The problem is the complexity of 'law' as a social phenomenon and its close links with other social phenomena.

Further, since the defining of concepts is not a matter of logic and since definitions are rarely, if ever, prescribed by reality, the most important decisions about a concept have already been made before it is actually defined. On the one hand it must be decided which segment of reality is to be defined, and on the other hand it must be decided where to place the concept in a general analytical framework. Is 'law', for instance, seen as the particular form of social control, as 'state' can be seen as one particular form of political organisation, or is 'law' seen as a metaphysical idea like 'morality' or 'religion'? Is 'law' seen as a phenomenon as it exists in one particular society or as a universal phenomenon existing in every society? If these decisions are not consciously made, it is impossible to rationalise the defining of 'law' and it would indeed be a 'silly word battle' to argue about a

definition of 'law' with someone who wants to define a different phenomenon.

Does it make a difference whether the social phenomenon primitive law is called 'law' or 'custom'? It would not seem so, because analytical concepts do not change the real phenomena to which they are applied. Yet, it is possible, owing to a tendency to use analytical concepts not only to describe but to evaluate reality. If this is done, analytical concepts begin to influence reality by changing human attitudes towards real phenomena. If an analytical line is drawn between primitive and Western law, it is drawn because they are regarded as two different phenomena. But, having drawn this line, it can easily happen that primitive law is at the same time regarded as inferior to Western law: primitive law is not 'law' but *only* 'custom'. This, however, is a mere side effect; generally speaking, reality and the world of analytical concepts are two separate spheres, the latter reflecting and explaining the former. The world of analytical concepts cannot and will not be a perfect image of reality: it must follow its own rules. In order to understand reality it is necessary to use analytical concepts which have no counterparts in reality or which even contradict real phenomena.

It can, for instance, be argued that the concept 'ownership' should not be applied to rights in land because it means the possession of all rights to an object whereas rights to a piece of land are always held by a multitude of parties. But it does not follow from the (assumed) fact that one individual never holds all rights to a piece of land that a situation where land rights are held by a multitude of parties cannot be analysed in terms of ownership—even if 'ownership' is defined as the holding of all rights to a piece of land. One can hardly expect that a complex segment of reality can be adequately expressed in one simple analytical concept. One or more series of concepts must be used. Various aspects of the same segment of reality must be separated. Typical and atypical cases must be distinguished. A whole framework of concepts is needed. In order to explain reality, the world of analytical concepts has to be equally complex, only somewhat more orderly.

Dealing with rights in land it is, for instance, possible to distinguish between public and private rights and to limit the use of the concept ownership to private rights, so that the concept can be applied even if the 'owner' does not hold the public rights in the land. The private rights can be further divided into rights of control and rights of use.

In a situation where these rights are held by two parties it can be said that the land is 'owned' by one party, but that its 'ownership' is encumbered by the rights of the other party. But it can also be said that the 'ownership' is divided between the two parties and that they 'own' the land together. A third possibility would be to say that both parties hold separate 'estates' in the land which, even combined, do not amount to 'ownership'. The same situation, oversimplified as it is, can be described in terms of individual 'ownership' and communal 'ownership' as well as in terms of 'estates' in land, merely by shifting the analytical emphasis.

Each segment of reality can be translated into different sets of concepts, and that translation is best which assists most in understanding reality. It is for this reason especially important to make sure that the clarity gained by avoiding familiar concepts like 'ownership' outweighs the additional confusion which is thereby created. Besides, one intentional change of terminology makes a large number of other changes necessary. If the concept 'ownership' is dropped, the whole terminology which has developed around it becomes automatically useless as well. Analytical concepts are, in their own way, as closely connected as the phenomena they try to explain. To change one concept means that a whole analytical system has to be revised.

Finally, it must be realised that analytical concepts or systems are attempts to project three-dimensional reality on one plane. No analytical system, even the most complex, can give an exact portrait of reality. All of them, no matter how crude or elegant, are two-dimensional models of three-dimensional realities. Only by combining several of them is it possible to create the illusion of a third dimension. Seen in this perspective, it is probably preferable to analyse reality by way of simple dichotomies. A crude model can teach more about one particular aspect of reality than a sophisticated model, provided it is not mistaken for reality—a far lesser danger when using a model whose crudeness is obvious than when using a complex model which pretends with only slightly better justification to be a portrait of reality.

That an analysis of reality results necessarily in two-dimensional models poses one of the major problems for a European trying to understand primitive law. Analysing the law of his own Western society he can, to a certain extent, bear other aspects of reality in mind because he is familiar with the existing conditions. Dealing with a foreign primitive society, his situation is essentially different; he

tends to see a two-dimensional analysis of primitive law against the background of his own social reality. Hence the insistence of anthropologists that it is necessary to give a full account of the life and the culture of a primitive society. It is essential, as Frazer wrote about Malinowski, to see 'man, so to say, in the round and not in the flat' (1922, ix). But seeing man in the round and not as a flat (two-dimensional) legal person makes legal analysis impossible. It is not accidental that Malinowski's (quasi three-dimensional) picture of primitive law is impressionistic and that his concepts are blurred, although this is not exclusively due to his subject.

If the defining of analytical concepts is so unrewarding, why bother about it? Whatever the attitude of others, lawyers (at least Western lawyers) will have to continue bothering, because legal concepts differ from other analytical concepts in that they are not merely analytical. They not only assist in analysing reality but also help in regulating it. Legal concepts have, besides their analytical function, a normative one. In their capacity as normative concepts, legal concepts do not form part of the theoretical world of analytical concepts but part of reality and influence other parts of reality in a very practical way: legal concepts decide whether a person has to go to jail or not.

At first glance it seems that the normative function of legal concepts does not influence the analysis of primitive law. But this is true only if primitive law is analysed *in vacuo*. If analysed against the background of colonialism and decolonisation, the picture begins to change.

Suppose it is decided for academic reasons to avoid the concept 'ownership' in analysing traditional land law, but it is found out afterwards that a colonial ordinance declares all ownerless land to be the property of the Administration, this use of 'ownership' as a normative concept should in theory be irrelevant for the decision not to use 'ownership' as an analytical concept. Being aware of the practical aspects of legal anthropology, however, the consequences of this analysis must be considered. Were it accepted as authoritative, it would give the analytical concepts used a quasi-normative character. Although they were chosen because they gave the best possible understanding of the traditional land laws, it could be the result of this choice that all lands, even if subject to traditional rights, were, according to the colonial law, ownerless and thus the (possibly restricted) property of the Administration.

This consequence can be avoided by reversing the decision not to

analyse the traditional land laws in terms of 'ownership' and by analysing them instead in such a way that all land in New Guinea appears to be native 'owned'. An analytical terminology can be designed to achieve personal normative aims, the theoretical analysis of the traditional land laws can be combined with a tacit reform of the colonial land law. It can also be argued that, 'ownership' being unknown to the traditional land laws, it is impossible to distinguish between owned and ownerless land and therefore also impossible to apply the colonial ordinance which makes this distinction. Another possibility is to attack the concept 'ownership' used by the colonial ordinance in its analytical capacity. It can be argued that the colonial ordinance is based on the assumption that the concept 'ownership' formed part of the traditional land laws and that it becomes necessary, because this assumption is unjustified, to redefine the analytical meaning of the normative concept 'ownership' accordingly. No matter which of these or other possibilities is chosen, even the most theoretical analysis of primitive law tends to be consciously or unconsciously coloured by political considerations.

Is primitive law 'law'? The answer appears to be a matter of belief rather than of practicability. At the one extreme are those who feel uneasy when thinking of the possibility of lawless societies, because they regard law as such a basic phenomenon that it has to be universal. At the other extreme are those to whom Western law is such a singular achievement that it comes close to a sacrilege not to regard it as being essentially different from primitive law. Salmond (1957, 54-5) has expressed the latter view in its most drastic form (revealing its close connections with the ideology behind the theory of the evolution of law).

If there are any rules prior to and independent of the state, they may greatly resemble law; they may be primeval substitutes of law; they may be the historical source from which law has developed and proceeds; but they are not in themselves law. There may have been a time in the past when man was not distinguishable from the anthropoid ape but that is no reason for now defining man in such a manner as to include an ape.

Salmond's remarks show at the same time how the view that primitive law is not law can be rationalised. Law is identified with a particular form of socio-political organisation and a line is drawn between societies which are organised in states and have law, and

those which are organised in another form and have no law. Most lawyers will probably agree that there can be no law without a state, although they might place an even greater emphasis on the existence of courts.

The identification of law and courts is most pronounced in the views held by the legal realists to whom law is what the court will do in fact. But others who do not share this view also concentrate on cases of trouble when trying to define law. The reason is that enforceability in case of trouble is widely regarded as the attribute distinguishing legal norms from other, especially moral, norms. As Thurnwald put it: 'It is the instance of organised force which distinguishes the legal order from usage and custom' (1934, 2). From this point of view the existence of a state and courts ceases to be an essential prerequisite for law. It becomes merely one of many possibilities to organise the force behind the law. This opens the way for a concept of law covering, for instance, kinship societies in which the norms of social behaviour are backed by magical sanctions.

If enforceability is an essential attribute of law, the cases in which a norm of social behaviour is broken move into a central position; they test whether the broken norm is law. But the question of enforceability reaches further than that. It must be argued that the enforcement of the norm in the case of breach is the reason why the norm is usually followed. This argument meets with difficulties because the enforcement of law is not, even in modern Western societies, the only or at least the most common way of settling disputes. However, this difficulty can be overcome by pointing out that it is not so much the individual enforcement, but rather the general enforceability which counts. Although the law is enforced only in relatively few cases, it is the ever present possibility of enforcement that ensures that the law is complied with as a rule.

On the other hand, the whole argument can be and has been turned upside down. According to Goodhart (1951, 107) enforceability does not make a norm of social behaviour a legal norm, but is the result of its being a legal norm, so that it depends on other criteria whether or not it is a legal norm. Goodhart suggested that it is their obligatoriness which makes norms of social behaviour legal norms and consequently defined law 'as any rule of human conduct which is recognised as being obligatory' (109).

With this definition enforceability also ceases to be an essential attribute of law. Law becomes a system of social control by means of

obligatory norms. This is probably a healthy change from placing the emphasis almost exclusively on trouble cases (thus trying to define the rule by using the attributes of the exception), but that alone does not make this definition satisfactory either.

After his field experiences during the First World War, Malinowski dropped his armchair demand that 'especially in the ethnology of primitive people precise concepts and explicit definitions are necessary' (1963, 9, n.1)—a demand he had made with direct reference to the concept of law. Instead he began to distinguish different types of law, using anything but precise concepts or explicit definitions. One of these distinctions was made between 'the law of order and law maintained as opposed to the retributive and restrictive social action' (1941, 1244). This distinction corresponds with the two basic sociological functions law can fulfil: law can be a system of maintaining order as well as a system of restoring order.

That law can fulfil different social functions does not mean, however, that there must be different types of law. From a lawyer's point of view, Malinowski's observation that there is no room for Law 4 (the retributive and restrictive social action) as long as Law 3 (the law of order and law maintained) reigns, simply reads: law does not have to be enforced as long as it is followed. Still, Malinowski's distinction shows a way of comparing primitive law and Western law without having to define law as a concept. The two basic sociological functions of law can be used to distinguish two areas of social life in which law can operate. It is possible to compare the rules or social mechanisms operating in the areas of maintenance and restoration of order in modern Western state-societies on the one hand and in the primitive stateless group-societies of pre-contact New Guinea on the other hand, and it makes but little difference whether what operates there is described as law, or whether another term is used. Moreover, it is important to oversimplify the situation drastically to bring out as clearly as possible some of the basic differences between primitive and Western law. The aim is to outline the skeleton of an argument before surrounding it with flesh which supports it but at the same time covers its structure.

The way order is maintained in modern Western societies appears to be basically the same as in the primitive societies of pre-contact New Guinea. Both kinds of society have a body of obligatory norms of social behaviour. The main differences are to be found in the restoring



of order. Although it is difficult to gain an overall picture of the situation in pre-contact New Guinea, it is certain that there were very different sanctions and very different ways of settling disputes. There were automatic magico-religious sanctions, though frequently backed by secular means. There was self-help in the form of sorcery or in the form of direct physical force. Disputes were discussed by the parties involved, by elders or by village assemblies. Mediators were called in from outside. There were fines and compensations, oracles, oaths, ceremonial fights and sanctuaries. Secret societies existed which could punish a law-breaker and whose services could be employed to make reluctant debtors pay. There were social sanctions ranging from loss of face to expulsion from the group. There was without doubt a tendency to develop institutionalised sanctions which could restore order and break the vicious circle of violence and counter-violence. There was a tendency to settle disputes without the use of violence or at least to control the use of violence. There was a tendency to organise the force behind the law, but there was, judging from the available evidence, no organised law enforcement (which does not mean that disputes were never settled in accordance with the law).

Primitive societies cannot afford to enforce their laws, whereas Western societies cannot afford to be without law enforcement. Law enforcement as a means of restoring order destroys the solidarity of the group which holds primitive societies together. After this solidarity has been destroyed, it becomes necessary to enforce the law. Enforceability has to take the place of group solidarity to make law work as a system of maintaining order in societies organised in states. On the other hand it can be argued if there is no law enforcement there is no justice, and if there is no justice there is no law in the 'proper' sense. The idea of justice provides the metaphysical justification for law enforcement which is not necessary for social reasons. There can be law without law enforcement but there can be no justice. This implies a second important difference between Western law and primitive law: justice has no place in primitive law (which does not mean that primitive people could not feel wronged or that they had no feeling for equity).

Justice becomes possible only after the state has emerged, after the members of the group have become its subjects. The state as a social reality apart from its subjects has to exist before an impersonal legal equality—the prerequisite of justice—can develop. Members of primitive stateless societies do not have this status of legal equality

because the group is identical with its members. As long as the members of a group depend on one another for the survival of the group there can be no legal equality and no justice. The solidarity of the group prevents justice being done because enforcement of the law would destroy the solidarity of the group by breaking it up into individuals.

This, the cynic would observe, is exactly why the state enforces the law. The state has to destroy the group as a political unit because it wants to usurp the group's place. The state has to divide the group into individuals before it can subject them to its authority. The state creates freedom from the group in order to enslave the individual. Justice is the bait to lure the individual into the trap. By writing justice on its flag the state hopes to create a feeling of loyalty in the individual which can take the place of his feeling of solidarity with the group. But the loyalty of its subjects is not essential for the survival of the state, whereas solidarity between its members is essential for the survival of the group. As a reality apart from its subjects, the state can enforce the law, and, what is more, it can force its laws upon its subjects. If the state is an achievement, the cynic would conclude, it had to be dearly paid for.

With the emergence of the state began the development of a technical law, a system of professionalised law enforcement with courts, counsels, police and prisons. A whole new branch of law, the law of procedure, the law governing the enforcement of the obligatory norms of social behaviour, came into being. These norms had now to be divided into those which could be enforced and those which could not—only the former being legal norms in the new technical sense. By developing the machinery of law enforcement and legal theory, the lawyers in time created technical law as a separate social reality which had not previously existed. Primitive law, or rather part of it, was transformed into a legal system which, for some time, felt capable of answering all legal questions by itself. It did not consider itself any longer as being one of many possibilities to maintain and restore order; law became order, the servant custom became king law.

With growing specialisation technical law began to have difficulties in fulfilling its function of maintaining order. Almost every adult member of a primitive society knows what is right or wrong in the naive sense of being in accordance with or against the obligatory norms of social behaviour. The ordinary subject of a Western state frequently does not know what is technically legal. This applies not

only in the new technical areas of law, like taxation law; it is, to a lesser extent, also true for the old provinces of law, even criminal law. Modern Western law no longer comprises the obligatory norms of social behaviour but, at the most, their technical parallels. There are technical laws for which no corresponding norms of social behaviour exist, although the state tries to establish its regulations, for instance its traffic regulations, as norms of social behaviour. If primitive law is law without law enforcement, technical Western law is, in a way, law enforcement without law.

The complexity of technical Western law is not the only reason why it is no longer identical with the norms of social behaviour and in fact even undermines these norms. Reality, too, appears to have (again) become more complex. Modern Western societies are in many respects more similar to primitive societies than to the liberal constitutional monarchies in Europe in the second half of the nineteenth century which still form the imaginary social background against which Western law is seen today. The individual depends as much on the modern welfare state as on the primitive group. Modern pluralistic societies and primitive societies are equally fragmented. The illusion of individual freedom has broken down, the individual in a mass-society is as bound, as confused and as susceptible to irresistible outside influences as man ever was.

A legal system based on the maxim that law enforcement is the only just way of restoring order can work only as long as the social organisation within a state as well as its economy and technology are relatively simple. Reality in modern Western societies has grown so complex that law enforcement becomes an increasingly less satisfactory way of restoring order, and reality was never simple enough to allow law enforcement to become the only way of restoring order. Technical Western law has lost its grip on reality, despite attempts to surpass it in complexity. Technical law can, for a while, try to save face by administering the type of pseudo-justice known from the treatment of traffic offences. In the end it has to replace the rigid black and white of justice with the varying shades of equity, or something similar which makes the settlement of disputes as unpredictable and as dependent on the various social factors of the individual case as it is in primitive law. The spiral of legal evolution, if there is such a thing, has moved above the point where primitive law developed into state law.

Another source of difference must be considered: the different sizes

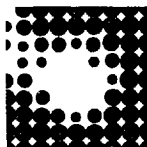
of the societies within which primitive and Western law operate. The primitive group is usually small; it sometimes comprises only the members of one nuclear family. Primitive law thus operates within social groups where the technical law of Western states normally does not. Only if these groups cease to function as social units and their members face each other as individual subjects of the state, does technical Western law become relevant. As long as, for instance, the nuclear family in a Western state functions as a social unit, state law does not usually interfere in 'internal' disputes (unless the state becomes totalitarian and tries to destroy the family as a social unit). Up to the point where group solidarity breaks down the members of a social group within a modern Western state can still be governed by a kind of primitive law, although this law differs basically from the law governing primitive societies, because the primitive group is a political as well as a social unit. In Western states two types of law operate which are not separated in primitive societies.

To get a full comparison, the primitive law operating between different groups or their members (the areas of international law in modern Western societies) must also be taken into account. The non-existence of a state influences the primitive law operating in these areas as strongly as it influences the primitive law operating within the group. On the other hand, the law operating in these areas is characterised neither by group solidarity nor by state authority. On the contrary, the more law operates in these areas, the weaker the solidarity of the group and the authority of the state tends to get. Both the group and the state need the threat of external violence in order to survive as political entities. It is war, or the fear of war, which kept the groups and keeps the states alive. Still, there is the human tendency to replace violence by law, to settle disputes in a peaceful and orderly way. This tendency is, generally speaking, more successful in primitive than in Western societies; not because the members of primitive groups are better people than the subjects of Western states but because the group is weaker than the state. This weakness, which prevents primitive societies from using law enforcement within the group, makes it also necessary to look for peaceful ways to settle disputes between different groups or their members, or at least to control the violence, because social balance has to be restored.

The idea of social balance is as central for primitive law as the idea of justice is for Western law. Its effects can be seen most clearly when war breaks out between different groups. Whereas the state thrives on

enforcing the law within its domain and on winning victories over other states, the group can frequently not afford either. In primitive societies victory cannot be the basis of peace. Instead social balance has to be restored. The victors cannot demand compensation, but each side has to pay blood money and the victors are likely to have to pay more because they have probably killed or wounded more than the defeated. This idea is pushed to its ultimate consequence when a fight between two groups is replaced by a ceremonial duel between two representatives: the victor must also die before peace can be made.

Primitive law is not a battle between right and wrong where one side has to win and the other to lose; primitive law is not an attempt to establish the higher order of justice, its aim is to maintain and to restore social balance. This is why there is and can be no finality in primitive law. There are no binding decisions: primitive law is an endless series of compromises, each side trying to get the best possible deal, a dialogue which can be reopened at any time. This central difference between primitive law and Western law makes the establishing of 'law and order' by colonial administrators in primitive societies so hopeless. Primitive law and the primitive group as a political unit have to be destroyed and a colony has to become a state before a Western type of law can begin to rule.



The simple test that a norm is legal if it can be enforced in court and non-legal if it cannot, is meaningless in primitive societies without courts of law. In such societies there can be no clear distinction between legal and moral obligations or between legal and factual claims, not even in theory (in practice this problem exists in the form of borderline cases in Western societies as well). Primitive law is not sufficiently specialised to allow such conceptual distinctions. If they are nevertheless used in analysing it, there is always a risk of misunderstanding—unless a clear distinction is made between the ‘folk’ system and the analytical system, between the normative and analytical functions of legal concepts. Even then the fundamental difficulty remains: legal analysis always tends to change the law. This is how technical Western law developed. It created itself by way of self-analysis, like Baron Munchhausen it pulled itself by the pigtail out of the swamp of primitive law.

Although primitive law is not technical law, it is a distinctive area of primitive culture and not merely its legal aspect. Only its boundaries are not well defined and its structure is vague. Primitive law does not even comprise all obligatory norms of social behaviour. There is a traditional tendency to distinguish between a legal minimum and a wider area of non-legal claims and obligations, although this distinction is—in the absence of courts of law—of lesser practical importance than in Western societies. Still, primitive people themselves consider it important to differentiate between law and non-law. They are in a way more legally minded than the average member of a Western society where law has become the prerogative of specialists who have turned it into a separate legal sub-culture, not shared by the layman but ruling a considerable part of his life.

During his field work on Wogeo Island, Hogbin asked an informant about rights to rock outcrops and patches of poor soil. The reaction was laughter and, afterwards, a counter-question:

Do you ever say that the ash that's fallen from a cigarette is yours, that no one else may touch it? . . . Yes, you may laugh at me when I say that. Now do you understand why I laugh at your asking about bare rocks and clay where nothing will grow (1967, 8).

This anecdote illuminates one of the basic differences between primitive and Western law. Western law is an abstract and closed system which provides answers for all possible cases. Even if it appears ridiculous, from a practical point of view, to ask who owns the ash which has fallen from a cigarette, Western law can answer this question; its norms cover cases of this kind. Primitive law is a pragmatic and open system, orientated to reality and not to theoretical possibilities. Its norms reach only as far as necessary for practical reasons; it is not interested in theoretical cases. But primitive law can provide an answer as soon as such a case becomes practical.

Primitive law being an open system, it cannot be argued that no rights to rock outcrops and patches of poor soil exist because the traditional law says nothing about them (as could probably be argued in Western law). Although not yet defined, these rights will be defined when their existence becomes a practical issue. This definition does not create new rights; they existed all the time, only in a latent form. Primitive law is as all-embracing as Western law, but whereas Western law is all active law, primitive law comprises active as well as dormant law. It needs neither legislation nor the help of judges to activate dormant areas, though it pays for this flexibility with a—for Western lawyers—confusing lack of definiteness.

Primitive law is not only open as a system of norms, it is equally open as an area of social life. There are no disputes in primitive societies which are legal in the technical sense. To begin with disputes in Western as well as primitive societies are not legal disputes between legal persons but social disputes between individuals or groups. In Western societies, however, these social disputes can, by way of analysis, be reduced to legal disputes which are decided by courts of law, their legal decisions being usually sufficient to terminate the social dispute as well. This transformation and re-transformation is impossible in primitive societies without a separate legal sub-culture. Dis-

putes always remain social disputes. They cannot be temporarily reduced to legal disputes which are decided by enforcing the law.

The deciding of disputes is the most dramatic form of law in action, but legal transactions are equally important. Trade was going on throughout pre-contact New Guinea. Not only had specialised articles, like salt or clay pots, become commodities, but so had food. Even 'incorporeal property', like songs, patterns or magic formulae, were bought and sold for economic gain. Trade and production monopolies were possibly the most valuable and most jealously guarded possessions. Transactions were clearly part of traditional everyday life.

Although most transactions had economic significance, few took place for economic motives alone; they were, for instance, made to strengthen the ties between groups or to improve the social status of individuals. As a result they tended to be a much more personal affair than transactions in Western societies. Not only did the identity of the partner matter for a transaction in a primitive society, the object involved was also important, the purchase of a clay pot being essentially different from the purchase of land. Transactions with exchangeable parties and objects, so typical for modern Western life, were foreign to primitive societies—although some forms of silent trade might appear to be at least as impersonal as shopping in a supermarket.

According to Western law, no person can, as a rule, transfer more rights than he himself possesses, but if a person transfers his rights to another person, the transferee will, as a rule, acquire the same rights as the transferor possessed and not lesser rights. This was not usually so in primitive law. Traditional rights nearly always contained non-transferable ingredients which were either lost or retained by the transferor. The buyer of a claypot, for instance, owned it less completely than the person who made it. The original settler 'owned' the land more completely than his heirs, and his heirs 'owned' it more completely than a person to whom the original settler gave part of it. On the other hand, all these rights could, in another way, grow more intensive the longer they were held by a person, and part of this intensity could be transferred. Although the heirs of an original settler could not 'own' the land as completely as their ancestor, they could, after some generations, 'own' it more intensively than he did; and a woman could own a claypot she used for a number of years more intensively than the potter.

All these phenomena can also be observed in Western societies. A



European owns a boat he built himself more completely than one he bought and an old coat more intensively than a new one. A family of European farmers which has lived on a property for several generations will still feel that it owns the land in a certain way after it has been sold. But these phenomena are legally irrelevant in modern Western societies, whereas they form an essential part of primitive law. In primitive societies a person does not acquire a particular right at a particular point of time as a result of a particular legal act, he acquires rights which grow and diminish during a historical process which continues as long as memory lasts. 'It has always been like this' is the closest approach to finality primitive law can achieve.

There are two views which try to explain the differences between legal transactions in primitive and Western societies as a result of different ideas about property. According to the first, primitive people do not have a concept of property, because objects a person possesses are 'considered only an extension of the person' (Seagle, 1941, 51). The second view is based on Hohfeld's premise that a person does not own an object but that all legal relations are between persons. It explains the differences between primitive and Western property law with the help of Maine's distinction that the former is based on status and the latter on contract. It thus reaches the same conclusion, namely that primitive property law is really part of the law of persons (Gluckman, 1965a, 171), only in a different way. This, however, does not make it more convincing than the first view.

The first view does not convince because it sees primitive law as more primitive than it is. It is possible to see objects like ornaments or weapons as extensions of a person, but trees in the forest (which can be owned) can hardly be regarded in the same way. Primitive law is quite capable of distinguishing between a person and his property. The second view does not convince because it sees primitive law as more abstract than it is. The idea that persons do not own objects is as foreign to primitive law as it is to the Western layman. Primitive law knows as well as the Western analytical lawyer that ownership gives rights and privileges against other persons but insists (as the Western layman) that the owner has these rights and privileges because he owns the object. If Hogbin caused laughter when asking who had rights to useless land on Wogeo, it is easy to imagine what would happen if anyone tried to persuade a potter on Bilibili Island that she did not own the pot she had just made, but only certain rights and privileges with regard to this pot against other persons.

Because primitive law is not a separate sub-culture, it neither can afford to be as abstract as Western law nor has to be. But primitive law is, in its own way, as complex as Western law. Primitive law is complex because the number of facts which are legally relevant is unlimited. Western law is complex because—selecting only a few facts as legally relevant—it analyses them *in abstracto*. The difference is a difference in method and not a difference in complexity. Western law is as primitive to a native looking for a differentiation of relevant facts as primitive law is primitive to a European looking for legal analysis.

One of the first attempts to describe a 'folk' system of primitive law in New Guinea was a paper by Hahl, published in 1897, which deals with the Gazelle Peninsula of New Britain. Hahl distinguished three native 'tribes', which were so different in language and appearance that he excluded two (the Baining and Taulil) from further discussion. The language and the customs of the third, the Tolai, were, according to Hahl, not uniform either. He distinguished four dialects, of which two were so different as to constitute separate languages. Even within each of the two remaining dialects local variations could be found and the social customs varied as much as the language. To present a uniform picture, Hahl concluded, he could discuss only the 'legally relevant customs' of the people living between Mount Varzin and Blanche Bay from Raluana to Kinigunan. Taking this as a typical example for the size of areas within which the 'legally relevant customs' are uniform, there would be more than two thousand different 'folk' systems of traditional law in New Guinea. Working on Hahl's assumption that the diversity in law parallels the diversity in language, the situation does not improve essentially: there are still many hundreds of mutually unintelligible 'languages'. Yet, the linguists have taken up the challenge and 'have been successful in combining an ever increasing number of languages into families, and families into groups of higher order', the largest of which is 'a macro-phylum occupying close to three-quarters of the entire New Guinea area' (Wurm, 1969, 210).

Compared with this proud record the legal anthropologists have achieved very little since the days of Hahl. Even the initial task of recording the various 'languages' of primitive law in New Guinea has hardly begun. The legal anthropologists working in Africa were more active. They attempted 'to see whether it is possible to arrive at generalisations which would cover ranges of systems and to see

whether some wide principles for all African law might not be adduced'. They 'concluded that some general principles did emerge, despite the variety of specific rules found in Africa' (Gluckman, 1969, 2). The legal anthropologists dealing with primitive law in Africa think they can do what the linguists in New Guinea have done and claim that they have already successfully begun to do so. There is no reason why it could not be done in New Guinea. However, the task is far too big to be tackled in this study, even when limited to the area of land law. Here it is only possible to assume (encouraged by the experiences in Africa) that the many sets of traditional land laws in New Guinea are not basically different but can be grouped together in families, phyla and macro-phyla, until the universal principles behind the diversity of specific rules have been reached.

Law has to cater for practical needs and will differ according to the needs for which it has to cater. At the same time, the law in different societies will be similar in so far as the practical needs are similar. Looking at pre-contact New Guinea from this point of view, the picture is more encouraging than in the linguistic field, though more varied than the popular image of the New Guinean as a subsistence gardener. There were also groups of semi-nomadic hunters and gatherers (who needed no gardens to subsist) and, on the other extreme, semi-professional artisans and traders (who could not subsist on the gardens they had). Still, the picture of a largely unspecialised, largely self-sufficient subsistence economy based on horticulture is probably true for most of pre-contact New Guinea. Even among subsistence gardeners, however, economic factors lead to variations in the land laws. The kind of staple crop (taro or sago, etc.) is one of the most important of these, but there are many others: gardening techniques, the relative importance of hunting, fishing and gathering, the magical or social significance of certain crops or animals. Seemingly irrelevant factors, such as the abundance or scarcity of wild pigs (which can decide whether it is worthwhile to make gardens), can also considerably influence the land laws. It depends largely on these and other economic or environmental factors which types of land rights develop and to what extent they are permanent, exclusive and individual.

Traditional societies in New Guinea were not organised in states but in groups. The absence of a state (as a reality separate from its subjects) is responsible for the—to a Western lawyer—peculiar mixture of communal and individual rights to land, because it makes

it impossible to distinguish clearly between public and private law, between sovereignty and ownership, between political and property rights. The absence of an institutionalised chieftainship was also typical for pre-contact New Guinea, although there are again exceptions and although it becomes more and more apparent that the authority of traditional leaders, in particular in land questions, was generally greater than previously assumed. Nevertheless, in most parts traditional land tenure was essentially non-feudal and the society egalitarian. A third and positive factor characteristic of traditional societies in New Guinea was kinship as a principle of political organisation.

In pre-contact New Guinea kinship groups, like lineages or clans, were not only social but also political units. Kinship, however, was not the only traditional principle of political organisation. The struggle for superiority between the kinship principle and the territorial principle, in particular, had begun long before the first Europeans arrived. The survival of the group was too uncertain and too important to rely exclusively on the kinship principle. The adoption of individual outsiders was frequent in many parts. Attempts to increase a group's strength by attaching in-laws or even strangers to it, were equally common. Whole groups were invited to settle on the territory of a group, then becoming either part of their host's political group or at least their allies. Neighbouring groups would move into one village for mutual protection. On the other hand, kinship groups would break up into separate local branches. There were many ways and many reasons for a departure from the ideal equation: each kinship group one political unit and each political unit one kinship group.

In some areas territorial elements appear to have had little significance because the kinship organisation was identical with the territorial organisation (each kinship group having its own territory). The tensions began when this identity did not exist. War was one of the cases testing the relative strength of these principles. In some areas the territorial organisation broke down as soon as a war started: each warrior joined his kinship group and they—instead of the territorial units—fought against each other. In other areas the fights were between villages and not between kinship groups. The kinship groups split up, each segment fighting for the village in which it lived rather than for its kinship group (although many people fled to neutral villages in order not to have to fight against their kin).

The dying out of a local branch of a kinship group was another

test case. In some parts the land of an extinct branch would be taken over by 'in-laws' living in the same village rather than by another branch of the kinship group living in another village. In other areas the land was used by the other groups living in the village, but it remained 'ownerless' and when sold to Europeans, the purchase price was not divided between the villagers but sent to distant kin of the extinct group living elsewhere.

Although the importance of territorial elements for the traditional land tenure has probably been somewhat underestimated in the past, it is probably true to say that kinship was the main basis of land law in pre-contact New Guinea. However, there co-existed two basically different principles of kinship organisation: there were matrilineal and patrilineal societies—not to mention those groups where a child's links with its 'in-laws' were so strong, compared to those with its kin, that they are sometimes described as bilateral.

Ideally a child in a matrilineal society 'inherits' land rights only from its mother whereas a child in a patrilineal society 'inherits' only from its father and his relatives. This ideal was probably never realised in any of the traditional societies of New Guinea. Several factors prevented this. Among them were the tensions between the ('bilateral') nuclear family and the wider (unilateral) kinship group and the tensions between the individual and the various groups or groupings to which he belonged. The combined influence of these factors not only resulted in very complex sets of laws of 'inheritance' but also shaped other aspects of the law. On the other hand, these factors were basically the same in most parts of pre-contact New Guinea; only their relative importance changed from area to area. The same factor X which hardly influenced the law in area A could be of central importance in area B.

The terms 'patrilineal' and 'matrilineal' might suggest that patrilineal societies are dominated by the male sex and *vice versa*. This is not necessarily so; matrilineal societies, for instance, can well be 'ruled' by males. Further, property can be passed down not only from father to son or from mother to daughter but from father's sister to niece or from mother's brother to nephew. It is also possible that certain kinds of property are identified with males and others with females. There can thus be societies where children belong either to the kinship group of their father or that of their mother, but where a patrilineal system of 'inheritance' for males coexists with a matrilineal system for females: for instance a society where land rights are passed

down from father to son and household utensils from mother to daughter. A similar constellation can be found when certain kinds of property are identified with the family and others with the kinship group. In this case only the latter type of property might have to be passed down patrilineally or matrilineally, a person being otherwise free to choose an heir. He might even be bound to follow an opposite principle, so that, for instance, a man in a matrilineal society has to pass on his land to his sister's son and his weapons to his own son.

Questions of residence are equally important. Do children live as adults with the kinship group of their mother or that of their father? Do the rules in this regard differ with the sex of the child? Does it have a choice between matrilocal and patrilocal residence? These questions arise when a child is born, they repeat themselves in slightly different form in case of marriage. Is the couple's residence virilocal or uxori-local? Do they have a choice? Or is there a rule according to which they have to live certain periods with the husband's as well as with the wife's kinship group? The practical importance of the rules of residence varies with the type of settlement. Does each (exogamous) kinship group have one or more hamlets of its own, or do a number of them live together in larger villages? If marriage within such a combined village is usual, the distinction between patrilocal and matrilocal or virilocal and uxori-local residence loses much of its significance.

The tensions between the ('bilateral') family and the (unilateral) kinship group are apparently stronger in matrilineal than in patrilineal societies. Or, to put it another way, the patrilineal kinship group appears to be less strong than the matrilineal kinship group because the position of the family in patrilineal societies tends to be stronger. As a result larger combined villages are more common in patrilineal societies. This encourages a tendency either to marry within the village or to bring one's wife or husband into the village, which further strengthens territorial links at the expense of kinship ties and leads at the same time to a greater emphasis on individual rights. The greater relative strength of the matrilineal kinship group corresponds with a less developed territorial organisation. The land of different kinship groups is frequently interspersed, and exclusive hamlets tend to be more common than combined villages. This gives the question of residence a far greater importance than in patrilineal societies and caused the development of two branches of matrilineal land law which are in some ways more different from each other than they are from patrilineal land law.

In matrilineal societies with uxorilocal residence the women and not the men (who have married into the kinship group and the settlement) tend to be regarded as the 'true owners' of the land, and land rights tend to be passed down from mother to daughter. This tendency works against the individualisation of land rights, at least outside the garden areas for which the females are largely responsible. It is unlikely, however, that, for instance, the hunting areas of the group are divided into individual blocks among the foreign husbands of female members. Virilocal matrilineal societies are in this respect more similar to virilocal patrilineal societies than to uxorilocal matrilineal societies.

In another respect the relations are reversed. The tensions between the ('bilateral') family and the (unilateral) kinship group are stronger in virilocal matrilineal societies than in uxorilocal matrilineal societies, where the situation resembles that existing in virilocal patrilineal societies. It is the passing down of rights outside the family (from mother's brother to nephew) as opposed to passing them down within the family (either from mother to daughter or from father to son) which causes these tensions. The wish of a father to secure rights to his land for his son who belongs to his mother's kinship group, is a strong incentive for the development of legal means to overcome the strict rules of matrilineal 'inheritance' or even for a development towards patrilineal 'inheritance'.

The primitive societies in New Guinea have so far adjusted themselves with comparative ease to the far reaching and rapid economic changes brought about by colonisation and decolonisation. Despite the development of native cash cropping, however, the traditional land laws have changed surprisingly little. The rules of land tenure appear to be basically the same as in pre-contact days, and most of the changes which have occurred were the result of trends already existing at that time, although the development of cash cropping encouraged them. But at the same time it enlarged the problems. The wish of a father to leave his property to his own son instead of his sister's son already existed but it became a much more serious matter for all parties concerned when it involved a little plantation instead of a few odd coconut palms. There was also a traditional tendency to reserve an area for the local branch of a kinship group, but the situation of a member of another branch wanting to join the local branch in pre-contact days was very different from that of his equivalent today who wants land for planting cash crops without changing his residence.

The development of cash cropping also consolidated the traditional land laws. This applies in particular to the rights of the group as opposed to individual rights. The trend towards individualisation, encouraged by cash cropping, has in some areas reached a stage where it threatens the balance between individual and communal rights. However, this new emphasis on rights of the group is not so much a reaction to cash cropping as to land shortage. If land becomes scarce, the group has to restrict the individual's freedom in using its land. The traditional land laws do not hinder an individual from engaging in cash cropping (unless the Administration or a European creditor insists that he has to have a 'proper' Western individual title to land). On the contrary, the development of cash cropping is probably easier than it would be under Western law. Until there is a shortage of land, there is no economic need to change the traditional land laws, and then the change will not encourage but attempt to control cash cropping. Although designed for a subsistence economy, the traditional land laws do not hamper the development of cash cropping up to the point where further expansion would mean the creation of a landless class (the prevention of which is one of the main aims of traditional land tenure).

The history of primitive law in New Guinea since the beginning of European settlement has so far mainly been a process of defining general rules and specific rights which were previously either undefined or only vaguely defined, because there had been no practical need for a precise definition. But this process has in some areas reached a stage where further adjustment without an alteration of defined rules or rights becomes increasingly difficult. Even in these areas, however, the traditional principles are still applied, they are only interpreted in the light of the changed economic conditions.

Traditionally a Tolai father could not leave trees he had planted to his son but only to his matrilineal relatives. Recently the Tolai around Kokopo decided that this rule was unsatisfactory in the case of a son who had helped his father to plant cash crops (Smith and Salisbury, 1961, 10-11). Instead of changing the traditional rules of 'inheritance' and allowing a father to leave the trees to his son, they made a compromise in the form of a new rule: the trees are still 'inherited' matrilineally but the son was given the right 'to enjoy the fruits of his labour during his lifetime'. Even this new rule was not an invention but the adjustment of a traditional rule to new economic conditions. Traditionally a son had a claim against his father's group for support



in the form of food. This traditional rule is the basis of the new rule that a son helping his father to plant cash crops, has the right of usufruct during his lifetime. The money he obtains by selling the crop replaces the food he could have otherwise demanded from his father's group. This is the kind of change likely to occur: cautious adjustments of traditional rules and principles to new conditions. The same area of Tolai law can illustrate the kind of changes which are improbable.

Smith and Salisbury's informants stated that 'trees are part and parcel of the land on which they are planted'. This contradicts a widespread principle of traditional land tenure in New Guinea, by which trees are the personal property of the planter. This principle formed almost certainly part of Tolai land law in pre-contact days. Why was this old principle replaced? How was it replaced? And was it replaced at all? Closer inspection shows that planted trees are still not treated as part of the land. During his lifetime the planter has rights to the produce of the trees. On his death they 'revert' to the clan owning the land, but only if the planter has not arranged otherwise during his lifetime. Even if he has not, his matrilineal relatives (as his personal 'heirs') have a prior right to the produce. In other words: trees are in fact still used and 'inherited' as if they were the personal property of the planter. What then is the purpose of stating a new principle that trees are part of the land on which they grow?

It is certain that even the most sacred principles of traditional law were questioned in pre-contact days when disadvantages became apparent. These discussions continued after European settlement when the differences between traditional and Western law raised additional questions. The Tolai, for instance, discussed more than sixty years ago whether they should replace their traditional system of matrilineal 'inheritance' with the Western, as they saw it, patrilineal system. They have probably also long been discussing whether it is a good thing to distinguish between the ownership of land and the ownership of trees. They have probably more than once reached the conclusion that it is not, that it would be better to treat trees as part of the land as Europeans do. However, it is a long way from questioning a principle to replacing it. Human beings, primitive or otherwise, are reluctant to replace a familiar legal principle, even if they see only the disadvantages of the old principle and only the advantages of the replacement. Instead, they will introduce all sorts of rules and take all sorts of measures to get around the old principle. Yet, they will not replace it, because this is not the way to do it. A legal

principle must be slowly undermined until it collapses. It has to be dead a long time before it can be buried. Before a living legal principle can be replaced there has to be a revolution, and legal principles have a remarkable ability to survive even revolutions.

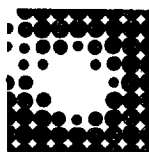
The formal native land laws are now probably basically the same as in pre-contact days; the attitude towards land, however, is changing and this in turn alters the social applications of the formal laws. The present native population is aware of this change and usually explains it by saying that land was not as important to their forbears as it is to them. This is true in one respect: land is becoming an economic asset, whereas it was rarely, if ever, seen as such before the Europeans came. But being recognised as an economic asset reduces the importance of land in other respects. Land as one of many economic assets begins to lose its unique position as the direct basis of each individual's life. The attitude towards land becomes more and more rational, until land is in the end nothing but an economic asset. Land ceases to be regarded as living space and turns into property. It becomes possible to own land in the same way as a claypot or a canoe. The concept of ownership changes, the interpretation of the traditional land laws in general becomes more legal in the Western sense.

Notwithstanding that this process is still in its early stages and hardly visible in some parts of New Guinea, it has already drastically altered native attitudes towards the early European land acquisitions. Traditional land law has developed many faces, some of which determine land dealings with Europeans and others land dealings among natives. According to present native attitude there is and was, for instance, no 'ownerless' land in New Guinea as far as relations between natives and Europeans (including the Administration) are concerned. On the other hand there were (and probably still are) large areas regarded as 'ownerless' among natives.

If one is not satisfied with the simple explanation that natives are, at least in their dealings with Europeans, habitual liars, discrepancies of this kind can be explained with the changing native attitude towards land. Whether a piece of land in pre-contact New Guinea was 'ownerless' according to traditional law can frequently not be answered by a simple 'yes' or 'no'. This lack of preciseness is not only foreign to modern Western law, but also no longer corresponds with current native views. Since natives like Europeans interpret their land laws according to their recent experiences, they themselves have growing difficulties in appreciating the situation existing in pre-contact and

early colonial days. They themselves see and want to see their traditional land laws and land rights as much more precise than they were at that time.

Besides, natives regard land claimed by Europeans as not belonging to the same category as other land. Having realised that Europeans and Western law do not treat land as they do, they have adopted a different attitude towards land claimed by Europeans and towards their land dealings with Europeans. Natives like Europeans apply different standards according to the people involved. They use their own (already differentiating) standards when dealing with members of their own 'race' and other Westernised or 'nativised' standards when dealing with members of the other. Both natives and Europeans try to translate the standard of the other side into their own 'language' and both try to get the most out of this translation, no matter whether for economic, political or academic motives.



One of the native witnesses told the first Land Commission in the British Solomons (1919-24) that 'his land was not like the land of the white man, in that it had a name only and did not have four sides like a box' (Allan, 1957, 86). This seems merely a metaphorical way of saying that the natives in the Solomons had no land boundaries, but then it becomes apparent that the native did not only point to names as a traditional alternative to identifying land by means of boundaries, but that he wanted most of all to express his contempt for the Western fashion of treating land as if it were a thing like a box.

In modern Western societies land is divided into political territories which are subdivided into property units. Both types of Western land unit are legally defined by boundaries in the form of imaginary lines, and Western law treats at least the property land units indeed very much like separate boxes. The area of Tolai settlement in the Gazelle Peninsula is divided into districts (*paparagunan*), each of which 'is named and has clearly defined boundaries which are defined in terms of natural land marks'. The districts are subdivided 'into numerous plots (*pakana pia*) each of which is also named, usually from some tree located on the block or from some event which occurred there' (Smith and Salisbury, 1961, 1). Among the Amele near Madang, land is divided into larger units called *Gada* 'the boundaries of which are usually defined by water courses, ridges and such natural features, though sometimes fruit trees and bamboo clumps are also used as boundary marks'. The *Gada* are subdivided into *Da*, 'which have individual names' after 'things connected with that block, such as trees, stones, vines or men who were killed or buried on the land' (Page, 1964, 2).

The Amele are organised into patrilineages (*Yobon Mede*) which are kinship groups as well as local groups, and political as well as land holding units. Although a number of patrilineages may trace their origin back to a common mythical ancestor, the patriclan is of little importance, especially in land matters. There are no land holding units above and below the lineage level. Tolai socio-political organisation is more complex because the kinship organisation is not identical with the territorial organisation. The basic territorial unit is the district (*paparagunan*) which can be subdivided into smaller territorial units, for instance into wards (*pakanagunan*). The basic kinship group is the matrilineage (*yunatarai*) which can be divided into several matrilineages (*apiktarai*). It is at this level that kinship and territorial organisation meet. Usually a number of lineages belonging to different clans make up the population of one district. However, not the lineage but the clan is the basic land holding unit; the clan instead of the district is also the basic political unit.

Since the *Gada* of the Amele is one block comprising all the land of a lineage as the basic political unit, it can be described as a political territory. The case of the Tolai *paparagunan* is different because not the district but the clan forms the basic political unit. If a political territory is all the land identified with the basic political unit, it would consist of the land holdings of a clan. But they are usually scattered over several districts which is irreconcilable with the concept of a territory. The district is the closest equivalent of a political territory in the traditional Tolai context. Its inhabitants, though not the basic political unit, form a loose political unit on a territorial basis, and these territorial ties were of greater relative importance in the past than they are now.

Among the Amele it is thought the division of one *Gada* into several *Da* 'evolved only as a matter of convenience when referring to various parts of the *Gada*' (Page, 1964, 2). Historically not very likely, this explanation is possible. Since the lineage is the only land holding unit among the Amele, a division of the *Gada* among smaller land holding units is neither required nor possible, so that the *Da* can hardly be seen as property units. But they have long acquired a significance beyond that of a subdivision for the sake of easier communication. It is, for instance, regarded as against tradition to change existing *Da*. This is particularly important when land is transferred to other lineages, because it has to be a whole *Da* or nothing. The *Da* is also

the basic land unit for internal purposes. Before a lineage member can make a garden, he has to receive permission, from the *Mahai'ilo*, the land leader, and this permission is sought and granted with reference to a particular *Da*. The role of the *Da* is that of a permanent administrative land unit.

The obvious purpose of the Tolai *pakana pia* seems to be the division of a district into smaller property units among the resident clans as separate land holding units. Yet, there are *pakana pia* which are subdivided between several land holding groups but nevertheless regarded as one land unit. A Tolai *pakana pia*, it seems—although economically divisible—is as permanent a land unit as a *Da* of the Amele people, and an administrative rather than a property unit. However, the view that a *pakana pia* is an administrative land unit does not explain the existence of another peculiar kind of *pakana pia*.

Smith and Salisbury were told by their Tolai informants that some of the large *pakana pia* in uncultivated areas are common land belonging to the district in which they are situated. No clan has clearly defined rights over them. Instead they form a 'no man's land over which the . . . [clans] living in the district can garden, hunt or fish, with one specific . . . [clan] being sometimes recognized as having a loose control over them' (Smith and Salisbury, 1961, 1-2). This rather vague description is further confused by information given in other contexts. On the one hand it is said that the land leader of the clan which originally settled the area is 'regarded as the trustee for the purposes of any division of the common land amongst individuals or individual . . . [clans]' (7). On the other hand it is said that an individual can acquire common land in his district by cultivating it. 'The individual previously had usufructuary rights and by cultivation he establishes a claim on behalf of his . . . [clan] to full proprietary rights' (8).

Ignoring the role of the original clan, the situation seems fairly clear: uncultivated land within a district is the common property of all residents which they can use freely until one of them establishes exclusive proprietary rights on behalf of his clan by cultivating it. As soon as the original clan is included, the picture becomes clouded: the clan has no clearly defined rights to the land, but its leader is regarded as a trustee for the purpose of dividing it amongst individuals or clans, yet his control is only loose and not always recognised. This ambiguity is probably due to the fact that the position of the original clan was

once much stronger than now admitted, whereas the residents of a district are still not quite the land holding unit they claim to be. This ties in with other still recognised privileges of the original clan.

The representative of certain . . . [clans], which were the original settlers in each district, have the ceremonial privilege of tabuing certain garden activities throughout the district . . . This represents a formal claim that their ancestors own all the land of the district, and it is acknowledged by all . . . [clans] living there paying tambu [shell money] to remove the ban (6-7).

Originally the whole district was controlled by one clan. This clan transferred certain *pakana pia* to members of other clans who migrated into the district. The 'common lands' are those which have neither been transferred to other clans nor been exclusively used by the clan of the original settler. The history of each district begins with the establishing of a political territory which could be divided into smaller administrative land units. At the same time a political territory could grow by adding more administrative land units. One of the administrative land units making up the district in its present shape forms its historical centre and the birthplace of one particular clan. Each Tolai clan has its *madapai*, the land on which its original ancestor first settled. The clan takes the name of its *madapai* and this act creates the group as a political unit. The group identifies itself with an existing land unit by adopting its name, thereby transforming the land unit into a political territory and itself into a political group. This is a reversion of the Western method of naming a political territory after the controlling 'group'. It is only possible because land in New Guinea was, from the traditional point of view, by nature divided into units which are older than man. The *madapai* was already in existence as a land unit when the original settler arrived. All that was left for him was to give it a name with which he could identify himself; and he was not even free to choose this name.

The natives in pre-contact New Guinea did not face their environment as a natural whole (which they could or could not divide into man-made land units), they were confronted with a vast number of separate phenomena which had (although in many ways interconnected) each an identity of its own. There were names for individual rocks and ridges and trees, but no name for a range of mountains. There were names for individual holes in a reef but no name for the reef as a whole. Only very small islands had names, whereas larger

islands or groups of smaller islands had no name in common, because they were not regarded as one entity. The largest named land unit among the Tolai was the district. There was no common name for the 'country' of the Tolai and (consequently) no common name for the Tolai as a 'tribe'.

The traditional world was, from a European point of view, extraordinarily fragmented. From the traditional native point of view, however, the modern Western world is characterised by an equally extraordinary disregard for essential differences; for instance the incomprehensible European inability to distinguish between a garden and the land on which it is made or, at least, between a tree and the land on which it is planted. Man in pre-contact New Guinea was quite capable of creating things important for the tenure of land. He could plant a tree, he could make a garden, he could fence a garden, he could even divide a communal garden into individual lots, but he did not thereby create thing-like land units. What he did, was to create new things: a garden, a tree, a fence.

Traditional land tenure is not based on man-made, box-like property land units but on the original ancestor and the natural land unit on which he first settled, and which he identified by giving it a name, at the same time identifying himself by identification with the land and its name. Two kinds of name are used to identify land: names of things on the land and names connected with events which occurred on the land. The second alternative is unlikely to be chosen when the first settlement in an area is established, since this event marks the beginnings of its history. This is different when the original ancestor is a mythical figure because mythology develops—in contrast to history—into the past and not into the future. If tradition starts with a mythical ancestor, the piece of land on which he enters human life is the first land unit. Even then, however, it is a thing rather than an event which identifies the piece of land: the cave or the tree where he lived, or the hole in the ground through which he came to the surface. The name of the original land unit is thus usually connected with a conspicuous thing on the land; the name refers to a landmark.

To appreciate the idea behind the landmark concept, it must be realised that it is one landmark and not a number of landmarks which identifies a piece of land. A landmark defines the focal point of a piece of land, not a point on its boundary. The term *paparagunan*, for instance, means 'the district round a place' (Smith and Salisbury, 1961, 1). The native sees a land unit traditionally from a focal point



and not from its boundaries as does Western law. Traditional land tenure is based on fixed points surrounded by spheres of control and not on defined areas of land.

It is now easy to imagine how a political territory grew around one and later possibly additional landmarks. It also becomes apparent that something like the Western boundary concept had to creep in as soon as competing claims met. But the basis for a boundary concept had always been in existence, quite independent of human competition. From the traditional point of view, land is by nature divided into units which form the pre-human basis on which man can establish his spheres of control. Whereas land, from the modern Western point of view, is a natural whole which man can divide by imaginary lines into thing-like units, in a traditional context a distinction has to be made between natural land units and human spheres of control. The two can coincide, however, and if this happens the outlines of the natural land unit can come to be regarded as the limits of the sphere of control—even if there are no competing human claims—and a boundary concept can begin to develop.

Natural boundaries, especially rivers, can provide lines of expansion and communication. They also form a natural division and therefore a natural limit for the expansion of a sphere of control in one direction. If a man chooses a bend of a river as a landmark with which to identify the land he claims, it is almost certain that the river limits this claim. He can expand this claim along and away from, but not across the river; he can only establish a new claim on the other side. There is a tendency for human spheres of control to grow into the shape of a natural land unit.

This tendency can cause a claim to land to expand much faster in terms of natural land units than in terms of spheres of actual control. For this reason many conflicts between territorial claims become visible only under the influence of the Western boundary concept: the areas where claims overlap were not used by any of the claimants. On the other hand, the Western influence in this particular field is so strong that it is difficult to say whether present claims to vast areas of land which no member of the group of claimants has ever visited, are traditional or whether they have grown in reaction to Western attitudes (which by itself would not make them frivolous). Still, it can safely be said that territorial claims in pre-contact New Guinea could go far beyond the area which at one time or another was actually

used by a member of the group and that 'boundaries' were not entirely foreign to the traditional way of thinking.

Traditional 'boundaries', however, are not a means of identifying land. They are only established as 'boundaries' between people when and in so far as it is necessary for political or economic reasons and begin to be forgotten as soon as this need disappears. 'Boundaries' develop where a need to limit competing territorial claims exist, or where an attempt is made to prevent the developing of such a rivalry. Otherwise the spheres of control can freely expand. As long as one 'boundary' mark is sufficient, the 'boundary' is not defined more clearly, and as long as it is sufficient to define one 'boundary' the other 'boundaries' are left undefined. Traditional 'boundary' marks are still landmarks. They do not define the limits of an area of land. Instead they are each the focal point of a sphere, except that this sphere is not a sphere of control but rather a sphere of non-control. A traditional 'boundary' mark identifies a border zone, a kind of no-man's land separating spheres of human control. It marks a sphere which can expand and contract, but which cannot be reduced to the imaginary line of a Western legal boundary which takes up no room.

In cases where, for instance, a river is used as a natural boundary, it has also little in common with Western boundaries. Such natural boundaries are not significant only because they define the outline of something else (as do Western boundaries which only define the area of land they enclose), they are natural land units in their own right which can be used by man like the natural land units they separate. Even this separating function is relative. It may seem natural to see a ridge as separating two valleys, but it is also possible to see the bottom of a valley as separating two ranges. What is seen as the natural boundary is largely a matter of perspective.

The closest traditional equivalent of a Western boundary is a line of trees or shrubs, especially planted to separate spheres of human control. Even this is not an artificial boundary in the sense that the line of trees manifests an imaginary line forming the legally relevant boundary. The line of trees *is* the 'boundary'. It is a natural boundary, like a river, only it is man-made. Such man-made 'boundaries' are regarded as imitations of non-man-made natural 'boundaries', quite different from the real thing. They are used only if they cannot be avoided. From the traditional point of view, it is beyond the power of man to create natural land units or to divide land into artificial thing-

like property units 'which have four sides like a box'. Man can establish his spheres of control over land. He can create new things on the land by making a garden or planting a tree. He can define the limits of his spheres of control by planting a row of trees on the land. Land is the living space of man with which he can identify and which he can use, but which he cannot own because he has not made it.

Western law distinguishes different kinds of property and different ways of acquiring property, but the concept of ownership depends very little on the kind of property owned or on the way in which it is acquired. The reason is that Western law sees ownership as a static condition. To own an object means to 'have' it. The miser lying awake on a mattress in which he has hidden his money, is the ideal personification of the owner in Western law. A wealthy old Tolai in pre-contact days may have similarly cherished the wrapped coils of shell-money in his tambu house, but his attitude was the exception rather than the rule. The owning of property in the traditional context is a continuing process of acquisition and utilisation—to own an object means to 'do' and not to 'have'. Man has to make an object his own in order to own it. The best way of making an object one's own, is to make the object. Traditional ownership is ideally the result of creation. The basic distinction for traditional law is a distinction between (ownable) man-made and (non-ownable) non-man-made objects.

This distinction, however, has hardly more than analytical importance. Creation is the ideal, but not the only traditional way of acquiring (original) ownership of an object. The range of ownable objects is so wide that in the end only land and water remain principally non-ownable. Even in this respect, modifications have to be made. Man can either by means of separation create ownable quantities of these substances (the water a woman carries back from the creek is her property) or he can discover and appropriate ownable quantities of these substances (for instance, floating islands). These last modifications might suggest that the basic traditional distinction is—as in Western law—a distinction between movable and immovable rather than between man-made and non-man-made objects. But from the traditional point of view the distinction is a matter of divisibility and not a matter of movability. The non-ownable parts of the traditional world are non-ownable because man cannot divide them *in abstracto* into artificial thing-like property units. The Western idea

that land or water can be divided into legally distinct objects by means of imaginary lines is too abstract to make traditional sense. Land is non-ownable not because it is immovable, but because it is not divisible into abstract yet thing-like and therefore ownable objects. Land and water as parts of the earth's surface are non-objects and not merely immovable objects. As soon as portions of land or water cease to be part of the earth's surface (in reality and not only in legal analysis) they become objects and at the same time ownable.

The basic traditional land unit is the sphere of human control. The right to control the land within this sphere is vested in a group, even if the right to exercise this control is held by one particular member of the group. The group's right of control entitles all members to use the economic potential of the land, although certain categories of group members can, because of their age, sex or residence, be temporarily or permanently excluded. Since the right of control is vested in the group, the right to share the use of the land is attached to the membership of the group and not passed down by way of inheritance from one generation of group members to the next. Each member, no matter whether by birth, adoption or *de facto* absorption, has the right to share in the use of the land within the group's sphere of control—as long as he is a member. Because of their relations with a member, non-members can also have claims to share the use of the land. This applies first of all to spouses and children of members (in so far as they are not themselves regarded as members). The circle of claimants, however, is much wider, it can include relatives as well as affines and friends, although the claim gets increasingly weaker the more distant the relation with the group member and the less important his position within the group.

Although the traditional right to control land resembles in some ways the Western concept of ownership, the group does not own the land it controls in the traditional sense. Land within a group's sphere of control remains ownerless. Further, not only the non-ownable land but also the ownable objects on the land remain ownerless when the right of control is established. The right of control merely constitutes a claim that the members of the group are entitled to acquire the ownership of these objects and that outsiders are not entitled to do so, unless they have the group's permission. Still, it is legally possible for an outsider to acquire ownership of such an object without the permission of the group. He infringes the group's right of control, he can even be killed because he enters its sphere of control, but he

nevertheless acquires ownership, because he does not violate existing property rights which could invalidate his claim. This causes the problems when a man plants without permission a tree on land controlled by another group. It also explains why natives are reluctant to evict a person from a garden he has made under the same circumstances. Despite the lack of permission the tree and the garden are his property.

Ownership is not the basis for the control of land, but the basis for dividing the economic potential of the land. The right of control is a political rather than an economic right. Outsiders in pre-contact days were not tolerated within a group's control because they were regarded as political enemies and not because they were regarded as economic rivals. The claim to political exclusivity did not reflect a claim to economic exclusivity. A group would rarely try to establish an economic monopoly by preventing outsiders from using the economic potential of the land it controlled. On the contrary, it would frequently invite outsiders to do so, provided they accepted and strengthened the group's claim to control the land by asking for permission.

From the traditional point of view, different individuals or groups can own different objects on the same piece of land. The men A, B and C can own together a clearing they cut in the bush. Their wives can own different garden plots they have prepared in this clearing each one by herself. Their children can own some vegetables they have planted on these plots. The man D can own a fruit tree in the clearing, because he 'inherited' it from his father who planted it when he had a garden in the same area a long time ago. The boy E can own a laying of birds eggs in a nest in this tree, which he discovered when playing with A's children in the clearing.

This fragmentation of the traditional world into an infinite number of separately ownable objects is one of the reasons why primitive land tenure is sometimes described in terms of a hierarchy of estates in land. But this is a misleading translation from primitive into Western law. Western law sees a piece of land (including at least all its essential component parts) as one thing-like property unit, although it can divide the rights to this one object into a hierarchy of separate estates. In primitive law there is instead a hierarchy of separate objects which can—with the exception of the non-object land itself—be owned by different persons. To describe the ownership of different things on land as a hierarchy of estates, is to replace the traditional

method of distinguishing relevant facts (or in this case objects) by the Western method of legal analysis (which results in this case in a differentiation of rights).

There can still exist a traditional hierarchy of rights to the same piece of land, but for other reasons. The different strength of the claims of different categories of group members or 'attachers' to share the use of the land within a group's sphere of control, can be described as a hierarchy of rights. Another kind of hierarchy develops when a sphere of control is divided by transferring parts of the right of control to sub-groups or individuals. A third kind of hierarchy is made possible by the traditional notion that ownership is a result of human effort; several persons can independently in different ways establish claims to the same object. All these different layers of property rights around the same object and rights to control the land within the same sphere (which includes a separate hierarchy of objects) can be appreciated only if ownership is seen not as a static legal condition, but from the traditional point of view, as a continuing historical process.

In many (virilocal) parts of New Guinea it is said that a woman 'loses' upon marriage all rights to her group's land. Usually this 'loss' is modified by saying that she 'resumes' these rights if widowed or divorced and retains them whilst remaining unattached. Since this 'loss' and this 'resumption' frequently coincide with a change of residence, it might be thought that a woman, instead of losing her rights upon marriage, is merely prevented by the distance involved in the change of residence to exercise her rights. But the consequences go further. Even if she can physically use the land, she now needs permission to do so, and this permission can be refused if land is short or if her husband is not co-operative. Still, it is probably too strong to say that a woman loses her rights to the group's land and regains them when the marriage is terminated. Such sudden and drastic changes are foreign to primitive law. It is more appropriate to say that a woman's rights are dormant during her marriage but that they can be reactivated when the marriage is terminated. It is not justified either to see the conclusion and the termination of marriage as the only legally relevant events. The position of a woman depended on many other factors as well, for instance on the rules of her or her husband's group regarding the residence of widows or on the place of residence she actually chooses (whether in accordance with or contrary to the rules of residence of one group or the other).

The change of status and/or residence upon marriage not only weakens a woman's claim to use her group's land, it also influences her individual rights to things on the land, for instance trees. The Amele elders stated that a woman who upon marriage moves too far away to collect the fruits of her trees will give them to her brothers. The younger Amele men found it necessary to specify the legal situation in the light of the growing importance of cash cropping: 'Married women do not always give their trees to their brothers when they move away; but brothers can collect fruit from their sisters' trees without prior permission if the sisters are living a long way away' (Page, 1964, 6). This is apparently the minimal restriction. A married woman retains the ownership of her trees but her brother acquires a kind of subsidiary right of usufruct; if she does not collect the fruit, he can do so without permission, probably without compensation and possibly even against her will. There is no evidence that a woman in any part of New Guinea loses all rights to her trees when leaving the village upon marriage. The maximal restriction is that the trees 'revert' on her death to her relatives living in her native village. In other areas she can pass on the ownership to her non-resident children even if they belong to their father's kinship group but the trees 'revert' on the latter's death.

Although ownership of things on land is principally individual, the interests of the group restrict the individual's freedom in disposing of his property. The effort involved in creating or appropriating an object gives the individual personal property rights. The situation changes on his death because the personal link created by his effort cannot be transferred to an 'heir'. It thus no longer restricts the hold of the group. Individual ownership in the traditional sense is in a way only a life interest, although it not always turns into group ownership and although the spirit of the dead owner can retain a strong legal interest in the object.

If individual ownership is acquired by personal effort (and not by 'inheritance'), the group has a strong hold only if its political interests are involved. Although a group might not be interested in preventing its individual members from claiming the exclusive use of particular fruit trees, it might have a strong interest in preventing outsiders from acquiring these rights. Politically, it makes an important difference whether a female member of the group married to an outsider comes to collect the fruits of these trees or whether it is her daughter who belongs to her father's group and is married to a member of a third

group. To restrict individual property rights within a group's sphere of control to resident members is a matter of politics rather than a matter of economic group egoism.

The political interest of the group was only one of the factors which could weaken an individual's right to things on the land. The 'subsidiary right of usufruct' a brother acquired to fruit trees of his absent sister indicates another possibility. The fact that the owner cannot utilise his property entitles a non-owner, because of his relations with the owner, to utilise the property in his place. If the claim of ownership is not maintained, competing claims can be established. They can grow so strong that they finally extinguish the claim of the owner in favour of the user—a traditional analogy to prescription in Western law. It is not unlikely that a brother, after a number of years, is legally entitled to say that his sister's trees are by now his, because he has looked after them for so long.

The intensity of the use of land also influences a group's right of control. A sphere of control does not only have to be established, it must also be maintained. Territorial claims, like property rights, can grow stronger and weaker and have to be balanced accordingly with competing claims. On the other hand, it would be wrong to think that the right to control land changed hands easily in pre-contact New Guinea. Changes were going on all the time, but sudden and drastic changes were rare, even in case of war. Groups frequently vacated their territories as a result of war, but conquest was unusual in many areas. If land was conquered, the legal situation still changed only gradually, until the conquerors began to say 'by now the land is ours' and the defeated group began 'to forget about the land'. When a territory was established in a previously unclaimed area, the situation was similar. Here too the territorial claim could grow stronger over the years or could fade away if it was not maintained.

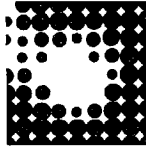
The original settler established the right of control and it remained vested in the group as long as the group remained identified with the land. The original settler began this process of identification by using the land himself and by insisting that all others used it only with his permission. His death started a process of mythological identification which continued with the death of each following generation of ancestors. Unusual topographical features were identified with mythological events which supported territorial claims as effectively as the historical fact that one's father or uncle used to garden or hunt on the land. Besides ancestors added a timeless aspect to the



territorial claim of the group. The group did not only consist of its living members but included the spirits of the dead ancestors to whom the living members were responsible for the use they made of the group's territory. The group as a land holding unit was immortal. Once it had been identified with a territory for more than one generation, it left a mark on the land which could never be fully extinguished as long as memory lasted.

## The Transfer of Traditional Land Rights

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Because of the structure of primitive law and primitive society, most aims, which in Western states require a transfer of rights to land, could in pre-contact New Guinea be achieved without such a transfer. All members of a group shared by virtue of their membership the right to use the land within its sphere of control so that this right did not even have to be transferred by way of inheritance from one generation of group members to the next. Outsiders could acquire a share in this right by being 'adopted' into the group, the incorporation of a person taking the place of an alienation of land. Outsiders could also be granted permission to establish their own temporary economic rights to land or things on the land. A transfer of existing economic rights was also not essential, since the rights of one person could be terminated by non-use whereas another person could, through use, establish new original rights. Yet, the transfer of land rights was not contrary to traditional principles. Most groups knew not only of the transfer of economic rights but also of the transfer of rights of control, even in a permanent form, although it rarely or never actually happened in some parts.

There is evidence that rights to land were used as pledge or as payment for debts, but, generally speaking, economic motives for the transfer of rights to land (or their traditional equivalents) were of secondary importance. This applied in particular to the transferor(s). The aim of transferring rights to outsiders or other groups was usually to strengthen one's own group, either by integrating the outsiders or by surrounding it with groups who were, as a result of the transfer of land rights, under an obligation to give assistance, especially in the case of war. Another aim was to strengthen the ties between neigh-

bouring groups by transferring land rights as part of bride price or dowry arrangements. This added considerably to the stability of a marriage since the land rights had to be returned in case of a divorce. But rights to land were frequently also transferred out of mere generosity or friendliness. In some areas the lack of economic exclusiveness in land matters was so great that it seemed everyone could use all the land. The clan brothers of A did not mind, if he gave his friend B permission to live on part of the clan's land and A did not object if B invited C, a member of a third clan, to move into his hamlet. Land was not a commodity; if there was plenty, it did not matter much who used it, as long as the relations between the people involved were good and certain non-economic claims, rights and privileges were respected.

The most 'legal' reason for a transfer of rights to land was the duty to fulfil certain traditional obligations, for instance the duty to reward allies for their military assistance or to compensate them for losses they suffered. More important, however, were 'anticipated bequests'—as they seem from the Western point of view. The traditional equivalent of the Western legal claim of certain relatives to inherit a portion of the estate was the obligation of a person to provide for those members of the next generation who were his personal responsibility. Instead of fulfilling this obligation by leaving these persons part of the estate, it was common in many parts of New Guinea that a person distributed his individual rights to land or things on the land during his lifetime or that he created new individual rights directly for his 'heirs', for instance by planting fruit trees for them.

That certain traditional obligations had to be fulfilled by the transfer of rights to land, gave people interested in acquiring such rights the chance to do so by creating corresponding obligations. Brown observed among the Tolai that a man 'wishing to have a piece of land for his own use takes advantage' of the death of a chief 'and brings diwarra [shell money] as an offering'. He then 'receives a piece of land for his own absolute use during his lifetime, but at his death the land reverts again to the family of the chief' (1901, 311).

Brown's account already indicates that such a traditional 'purchase of land' had its limits, the 'buyer' acquiring a life interest instead of permanent ownership. There were probably other restrictions as well. It is, for instance, unlikely that it was open to anyone wishing to acquire rights to land to make such an offering. The circle of persons entitled to do so was probably restricted to close relatives other than

the kin of the deceased, in case of the matrilineal Tolai particularly sons. The circle probably widened over the years, but even now the Tolai are still not prepared to accept a total secularisation and commercialisation of their traditional customs. 'In the future I too . . . will spend *tambu* on my father's death. But I "cut *tambu*" not just to claim rights to land. The reason is because I sprang from him, he gave me my existence' (Epstein, 1969, 136).

On the other hand, there were traditional 'land transactions' for which at least the transferee(s) had very practical reasons. Members of land holding units which did not have land suitable for growing certain crops would try to come to an arrangement with groups having a surplus of this particular kind of land. People sometimes preferred to secure rights to make gardens in areas of secondary bush within another group's sphere of control rather than to tackle primary forest in their own sphere with their stone adzes. Moreover, there were the groups or individuals who had become temporarily or permanently landless as a result of war or the fear of war. But the history of strong and successful groups could also give reasons for transferring rights to land.

The right to control the land around a settlement was in the beginning usually vested in a single kinship group represented by the original settler. If the new settlement was a success, the original settler was frequently joined by others with whom he either shared his settlement or whom he permitted to establish semi-dependent or allied settlements nearby. As long as the new settlers were already members of, or were absorbed into, the original settler's kinship group, they could, by virtue of their group membership, share the use of the land within the group's sphere of control. Otherwise arrangements regarding their rights to use the land had to be made—if anyone was interested in clarifying the general legal situation instead of only trying to solve specific practical problems as they arose.

There were three main possibilities of dealing with the land rights of outsiders migrating into a kinship group's sphere of control without being absorbed into this kinship group. Firstly, the right of control could from then on be seen as vested in a local group, comprising members of several kinship groups rather than in the kinship group of the original settler; the kinship principle could be replaced by a principle of locality based, for instance, on residence or place of birth. This did not require a transfer of the right of control because the (new) local group in its capacity as land holding unit could be

regarded as identical with the (old) group of the original settler which was not only a kinship group but at the same time also a local group. As a second possibility, the right of control remained vested exclusively in the kinship group of the original settler, but other kinship groups—or at least their resident members—were granted the (temporary or permanent) right to use the land (or certain of its sections) under the control of the original settler's kinship group. The third possibility was to divide the sphere of control and to grant other kinship groups (subordinate or equal) rights of control over certain sections.

The borderline between these three possibilities was fluid. A small splinter group of outsiders which was given permission to use the land of its hosts could become over two or three generations so powerful that it not only controlled the land used by its own members, but in fact controlled the use of the whole territory of the local group. Because of its political superiority, this group could even be regarded as the senior sub-group, although the kinship group of the original settler had a prior claim to leadership. Still, it can hardly be said that the outsiders in such a case usurped leadership contrary to the principles of traditional law. The legal 'transfer' of rights of control was frequently the tacitly approved (or accepted) result of a gradual change in the power structure rather than the immediate result of a legal transaction. Even the mere passing of time, without such political changes, could gradually change the legal situation, as in Koanumbo village, near Wewak. All groups which arrived after the original mythical settler, Sirimbo (who had always been there), were 'given' land. The descendants of Sivier, who arrived in mythical times, are now regarded as being equal with the descendants of Sirimbo. The Kombigo, who arrived in the distant historical past, are still known as migrants, although now regarded as 'owners' of the land 'given' to them. The more recent migrants are not regarded as 'owners', but they can continue to use the land (Kovingre, 1968).

A transfer of rights of control could also become necessary when the kinship group had grown so large that sub-groups began to develop, provided the group exercised a fairly strict control over the use of the land by its members. (When they were largely free in how to use the land, there was no need to subdivide the group's (theoretical) right of control among the sub-groups.) If the relations between the new sub-groups remained basically friendly, they formed a second level in the socio-political organisation of the group. They faced each

other as semi-autonomous bodies but regarded themselves vis-à-vis outsiders still as parts of the same group. In this case, the sphere of control was usually divided between the sub-groups and the right of control between the sub-groups and the group. This process could continue until all land within a group's sphere of control was seemingly 'owned' by individuals. Moreover, the more the groups and their spheres of control were subdivided, the larger was the number of possibilities of transferring rights to land or to things on land at the various levels either within or outside the group.

As long as a group's sphere of control and its right to control the land within this sphere were undivided, rights of control could not be transferred within the group but only to outsiders, usually other groups. The same applied to the permission to establish economic rights, although it was usually granted to individuals rather than groups. Only for a transfer of existing economic rights was a distinction between internal and external transactions necessary, and this distinction was of central importance for all traditional 'land transactions', because an internal transaction could have merely economic significance, whereas an external transaction also involved political rights.

A man may have been legally free to 'give' a fruit tree he had planted to anyone he wished, but was he entitled to give an outsider permission to enter the group's sphere of control in order to reach the tree, or was he entitled to transfer the ownership of the tree if he had not fulfilled his traditional obligation to provide for certain group members—for instance, his or his sister's children? Was a land leader who had full discretion in internal land matters entitled to give permission to an outsider to use the group's land without consulting other members of the group? Was he entitled to refuse an 'outsider' the use of the group's land, if the 'outsider' had been 'adopted' into the group by a war leader? Was a childless man in a patrilineal society entitled to adopt an outsider as son and heir to his rights to land without the permission of the group? What was the situation if a person or a group transferred rights to land without such permission or contrary to traditional obligations? Was the transaction void? Did it become valid if nothing was done about it? Was it valid as far as the outsider was concerned, but up to the group to take action over the infringement of its rights or the violation of traditional obligations towards one of its members?

Despite the small size of traditional societies, there could be many levels of groups or groupings because different principles of organisation could overlap. Firstly, there could be divisions due to the kinship principle, like divisions into moieties, clans and sub-clans, lineages and sub-lineages. Below the sub-lineage level could be a family level and above the moiety level could be a level of 'tribal' or language groups. Identical with, parallel to or instead of kinship divisions, there could be territorial divisions into hamlets, villages, wards, districts and so on. Besides, there could be a number of more specific groupings: work teams, men belonging to the same men's house, or to the same secret society, men who were trade friends or related by marriage, or who were supporters of the same big man, groups which were traditional enemies or which exchanged women, groups which depended on each other economically or which were united or separated by the same 'racial' superiority or inferiority complex, like bush kanakas and salt water men. Taking further into account that the lines separating these groups and groupings were, despite the importance of group solidarity, constantly shifting and that in pre-contact New Guinea relationships on an individual basis were also possible, it is not hard to understand why there apparently existed no general rules in this field.

When Burger studied the traditional laws of the Tolai shortly before World War I, he concluded that those living around Mount Varzin recognised individual ownership of land with a free right of disposal whereas all land on Watom Island and along the north coast was owned by clans (*Sippen*). The individual entitled to use and control the land was not authorised to dispose of the land without the consent of the group which had to be given by its oldest member (1913, 17).

This account suggests three extreme possibilities: firstly, an unrestricted right of disposal of the individual using the land; secondly, an unrestricted right of disposal of the land leader over all the group's land; thirdly, a situation where all members of the group have to agree before any land can be disposed of. Another possible extreme is that each member of the group has an unrestricted right of disposal over all the group's land. There is evidence that most of the theoretical possibilities did occur, although the extremes were not as extreme in pre-contact New Guinea as they now look on paper and although they could occur side by side or one after the other in the same area.

Also commenting on the situation among the Tolai, Kleintitschen wrote that the chiefs liked to pose as the sole owners of all land inhabited by their groups. They sold, he said, the whole territories of their groups to Europeans, taking no notice of the real owners and sharing the purchase price only with those who were strong enough to be dangerous. But the chief's rights of 'ownership', Kleintitschen concluded, had no legal foundation whatsoever, their only basis was power and force. 'The stronger said: "All the land is mine", and the weaker did not risk objecting so as not to suffer bodily harm as well' (1907, 230). It is possible, however, that mere political power was in primitive societies a legitimate source of law (as is the political power of the majority in the legislative bodies of Western democracies). Besides, the pre-contact Tolai had their own traditional ways of dealing with a situation of this kind. According to recent native evidence, a clan leader (*alualua*) could sell land on his own authority and had virtually power over life and death of his kinsmen. But if he became too unpopular, it was not uncommon to arrange for his assassination. 'The normal method was to suggest that the Alualua take a trip into 'foreign' territory to improve trade relations or arrange the purchase of a bride. The 'foreign' natives were told of the impending journey and arranged for the quick demise of the Alualua' (D. O. Rabaul, File 34-3-13).

On the other hand, this method was not always used or did not always work so that some chiefs, like the 'monster' Talili, could acquire the powers of absolute despots. 'For bagatelles he made . . . [his people] pay high fines . . . or struck them down with his club. He took children away from their mothers in order to eat them. When he selected a victim, he ordered him to his house and killed him with his own hands' (Kleintitschen, 1907, 236). When the people did not dare to get rid of their leader, they sometimes rather left their land as did one of the Ngaurul sub-groups in Wide Bay, New Britain. They left Kialom village for fear of their Luluai, Taiu, 'because of his anger and the fact that he had killed members of his own clan. They all left and went to Twai, over which Totpu was Luluai, he was also a Ngaurul' (D. O. Rabaul, File 35-22-16).

Not all chiefs among the Tolai were Talilis. There were others of whom their people took hardly any notice. 'They act without asking for their advice, take the important marriage and tambu [shell money] affairs into their own hands and do not follow their orders' (Kleintitschen, 1907, 236). Still, it would be wrong to conclude that the



powers of a chief depended entirely on his personality. His office as such gave the leader considerable legal authority in land matters. Another question was whether he used this authority.

During investigations in connection with recent large scale Administration land purchases near Cape Hoskins in New Britain, the natives stated that 'the rights of clan members did not include any power of disposal of land, nor even a veto thereon. These rights were exercised by a single land chief belonging to the primary owning clan'. But before agreeing to the sale, this land chief 'informally obtained the approval of the various members of the various owning clans' (D. O. Cape Hoskins, File 35-3-39). A leader could do and get away with many things he was apparently not entitled to do; or he could refrain from exercising what were apparently his legal rights and, in the interest of good relations, first seek the approval of others.

Chinnery's observations indicate that the land between Fatmilak and Karu on New Ireland was owned by sub-groups but that each member had vague individual rights to certain portions. He had 'the right to allow any person, either of his own or the opposite clan, to make gardens on his land', but no person appeared 'to be able to dispose of any land without the consent of the other members of his sub-group' (1931, 25). The individual controlling the use of a section of the group's sphere of control had the right to permit other group members and outsiders to establish their own economic rights, but he was not entitled to transfer the right of control to another person within or outside the group. The right of control was still vested in the group. The individual members were authorised only to exercise certain specific rights included in this general right. Moreover, it is doubtful whether individuals could really allow *any* person to make gardens on the land in their direct control. Although the person to whom permission was granted probably did not have to be a member of the land-holding sub-group, it is likely that he had to be either a member of the same clan or a member of the 'opposite' clan living in the same village. In this case the user would in his capacity as clan-brother or co-villager presumably already share all political rights necessary to exploit the economic potential of the land. The permission to use the land would thus involve neither rights of way nor rights of residence—which would be a plausible limit on how far an individual group member could go on his own.

It is often said that the decision to 'sell land' was made at a meeting of the group in which all members participated. But this broad state-

ment is then usually modified. Children had to keep out of the way and were not allowed to listen to the discussions. Women were also frequently excluded from either the meeting or the (official) decision making process, but it is not always clear whether this happened because of their sex or because of their residence. On the one hand, most adult females in virilocal societies live away from their groups with those of their husbands, on the other hand it is not uncommon that adult male absentees are also expected to accept the group's decision.

Whoever was entitled to take part in such a meeting, usually general agreement of all present members was required before a group could arrive at a decision. 'If land is sold, everyone has to agree. When there is only one dissentient the group has to take notice of him' (N.L.C., Madang Claim No. 19). This, however, was only the ideal and it was not so much based on legal considerations but rather on the fear that otherwise there might be a dispute between the members of the group afterwards. The Jabim, for instance, were apparently sometimes prepared to take this risk: if only one person did not agree, the land was nevertheless sold (*givam uli*), but the opponent got a larger share of the purchase price to keep him quiet. If a substantial minority was against a sale, a compromise was made, the land was, for instance, only leased (*kewabu*) instead of being sold.

The division of authority between groups and sub-groups was also rather vague. According to Salisbury each group among the Siane was entitled to override the rights of control held by its sub-groups. This became, for instance, apparent when the clan decided to move its village to a new site. 'The strips of land on the new site may be owned by a small number of lineages, but these lineages cannot refuse to permit their land to be built upon by members of lineages not owning land' (1962, 71). This corresponds with the situation along the lower Waria River where it was customary for a clan 'owning' the site to allow the land to be used for the village, once the village had chosen the site (D. O. Lae, File 34-2-25). In the Wau area the situation appears to have been different: when a village was about to be moved, the 'owner' of the chosen new site would usually grant permission 'but this permission may be denied, and if the owner of the ground is obdurate, another site must be selected' (P. R. Morobe/Wau No. 6/1949-50). But among the Siane probably also much depended on the persons involved. Even if the clan could legally override the lineage, it would hardly decide to move the village to a new site if the

influential leader of one of the affected lineages was strongly against it. Again it is impossible to say whether a group acted in a certain way because it had no right to behave differently or because it decided, for political reasons, not to exercise a right it did have.

During a native land dispute on Bougainville, the plaintiff Duri at first freely admitted that his grandfather had received a large number of pigs for the land in question. He claimed, however, that this 'purchase' was invalid as no money had been paid. Only after the Patrol Officer had told him that this was not so, did he change his story, now denying that any 'land transaction' had taken place at all (P.R. Bougainville/Kieta No. 6/1959-60). Assuming that Duri was as likely simply to translate from traditional law into Western law as a Western lawyer, this behaviour suggests that a traditional 'payment' had an entirely different function from a 'purchase price' in Western societies. Whereas a Western payment compensates the seller for the loss of the object sold, it appears that it was in the traditional context the kind of payment rather than its value which counted. At least, this would explain Duri's behaviour. Because the kind of payment was important for the traditional 'sale of land', he concluded that a valid 'sale' required, according to Western law, a payment of money. Since such a payment had not been made, the land, in the eyes of the Government still belonged to him.

According to Kimmorley (n.d.), the Siwai in south-eastern Bougainville had three kinds of traditional land transaction. The first was called *Miso Mowre*. It was something like a seasonal lease 'for the purpose of planting non-permanent food crops and was paid for by some produce and a pig'. A more formal payment, called *Soksoku*, was made 'by refugees from fighting in the old days who fled to places distant from their home. It was paid with money for the right to use the land. If it was not paid, the refugee was liable to be killed'. *Misi Pu'una*, the third kind, was 'an outright purchase by one matrilineage from another. The currency exchanged was given to the leader, who divided it among the elders or else it was given to the *Misi Ukuna* [the senior woman] who kept it for her matrilineage'.

These different kinds of land transaction show that there were two different kinds of payment: payment in form of produce, and payment in form of traditional valuables. Oliver, also writing about the Siwai (or Siuai), describes the payment of produce as a 'tribute' (*muhni*

*ukum*) to the 'owner' of the land. In his view it depended on various social factors whether such a 'tribute' was demanded:

. . . persons of equal status rarely ever pay it to one another, nor does a leader customarily pay it to a follower: this, in spite of the fact that most informants insisted that *muhni ukum* is really 'rent', having nothing to do with the rank of either party. But, native theory to the contrary, I observed that *muhni ukum* is a tribute, paid by followers to their landholding leader in return for the use of his land. But not every landholding leader exacts *muhni ukum* (1949, 65).

Whether or not social rank had anything to do with the payment of *muhni ukum* or *miso mowre*, it was clearly a payment the person exercising control over land could demand, if he wanted to gain an economic advantage by letting other people use 'his' land, but which he did not demand when he regarded it as inappropriate for socio-political reasons—and which the user had no legal interest to pay. This was different in the case of a *misi pu'una* or *soksoku* payment. They both had the function of formally ratifying a transaction. Whereas the payment of produce was an informal economic affair between individuals, the payment of valuables was a formal legal affair between groups. As a result the payment was not divided between the members of the group according to the economic interests they had in the land but was kept either by the male elders forming the political government or even by the *misi ukuna*, the ceremonial head of the lineage.

Another significant point is the distinction made according to the status of the group to which land rights were transferred. A group of refugees was granted permission to use the land temporarily. The payment it made was a formal acknowledgment of the generosity it was shown, a kind of ritualised tribute, which had to be repeated from time to time to make sure that the refugees did not develop competing territorial ambitions. A *misu pu'una* payment, on the other hand, was the ceremonial ratification of a permanent transfer of control over land from one matrilineage to another matrilineage of equal status, probably long established in the area, and possibly a neighbour already related by marriage to the 'selling' lineage.

The formal character of such payments comes out particularly clearly in the case of the Teop people, also on Bougainville, who had a custom of 'outright purchase of land' called *wawonwon*. In a case of *wawonwon* the buyers had to give a feast at which the purchase price was handed over to the sellers.

It was not put into the common store and used for bride-price etc. The elders took charge of it, and it was their duty to show it to the younger people, so that they would know that the land had been sold. If later there was any dispute the currency would be available to give back to the buyers in return for the land. This holding of currency received for land was called *tabin* (Kimmerley, n.d.).

The payment was made to ratify the transaction and the valuables which were handed over were treated as documentary evidence of the transaction instead of as a purchase price. If there was a consideration, it was not the payment, but vague obligations which the transaction created for the 'buying' group: obligations to assist in war, to contribute to feasts, to exchange women and so on. The 'purchase of land', that is the permanent transfer of the right to control land within a certain sphere, was an international treaty rather than a private contract. All this might appear very exotic, but some of these 'land treaties' are ironically reminiscent of the early European land acquisitions.

Around 1870 the islands in Bougainville Strait were inhabited by the Alu people who had also established settlements along the coast of southern Bougainville.<sup>1</sup> The Alu were attacked by the Mono people, who had probably come from the central Solomons not long before, and were driven off the islands. The power of the Mono reached its height under Gorai who made the islands a centre of early European activities and tried to bring the coastal settlements of the Alu also under his rule. One of his main enemies was Garuwai, a leader of the Torau people, an Alu colony at the southeastern corner of Bougainville. Partly as a result of Gorai's raids, but probably also owing to fights with the bush people and internal disputes, the Torau split up, most of the splinter groups moving north, along the east coast of Bougainville.

The splinter group led by Garuwai first went to Taboroi, another Alu settlement not far from Kieta. Garuwai and his people rested and bought food from the local chief Sikot. They then moved further north almost as far as Numa Numa, stopping on the way for longer or shorter periods and possibly splitting further into smaller sections. Those accompanying Garuwai, who, according to one version, was still pursued by Gorai's men, turned, after some time, back south.

<sup>1</sup> The following account is mainly based on information gathered by Thurnwald in 1907-8 (1909 and 1910) and Kimmerley during recent land disputes (L.T.C., Claim No. N.L.C. 298).

They landed in Arawa Bay, just north of Kieta. Garuwai came to an arrangement with the Arawa people and paid their leader Rangen valuables for the land Arakau. The land was renamed Rorovana, Garuwai's group now taking the name of the land.

The Rorovana afterwards assisted the Arawa in a fight with the Kekereke and more land was given to them by the Arawa as a reward. A similar grant was made to them by the Eivo when Garuwai and his warriors assisted them in fighting off a raiding party which had come down the coast from Numa Numa. By this time Gorai was dead and the power of the Mono declined rapidly, mainly owing to venereal diseases, introduced by the Europeans on whose firearms and trade goods Gorai had based his power during his later years. His enemy, Garuwai, lived to see the establishing of Pax Germanica, and his group has flourished ever since. It has a good chance of surviving the current copper boom as well, possibly without land but probably rich in Western valuables to buy land somewhere else in twenty years' time.

This is how a native witness described in 1953 the acquisition of land by Pornut, the leader of another section of the Torau people, about a hundred years before then.

Pornut came to Vito. His followers searched the bush and brought natives to the coast. These said their land was far away inland. They said their chief was Ketuai of Siputo. A feast was made and a date fixed on a rope for them to come down and meet . . . [Pornut]. He then asked whose ground it was, and Ketuai replied that it was his. He was then paid. The leader of Naruwa heard of this and came down. His name was Beriai. He claimed that the bush belonged to him and he was paid. The leader of the Hongovi heard of this and came down. His name was Perai (S.D.O. Kieta, File 35-5-1).

Although this account is almost certainly influenced by colonial experiences, it raises doubts as to whether it is justified to say bluntly that the 'selling of land is an innovation brought in by the white Government' (Powdermaker, 1933, 158). The arrival of foreigners who spoke another language and wanted to acquire land was not an entirely new experience to the native population of New Guinea at the beginning of European settlement. This, however, complicates rather than simplifies matters. A European wanting to buy land did not meet with a complete lack of comprehension but with a complex set of traditional motives and expectations, limitations and possibilities, at least some of which he was bound to misunderstand and disregard.

It was one of the most important traditional limitations that the permanent transfer of the full right to control land was traditionally only possible between groups, whereas individual outsiders wanting to acquire rights to land were instead incorporated into the 'selling' group. Nowhere, it appears, was it possible for an individual to acquire—as an individual, not as a representative of a group—the full right to control land. Kimmorley (n.d.), for instance, found no evidence in Buka of any custom 'whereby an individual could purchase ground either from his lineage or another' although there was a custom, called *hul*, according to which one lineage could 'buy' land from another. Moreover, even this custom probably only operated between lineages belonging to different clans. Not only 'land transactions' within the lineage as the land holding unit, but also 'land transactions' within the clan were regarded as improper, because they were too 'individual'. Nevertheless, an individual could play a leading part in a 'land transaction' between different groups.

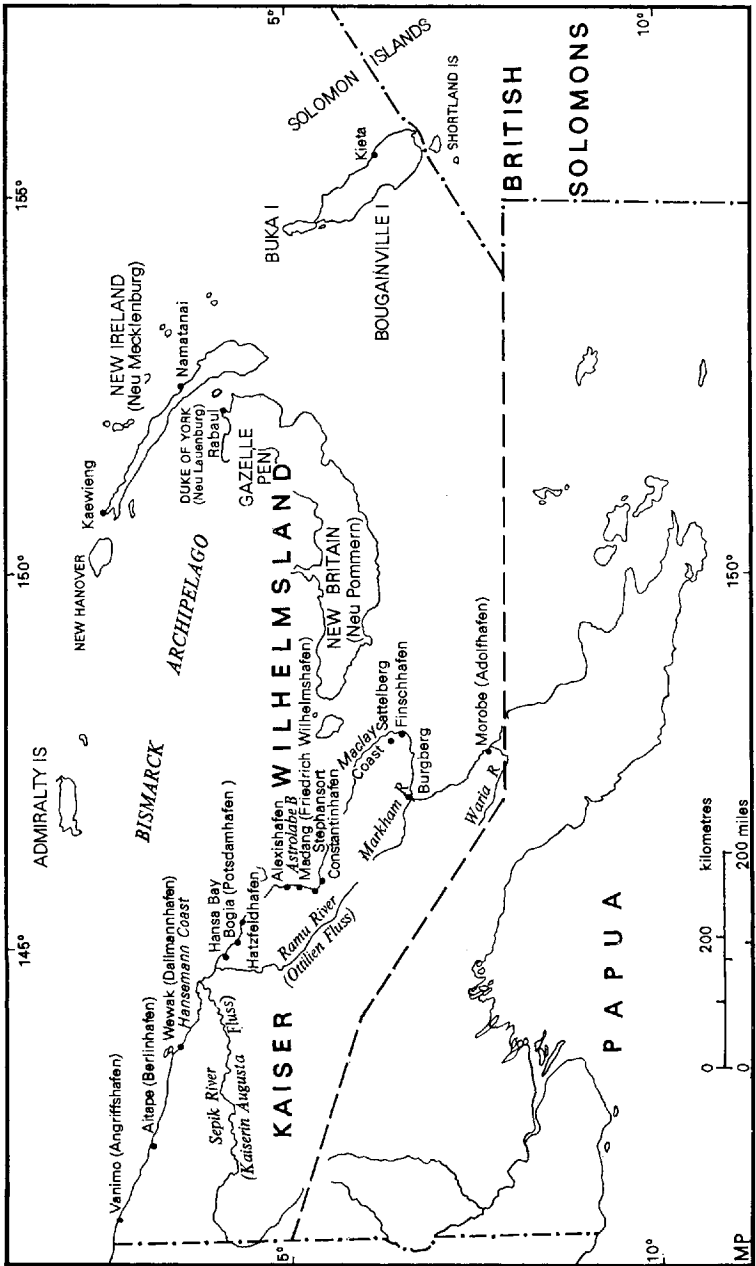
The most individual of these transactions were probably the attempts of a father in a matrilineal society to secure rights to land identified with his group for his children (who belonged to their mother's group). Even these transactions, however, took place between groups and they had often very little in common with a purchase of land. Some of them rather resembled a mixture of lease and inheritance: members of the same family group continued using the land, but, depending on whether or not they belonged to the 'owning' kinship group, the family did or did not have to pay 'rent' for its use. In other cases a transfer of rights to land was combined with marriage arrangements. To ensure that land remained within the family without passing permanently out of the hands of the kinship group, the outsider son had to marry into his father's group so that his son again became a member. The land was always controlled by the head of the same family but it was for one generation family land and for the next generation kinship group land. To prevent the land from becoming identified with another kinship group, the controlling kinship group rather allowed the land to be controlled for one generation by an individual outsider related by marriage. The temporary 'individualisation' was no true individualisation at all but, on the contrary, a means of keeping the land within the group.

Looking back it is easy to see that the traditional systems of land law were so complex—far more complex than any modern Western system—that it was impossible to apply them as systems of binding

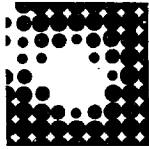
rules. Adjustments had to be made all the time and only a few of them crystallised into alternative rules. The people in Lontis village on Bougainville, for instance, found that their system of matrilineal inheritance does not work satisfactorily when a man marries a woman from far away who belongs to a kinship group not represented in Lontis. In such a case the woman is 'adopted' into her husband's kinship group so that her children become members as well. A woman from a nearby village is not adopted in this way. Her children are expected to go to their mother's land. 'But this is not a strict rule. The *tsunon* [land leader] said that when the time comes the children might be allowed to stay in their father's village' (N.L.C., Bougainville Claim No. 4).

'Let us not worry too much about rules, when the time comes we will make a compromise' could well serve as a motto for traditional law in New Guinea. This means that a final and just solution of the problems arising out of European land acquisitions is impossible as long as the native population does not accept the basic principles of Western law. Under these circumstances, even a colonial administration with the best intentions had only the choice between enforcing inadequate colonial land laws and replacing Western law with a series of political compromises—unless it decided to prevent Europeans from acquiring any land at all, a rather unlikely choice and of dubious value.





German New Guinea.



After a visit in H.M.S. *Sulphur* in 1840, Edward Belcher wrote: 'In a mercantile point of view I cannot at present perceive how these islands can prove interesting beyond fancy woods and tortoise shell' (1843, vol. II, 77). Even this modest assessment proved too optimistic for the next thirty odd years. Sandalwood was never found in appreciable quantities, and the islands did not seem to be able to produce anything else of commercial value to Europeans. The sea was only a little more promising. Whaling in New Guinea waters became uneconomic around 1860 and tortoise shell, for which vessels from Sydney had already been trading before Belcher's visit, was not plentiful enough to justify permanent European settlements on economic grounds. Since it seemed impossible to gain material wealth, the first attempt to establish European settlements was left to the missionaries. In 1845 a party of Catholic Marists landed in the Solomons. They had hardly set foot ashore, when their leader was mortally wounded and another missionary killed by natives. Thus began ten years of suffering after which the Vicariate of Melanesia was left vacant for the time being.

At the end of the 1860s New Guinea still held little promise for traders or missionaries, only islands inhabited by hostile natives who had little to offer to traders and who were reluctant to accept what the missionaries had to offer them—and there was no flag in sight which traders or missionaries could follow. But then the price natives in other parts of the Pacific were demanding for their copra began to increase. Thus the copra trade, and with it German firms and larger capital, entered the area.

Though German commercial interests in the Pacific go back to the 1820s, they are usually seen as largely identical with those of the firm

of Godeffroy & Son which opened its first island office in Apia, Samoa, in 1857. The growth of the enterprise was spectacular. By 1862 the competition in Samoa had been pushed into the background and branches had been opened in Fiji, Tonga and other smaller groups of islands. Despite the rapid progress made by the local managers, Alfred Unshelm and later Theodor Weber, things did not develop fast enough for the Godeffroys in Hamburg. In 1865 they dispatched Alfred Tetens to start trading operations in Micronesia from a base in Hongkong. Tetens could probably claim the honour of having been the first German trader to enter the area which later became German New Guinea, otherwise the venture was a fiasco and had to be abandoned in 1868. By that time, however, Weber had reached Micronesia from the east. Thanks to an arrangement with Adolf Capelle, who had been trading in the Marshall Islands since 1861, the Godeffroys were soon firmly established and ready to take on Melanesia.

Meanwhile the Duke of Yorks had become the northernmost cornerstone of the Sydney based trade, largely because the local natives were 'inveterate traders and pedlars' (Brown, 1908, 113). They realised their chance and set themselves up as intermediaries between the European traders and the natives of the neighbouring parts of New Britain and New Ireland. The father of Topulu (King Dick) of Makada was particularly successful. He managed to monopolise this trade to such an extent that he could supply large enough quantities of tortoise shell to make it worthwhile for John Stevens to maintain a station in Port Hunter in the early 1870s. But John Stevens and the Duke of Yorks were exceptions. Usually trade was still carried out by visiting vessels, the most prominent being those of Captain Ferguson and Captain Brodie. The reception given these vessels by natives in other parts was often rather different from that in the Duke of Yorks: Brodie's schooner, *Lavinia*, was burnt in New Ireland in 1875, and Captain Ferguson was killed in 1880 on Bougainville.

The first organised attempt to establish traders was made by the Godeffroys in 1873 when Captain Levison landed John Nash, William Wawn and a few helpers in Matupi and Nonga on the Gazelle Peninsula. After the necessary buildings had been erected, Levison left for the Carolines to come back after about three months. But Nash and Wawn did not last that long. According to Wawn (1893, 286ff.), the natives had 'with their usual treachery' immediately formed the intention to rob and murder them. After about four weeks, the last of

which they spent in a state of siege, Wawn managed to escape one night with his two helpers in a canoe 'just as a crowd of savages stormed the station'. He joined Nash on Matupi only to have to fight his way out of their burning house three weeks later. Although they had 'rubbed out' eight natives and wounded another seven, the big man Toporapora defended them; he was even wounded by his own people while doing so. The Europeans fled in Nash's boat to Port Hunter, where they were probably later picked up by Levison.

The first attempt of the Godeffroys had failed, but this failure differed markedly from that of the Marists thirty years earlier. Although the traders had given the natives much better reason for killing them, they were allowed to escape. Since their escape could have easily been prevented, the natives clearly had not plotted to rob and murder them as Wawn claimed. It is more likely that they merely wanted to force the Europeans to leave but changed their plans after some of them had been killed or wounded. This does not explain, however, why one of their chiefs, even at this stage, risked his life to protect the Europeans from the wrath of his people. Toporapora possibly acted this way because the more and more frequently calling European vessels, especially the visit of H.M.S. *Blanche* the previous year, had made him aware of the dangers which might be connected with the killing of a European, although no punitive expedition had as yet been carried out in the area. It is also possible that, having seen how the influence of the big men in the Duke of Yorks had increased through their connections with European traders, he saw the advantages of allowing a European to live amongst them. Whatever the reasons, the resistance was not determined enough to discourage the Godeffroys. But it was the Methodist missionary George Brown who established on 15 August 1875 the first permanent European settlement in Port Hunter, in the Duke of Yorks. When two months later the German merchant Eduard Hershheim anchored in this harbour he was 'somewhat surprised to find a missionary in these parts as he had been here before' (Brown, n.d.a, 15 October 1875).

Hershheim had started trading in the islands from a base in Hong-kong in 1872 and soon realised that only the copra trade had potential since no other product was available in sufficient quantities to justify operations on a large scale. Besides, copra prices were rising in Europe. The less the natives were familiar with European trade goods, the more profitable the business was. Hershheim therefore decided to try his luck in the virgin Bismarck Archipelago where in the beginning

the cost price per ton of copra was only \$0.60 compared with \$2.00 in Polynesia. In October 1875 Hershheim established Blohm, who had been trading for the Godeffroys in the Carolines, as his agent with a number of helpers in Port Hunter. When he returned in January 1876, there had been disputes with the natives and Blohm had shifted the station to nearby Makada Island. This was not too encouraging and things became worse when Captain Levison founded a trading station for the Godeffroys on the island of Mioko at the opposite, southern end of the Duke of Yorks. There was immediately sharp competition and, when Hershheim visited the group again at the end of the year, Blohm and his helpers, suffering from fever, were reluctant to carry on. Hershheim decided to close down all his stations in the Bismarck Archipelago and to take his traders to the Marshall Islands. But there the situation was also not very promising since Capelle, the Godeffroys' agent, 'seemed to be all powerful in the group' (Hershheim, n.d., 47). On the other hand Hershheim received news from his partners that he could expect more support from Hamburg. Under these circumstances he was prepared to take up the battle in Melanesia as well as Micronesia and sent Blohm back to Makada in April 1877. When Brown, who had been away for a year, returned in August 1877, he found Hershheim as well as the Godeffroys determined to expand their operations. 'When we arrived . . .', he wrote to Chapman on 6 September 1877, 'there was not a single white man here and not a single pound of copra made and now many tons of that much prized article are being regularly exported'.

The traders appeared to have made it. The state in which Brown found the affairs of the Mission was therefore particularly disappointing. The native minister left in charge had not taken up his appointment to Kabakada in the Gazelle Peninsula. He had also kept most of the other teachers in Port Hunter 'where they had formed quite a little village of their own' and had done 'absolutely nothing', besides wrecking the whaleboat in bringing over food from New Britain and New Ireland (Brown, 1908, 225-6). Under Brown's energetic leadership the situation soon changed. By the end of 1878 the Methodist Mission maintained seven stations in the Duke of Yorks, eleven in New Britain and five in New Ireland, occupied by twenty-six Polynesian teachers with their families. Brown and his family resided in Port Hunter, and early in 1879 Benjamin Danks and his wife established a second main station in Kabakada.

The area in which the two German firms were active corresponded

largely with that of mission activities. The commercial success, however, was not as great as this rapid expansion might indicate. During the first six months of 1878 not one bag of copra was produced. Although trade revived during the second half of that year, the traders began to look for greener pastures elsewhere, partly because a further local expansion was not possible since the north-west corner of the Gazelle Peninsula was the only place in the vicinity where coconut palms were to be found in greater numbers, and also because they did not feel safe.

Although so far only one European had been killed by natives, the traders lived, with some reason, in constant fear. One of the two traders in the Duke of Yorks told Brown the natives had tried to 'take him' five times and the other had not long before been threatened with an axe (1908, 226). This fear also poisoned relationships between the Europeans. The three leading characters, Brown, Hershheim and Weber, were diplomatic enough to prevent the conflicts from growing out of proportion, but at the grassroot level things were different. The traders who were prepared to work in the Bismarck Archipelago were a rather mixed lot and local conditions did not improve their characters. Most drank heavily and when drunk they became either careless, desperate or aggressive. Since firearms were always handy, they ended many drinking sessions by either shooting themselves or each other, accidentally or intentionally. The events terminating Captain Levison's career are a good illustration of the relationships among the traders in those days. John Knoles, a half caste Tongan trading for the Godefroys, had killed another trader, a Portuguese, in the Duke of Yorks in 1878. Everyone knew about it, but no action was taken beyond banishing him to the one isolated trading station in New Ireland. When Levison came to collect Knoles's copra in 1879, they started to drink and talk about affairs in the islands in general and recent murders of Europeans in particular. Everything was peaceful until Knoles accused Levison of having paid a native to kill Tom, a trader on Matupi. Levison snatched a loaded rifle standing between them. They fought over the weapon, Knoles secured it and fled from the house, shooting Levison while the latter was closing the door. 'There were three other loaded rifles in the room'. He later told Danks: 'If I had not shot him he would have certainly shot me' (Deane, 1933, 52ff.).

Probably the first major clash between Europeans and natives occurred around Christmas 1877. A dispute developed between the

natives of Mioko and the crew of the Godeffroy ship *Johann Caesar*. A European was wounded and fighting broke out. It lasted for several days and the natives were driven off the island but apparently no-one was killed. Captain Levison demanded a fine before allowing the natives to return and, after some time, they gave in. On 24 February 1878 Brown wrote to Chapman:

It was a miserable affair and I trust we shall have no more like it but I fear there will be more trouble unless some of these men are restrained. One of them shot a Native and killed him the other day because he had stolen a piece of tobacco from *another* trader some time before . . . One of our Teachers was in great danger the other day when passing a village here because the same fellow had fired at the natives the day before.

The first real test of strength, however, was not caused by the behaviour of the traders and Brown's role this time was not that of an observer. In April 1878 four mission teachers were killed and eaten during their first attempt to penetrate the interior of the Gazelle Peninsula. The other mission teachers and the traders regarded this murder as a signal for the killing of all of them. They saw themselves confronted with the decision 'either [to] fight and [to] fight well or [to] withdraw altogether from these islands at once' (Powell, 1883, 125). They decided to carry out the first punitive expedition in New Guinea. Brown reluctantly accepted the command, but, as he wrote to Weber on 6 July 1878, he was fully satisfied with the effect of the expedition. 'It was sharp, short and very decisive and so had a very beneficial effect upon . . . [the natives]. They respect us now as they never did before and I am very sure that we occupy a better position with them than we have ever done'.

Around 1880 about 90 per cent of the copra trade with the independent islands in the South Pacific—copra still being the main item of export—was in the hands of three large German firms. The German share in the import trade was not much smaller. Although the trade volume was still relatively small it was a very lucrative business. During 1878 the Pacific branch of the Godeffroys, for instance, made a net profit of \$100,000 compared with a gross profit of \$10,000 in 1862. From a commercial point of view, the 1870s were a highly successful period for the German firms. But it also became clear that the days of a commercial colonisation on a private basis were about to come to an end. In particular the attitude of the new colonial Government after England's annexation of Fiji in 1874 convinced the

Germans that economic activities would be made impossible for them as soon as an island was annexed by another power. Besides pressing for reparation of the damages they claimed to have suffered in Fiji, they tried to persuade the German Government that German economic interests in the Pacific were doomed if Germany did not immediately embark upon a policy of active support and protection.

Before the establishing of the German Reich and the German Navy in 1871 no effective protection had been possible, and the German firms had been left almost entirely to their own devices. By 1875 the situation had changed. Since diplomatic activities did not find much response in London and other European capitals, Bismarck agreed that a warship should be sent out to investigate the situation. The voyage of S.M.S. *Gazelle* under the command of Georg von Schleinitz (who was ten years later to become the first Administrator of German New Guinea) resulted in 1876 in a treaty with Tonga guaranteeing reciprocal commercial freedom and ceding to Germany the right to establish a coaling station. The latter was already a step too far for the taste of Bismarck, who was concerned 'the Navy might create facts not dissimilar to the founding of an Imperial German colony' (Zimmermann, 1914, 14). In 1878-9 a series of similar treaties was concluded, most of them by B. von Werner, commander of S.M.S. *Ariadne*, accompanied by Weber, the manager of the Godeffroys and German Consul in Samoa, who 'proved himself so to speak infallible' (Werner, 1889, 396). The Bismarck Archipelago posed particular problems. On the one hand Werner regarded the natives' political organisation as so primitive (in contrast to Polynesia and Micronesia) that the conclusion of an international treaty would have been a farce. On the other hand he was convinced that he had to secure rights for Germany, if she was to have any say in the dividing up of the islands, which, he was sure, would take place in the near future. Werner finally decided to follow 'infallible' Weber's suggestion and bought the harbours of Mioko and Makada in the Duke of Yorks which were then the centres of European activities.

This (private) purchase of harbours came even closer to establishing a colony than the cession of the right to establish a coaling station in an international (public) treaty. Werner had therefore serious doubts as to whether the German Government would approve. He arranged with Weber and Hershheim that the German firms should, if necessary, enter into the contracts with the natives in place of the Reich. The German Government approved the contracts, though with



some hesitations, but Parliament, which had ratified the Tongan treaty without opposition, this time left no doubt that treaties of amity and trade and the stationing of German warships and consuls in the Pacific was all it would accept as part of an established trade policy. The treaties were ratified but the Government was warned that Parliament would regard the next step as a test of its willingness to approve a new colonial policy which would eventually lead to annexations.

Although growing pressure was put on the English as well as the German Government during the 1870s, neither was keen to establish colonies in the New Guinea region. This gave the Marquis de Rays a chance to stage the tragi-comedy of his *Colonie Libre de Port Breton*, which was to comprise the eastern half of New Guinea, the Bismarck Archipelago and the Solomons. But his scheme collapsed in 1882 and only indirectly influenced the history of New Guinea.

The part Weber played in the concluding of the treaties of amity and trade in 1878-9 marked the climax of the political influence of the Godeffroys, who, at that time, had already ruined their economic basis by disastrous mining speculations in Germany. In an attempt to keep their Pacific enterprise out of the financial collapse, they founded a separate firm—the D.H.P.G., the German Trading and Plantation Company for the South Sea Islands in Hamburg, the famous 'long handled firm'—but without success: on 1 December 1879 the Godeffroys were bankrupt. When this became public, the financial crisis of the Godeffroys developed rapidly into a national issue. Not only individuals and organisations propagating German colonies, but also an increasing number of influential newspapers declared vocal support for the Godeffroys because they saw German interests and German prestige in the Pacific generally threatened. Public sympathy thus aroused, it became possible to arrange for financial support as well. A syndicate of banks, led by A. von Hansemann, was formed, willing to launch a company to take over the D.H.P.G. All this happened, however, on the basis that the Reich would guarantee a minimal interest of 4.5 per cent on the capital for twenty years. Since the Government supported the guarantee, the approval of the legislative bodies seemed a mere formality. Instead this so-called 'Samoa Bill' was defeated by 128 to 112 votes, not so much because of the strength of the opposition but owing to lack of active support.

The financial crisis of the Godeffroys became again a private business affair. The syndicate of banks dissolved, but friends in Hamburg stepped in securing this time enough money for the D.H.P.G. to

carry on. This it did so successfully that it would never have been necessary to make use of the interest guarantee Parliament had rejected. Commercially this was hardly surprising as the Godeffroys had always done excellent business in the Pacific. It appears that Hansemann insisted for political rather than economic reasons on a government guarantee. Although the Godeffroys were the 'Kings of the South Seas', they operated on too small a scale to make Hansemann enthusiastic about taking part in their venture, even if he did not have to fear for his money. He was not interested in a business which still mainly consisted of bartering with natives. To have his own colony which he could exploit and develop, was an entirely different and tempting idea. Hansemann did not care about the Godeffroys, but he did make up his mind to become a Super-Godeffroy himself. He realised that he could only achieve this aim with the support of the Government and it was the possibility of testing the willingness and the ability of the Government to support such a venture which made him decide to help the Godeffroys.

The defeat of the 'Samoa Bill' was a blow for Hansemann, but he had become so fond of his castle in the air that he forwarded, in November 1880, a lengthy memorandum to Bismarck explaining his plans in detail. He began by arguing that in the long run it would be impossible to continue effectively the current German policy of 'defending the independence of the islands in the Pacific'. Sooner or later, for internal reasons or as a result of outside interference, embittered fights between various factions of natives would break out, fights which England would terminate by annexing the islands in question. If Germany wanted to defend and expand her commercial interests, she had to annex colonies herself, which would present no problems since 'the area in the Pacific still available for founding colonies is so large that each of the nations now engaged in . . . [commercial activities] will find enough space in proportion to its entitlement' (Poschinger, 1907, 131). Germany's share, Hansemann suggested, should consist first of all of Samoa in the east, where German interests already had a dominating position. But Samoa was too small for a German colonial enterprise capable of large scale development. To achieve this, it was necessary to establish a second centre in the west, on a coast with a large hinterland, which could only be the north-east coast of New Guinea. Either the whole of New Guinea would in the end become English, Hansemann concluded, or another nation would have to establish itself on the north coast and negotiate a mountain boun-

dary with England. Hansemann proposed that Mioko, which had become a coaling port of the German Navy, be made the centre of future colonial effort, that further coaling stations be secured along the north coast of New Guinea where interested commercial firms would establish factories, and—the cloven foot—that the Reich pay a subsidy to a shipping line which was to connect Mioko with Apia, Tongatabu and other German factories. Bismarck informed Hansemann that he did not consider it expedient, after his propositions regarding Samoa had been rejected, to take any steps in this direction; looking at the attitude of the Reichstag, the Government could not occupy territories in the South Seas. But Bismarck's answer was not entirely negative: 'At the same time, [the] Government would extend its protection, naval and consular, to property in land acquired by private enterprise' (Great Britain, 1885, Document 2). The flag still refused to take the lead but it was now prepared to follow trade and to protect it—as long as no direct costs were involved.

This was all the encouragement Hansemann needed. He continued his preparations, and in April 1883 they were so far advanced that he approached the D.H.P.G. and Hertsheim to secure their co-operation. At the same time events in the Pacific threatened to make a realisation of his plans impossible. On 4 April 1883 Chester, acting on instructions from the Government of Queensland, took possession for England of the non-Dutch half of New Guinea and all adjacent islands. This annexation was disavowed by the English Government on 11 July, but the Australian colonies continued to press for an immediate annexation. Having accepted a draft of an Australian constitution, the Intercolonial Convention in Sydney turned to the Pacific Islands. On 5 December it declared: 'that further acquisition of dominion by any Foreign Power would be highly detrimental to the safety and the well being of the British possessions in Australasia'. With regard to New Guinea the Convention went a step further and resolved:

This Convention, while fully recognizing that the responsibility of extending the boundaries of the Empire belongs to the Imperial Government, is emphatically of opinion that such steps should be immediately taken as will most conveniently and effectively secure incorporation with the British Empire of so much of New Guinea and the small islands adjacent thereto, as is not claimed by the . . . Netherlands (Morell, 1960, 253).

Only the Governor of Fiji argued against further annexations, mainly

on the grounds that they would open the way for land speculations to the detriment of the native population. To overcome these objections the Convention resolved on 8 December: 'That . . . no purchases or pretended purchases of land made before the establishment of British jurisdiction or dominion in New Guinea or other [independent] islands of the Pacific . . . should be acknowledged, excepting in respect of small areas of land, actually occupied for missionary or trading purposes' (Great Britain, 1885, Document 13).

This endangered not only Hansemann's plans but also the existing interests of German firms, and the D.H.P.G. and Hershheim promptly protested to Bismarck. But the resolutions of the Intercolonial Convention were not the only reason for their protests. The activities of the Queensland labour recruiters were another source of complaint. Early in 1883 S.M.S. *Carola* left Sydney to inspect the situation. The report on this inspection stated: 'The English Consul-General and High Commissioner for the Western Pacific is about to establish a Deputy-Commissioner at Matupi, whose house has already been got ready. Whether this is the first step towards annexation is not at present clear' (ibid., Document 4). As a result of this report Stuebel, German Consul-General in Apia, was instructed on 29 December 1883 'that the representation of German interests in New Britain and New Ireland should be entrusted to a government official, who would reach New Britain in the course of the next labour season' (ibid., Document 6). The official chosen was the Imperial Commissioner G. von Oertzen, the author of the above report, who arrived in Mioko during the first half of 1884.

Whereas the situation in the Pacific became critical, developments in Europe and Africa raised Hansemann's hopes. First of all public opinion in Germany was now more in favour of German colonies than in 1880. Secondly, Bismarck, deeply dissatisfied that negotiations with the English Government regarding the compensation claims of the Germans in Fiji had, after nearly ten years, still not been completed, became convinced the German Government would have to play a more active part if it wanted to protect German interests effectively. The decisive step was taken in March 1883 when, after a drawn out correspondence with the English Government, the German merchant Luederitz was promised Imperial protection for the land acquisitions he had made in southwest Africa. After further correspondence the English Government was officially informed in April 1884 that Luederitz had been granted Imperial protection. This was accepted by

the English Government in June 1884. The day after the acceptance had been received, Bismarck used the reading of a bill regarding the subvention of shipping lines to East Asia, Australia and the Pacific to define the new colonial policy in Parliament. He was, he said, still against a system of acquiring colonies where Germany had as yet no interests, but, if Germans without the help of the state had founded settlements in areas which were not under the sovereignty of other nations, he felt the Reich had the duty to follow these people with the shield of national protection (Koschitzky, 1888, vol. I, 156ff.).

The time to act had come for Hansemann, and he had to act quickly and secretly, before the negotiations regarding an annexation between the Australian colonies and the English Government had been completed. However, HERNSHEIM regarded Hansemann's plans as utopian and was, moreover, not prepared to co-operate with his local competitors, the D.H.P.G. Still, on 27 June 1884 Hansemann addressed a petition to Bismarck seeking Imperial protection for his venture, which was to be carried out 'according to the principles laid down by your Excellency in the recent debates of Parliament' (Great Britain, 1885, Document 19). The venture was disguised as an expedition fitted out by the D.H.P.G. in the ordinary course of its business. It was led by Otto FINSCH, an ornithologist and anthropologist, who had recently returned from a lengthy field trip to the area. FINSCH had already left for Sydney, where the steamer *Samoa* had been bought. FINSCH would ostensibly use a passage on the *Samoa* for scientific purposes; in truth, he was charged 'to seek out the best harbours, to establish friendly relations with the natives . . . and to acquire land on the largest possible scale' as a basis for a colony. Bismarck answered on 20 August 1884:

The acquisition planned by your association will be placed under the protection of the Reich to the same extent and in the same forms as the Hanseatic enterprise in southwest Africa as soon as it has been confirmed that the areas which you plan to acquire are independent, that is to say, as soon as it has been proved that your claims do not collide with the legitimate rights of other nations (*D.K.P.*, vol. 2, 108-9).

Owing to the financial crisis in Germany, the Godeffroys, now the D.H.P.G., had a difficult time in the Pacific. According to FINSCH (1887, 526) the firm could barely provide its traders in the Bismarck Archipelago with the essentials. This gave HERNSHEIM the chance to expand. In 1881 he opened the north of New Ireland for European

trade. 'It would have been important', he wrote in his *Memoirs*, 'to have made some sort of arrangement with the natives which would have enabled us to keep this new area we had discovered for ourselves and to exclude all competition but this was unfortunately impossible' (80). It is doubtful, however, whether an agreement would have helped much against his new rival, the husband and (*de facto*) wife team, Thomas Farrell and Emma Forsayth, the famous Queen Emma.

In 1878 Hemsheim decided to direct the business in the Bismarck Archipelago himself. This caused his manager, Blohm, to enter again into the services of the D.H.P.G. which had been looking for a successor for Captain Levison. In 1880 a dispute started between Blohm and Danks (Deane, 1933, 80-1), who had decided to 'enlighten' the natives on the fate of recruited labourers in Samoa, which 'made the whites very angry' since as 'a result few recruits could be obtained'. In the absence of Brown the matter got out of hand. Danks wrote in his diary: 'The trouble is deepening and the breach between ourselves and these men is widening. I am not sorry, for our apparent friendship with many of them can do us no good in the eyes of the people'. After the return of Brown the affair was settled. The D.H.P.G. apologised and Blohm was discharged, but his successor, Farrell, who had been trading for the firm in the Marshall Islands, was certainly no improvement from the Mission's point of view.

In January 1880 the first shipload of Marquis de Rays's colonists had been landed at the southern end of New Ireland. Shortly afterwards they were in a desperate position. At the beginning of April, Brown (1908, 354ff.) learned of their presence and went on Captain Ferguson's *Ripple* 'to ascertain what were the real facts of the case'. He saw 'that unless something was done many of the men would die' but also realised 'the difficulty of my position in interfering with any scheme of settlement'. To be on the safe side, Brown asked for a written petition which the colonists promptly prepared. 'After receiving this I arranged that Captain Ferguson should convey the party to our station at Port Hunter, which he very kindly consented to do, at some personal inconvenience and loss'. Soon after the colonists had arrived, Farrell tried to engage those healthy enough to work as traders for the D.H.P.G. Brown prevented this because, as he claimed, he needed them to look after the sick. Farrell on the other hand claimed Brown wanted them as traders for Captain Ferguson who, he suggested, was Brown's business partner. Brown found support in the person of Captain Bower of H.M.S. *Conflict* who told Farrell 'very

plainly his opinion of his conduct and on his getting abusive he twice threatened to put him under arrest which made him quiet for the time' (Brown, n.d.b, 23 August 1880).

When Marquis de Rays's settlement scheme finally collapsed, Farrell was more successful. He was at the time the only person able to provide the desperate colonists with sufficient coal to reach Australia, and he made full use of his position. After three weeks of bargaining 'agreement' was reached, leaving Farrell with enough resources to set up his own business. Farrell and Queen Emma moved in 1882 from Mioko to the Gazelle Peninsula where they were joined by Richard Parkinson, Queen Emma's brother-in-law, who had worked as a surveyor for the D.H.P.G. in Samoa. Farrell and Queen Emma built up a network of trading stations which soon rivalled that of the two German firms and in 1883 Ralum, established by Parkinson, became the first plantation in New Guinea.

To provide the financial basis for Queen Emma's commercial empire was the first important result of Marquis de Rays's settlement scheme, the other was the return of the Catholic Mission. Marquis de Rays had been anxious to win the support of the Catholic Church, and he had had some success. Not only was the last group of colonists accompanied by two priests, but the Vatican asked the Sacred Heart Society in March 1881 to take over the vacant Vicariate of Melanesia and Micronesia. The Society accepted and in September four missionaries left for Nouvelle France. By the time they had reached Batavia, however, Nouvelle France had collapsed. After almost a year they were advised to go ahead. They reached Matupi with some difficulty in September 1882, anxious to counteract the errors spread by the Protestant 'preachers of the pure word'. For the next few years, however, the Sacred Heart Mission had more immediate problems. In June 1883 their only station near Kokopo was burnt down by natives, allegedly on Farrell's instigation. Following an invitation of the trader Dupré (one of Marquis de Rays's colonists), they left Blanche Bay and established a station in Vlavolo on the north coast of the Gazelle Peninsula. Not long afterwards the centre of Catholic mission activities for the region was shifted to Papua, and Father Cramaille, who had to remain inactive because of his total deafness, was for quite some time the only representative of the Catholic Mission.

According to a German consular report of 20 April 1884 (Great Britain, 1885, Document 5), the D.H.P.G. maintained, besides its local headquarters in Mioko, ten trading stations, eight along the north

coast of the Gazelle Peninsula and one each in the Duke of Yorks and in New Ireland. It employed a manager, two clerks, five white and five native traders. Hershheim, who had shifted his headquarters from the Duke of Yorks to Matupi, maintained twelve trading stations manned by eight white and four native traders. Both firms exported annually about 1000 tons of copra each. The D.H.P.G. owned between 1000 to 2000 acres of land in the Duke of Yorks and Hershheim about 14,000 acres in various parts of the Archipelago. Farrell had one trading station and a plantation with thirty acres under cotton in Blanche Bay, exported about 100 tons of copra annually and claimed to have acquired many square miles of land. With the exception of the figures for the export of copra by the D.H.P.G. and Hershheim, which are almost certainly too high, this report probably gives a fairly accurate picture of the situation at the end of 1883. But it does not show that the importance of the D.H.P.G. was rapidly declining and that of Farrell rapidly increasing, whereas the volume of Hershheim's business was growing steadily.

While the diplomatic game of hide and seek continued between the German and English Governments in Europe, Finsch tried to persuade Captain Dallmann to take the responsibility for the apparently not entirely seaworthy *Samoa*. The *Samoa* finally left on 11 September 1884 and arrived at the factory of the D.H.P.G. in Mioko not long before S.M.S. *Elisabeth* and S.M.S. *Hyaene* cast anchor at Hershheim's factory on Matupi. Between October 1884 and May 1885 Finsch made several exploratory trips, mainly along the north coast of New Guinea. From 3 November onwards, a few days after the English Protectorate over the south coast was proclaimed by Romilly and a few days before it was re-proclaimed by Erskine, the two warships began to follow him, hoisting the German flag.

When this became known, the English Government was shocked and the Australian colonies were furious, the English Government rather than Bismarck being the object of their anger. However, time was ripe for a general colonial settlement, and negotiations were soon under way. An exchange of notes on 25 and 29 April 1885 defined the boundary in New Guinea. On 6 April 1886, a declaration relating to the demarcation of the German and British spheres of influence in the Western Pacific was signed. Four days later, a second declaration, relating to the reciprocal freedom of trade and commerce was made,



which laid down the rules according to which land claims of German subjects in a British possession or protectorate—or vice versa—were to be treated. This finally settled the controversy over German land claims in Fiji and showed at the same time that both Governments would in principle accept European land acquisitions made before an area became a colony or a protectorate. After the exchange of notes in April 1885, an Imperial Charter for the German part of New Guinea and the Bismarck Archipelago was granted on 17 May 1885 to the Neu Guinea Kompagnie which Hanseemann had founded in the meantime. On 28 October 1886 S.M.S. *Adler* proclaimed German sovereignty over the northern Solomons within the limits of the Declaration of 6 April 1886 and on 13 December of the same year the Neu Guinea Kompagnie was granted an Imperial Charter for these islands as well. In these Charters the Company promised to establish and maintain administrative institutions (*staatliche Einrichtungen*) ‘which are useful for promoting trade and the economic utilisation of the land or useful for establishing and strengthening peaceful relations with the natives and for civilising them’. In return the Emperor granted the Company

the corresponding rights of local sovereignty [*Landeshoheit*] as well as the exclusive right to occupy and to dispose of ownerless land and to conclude contracts with natives with regard to land or real rights to land [*Grundberechtigungen*], all this under the supervision of our Government which will enact regulations necessary to protect previously acquired legitimate rights of ownership and the natives.

The granting of an Imperial Charter to the Neu Guinea Kompagnie was officially announced in the islands on 22 May 1885 but, since no Company officials had arrived, government was still represented by the Imperial Commissioner Oertzen. The measures taken by him were largely negative. (His main positive contribution was a preliminary registration of European land claims.) Announcing the granting of the Charter, he notified the public at the same time that acquisitions of land in the future were invalid without government authority and that it was prohibited to supply natives with liquor or firearms or to recruit them for work outside of German New Guinea. But Oertzen did not have the means to police these regulations or to take any other measures in the interest of law and order. His power was real only as long as a German warship was in the area and this did not happen often during the next year or so. He was therefore probably em-

barrassed rather than satisfied when he was asked to intervene, as for instance by Danks, who wrote in June 1886:

Since the annexation of these islands by Germany I have endeavoured to make the natives understand that the laws of Germany would protect them as well as the whites. I have in my school explained to the Scholars the nature of the act of annexation and that the Emperor of Germany is now their great chief. This native boy told his assailant that he would appeal to the laws of Germany for redress, and he does so now through me.

Having got its Charter, the Company carefully prepared itself to open the way for settlement and commerce and to attract and promote private enterprise. An apparently semi-official article in the *Deutsche Kolonial Zeitung* (1885, 376) shows how this was to be done. First of all the Company would send out one or more expeditions to continue the exploration of the coast and to begin the exploration of the unknown interior, since systematic cultivation and a rational exploitation of the rich resources was possible only after the results of such explorations were known. Further, officials with a lengthy list of duties would be stationed in selected areas. They had to acquire a thorough knowledge of the natural resources, at the same time surveying and mapping the land. They had to conduct and record regular meteorological observations. They had to learn the language and the customs of the natives in order to establish peaceful relations and to gain their confidence, so that they were willing to trade, to treat Europeans in a friendly fashion and in general to place themselves willingly under the protection of the Company and the Reich. They had to encourage the natives to increase their own production and had to carry out agricultural experiments. They had, if required, to act as policemen and fulfil other official duties and, last but not least, they had to establish the stations where all this was to be undertaken.

The first expedition left Germany on 29 June 1885. Having bought seeds and plants and engaged a number of Malays in Batavia, including—as Hanseemann's main concession to reality—three unmarried women 'who had complete freedom' (Schellong, 1934, 36), it arrived on 5 November in Finschhafen which had been selected in Berlin as the capital.

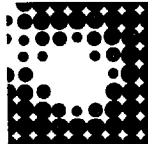
The founding of Finschhafen did not mean that the Company was ready to let settlers into the country. In September 1885, it informed the public, 'caused by inquiries from all parts of Germany and from Germans in Australia', that this would probably take another year

(*N.K.W.L.*, 1886, 2). The Company was at first also not prepared to open the country to missionaries. Johannes Flierl of the Lutheran Neuendettelsau Mission had to wait for several months in Cookstown before he was, as a result of pressure in Germany, allowed to proceed. He arrived in Finschhafen in July 1886, about a month after Admiral von Schleinitz, who had been appointed Administrator (*Landeshauptmann*) of German New Guinea.

When the bachelor colony in Finschhafen learnt that Schleinitz was accompanied by wife and children, there was a hectic cleaning up. Enormous numbers of empty bottles were buried in deep drainage ditches which the natives still used as European type obsidian quarries when a few overgrown concrete floors were all that remained of Finschhafen. But the bachelors did not bury their growing disillusionment with the Neu Guinea Kompagnie. On 30 July 1886 Otto Schellong, the Company's physician, entered into his diary: 'I do hope that those of us will be proved wrong who regard the whole venture as nothing but a speculation of the Disconto Company [Hansemann's Bank]' (1934, 85).

## The Neu Guinea Kompagnie

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It was with mixed feelings that the settlers heard the Neu Guinea Kompagnie had been granted an Imperial Charter. On 20 March 1886 Parkinson wrote to Le Hunte: 'I only hope the German Company will buy us out and we will be all right . . . [I]t is not agreeable to them, it seems, to have us here.' He soon learned that the Company was not at all interested in competing with the settlers in the Bismarck Archipelago. It concentrated on exploring the German part of New Guinea, now named Kaiser Wilhelmsland, on various agricultural experiments and waiting for a stream of settlers, especially for the Germans in Australia who, the Company was sure, would rush to New Guinea as soon as the colony was opened to them.

Hansemann had directed the first expedition sent out from Germany to found stations at Finschhafen, Friedrich Wilhelmshafen (Madang) and Dallmannhafen (Wewak). A local inspection convinced the officials that the latter two places were unsuitable. Instead they founded in January 1886 a station on the island Tschirimotsch in Hatzfeldhafen and in May another in Constantinshafen in the Astrolabe Bay. When Schleinitz arrived in June, only the first building had been erected and an area of bush around the stations had been cleared. The 'Scientific Expedition', which had arrived in April, had found that it would hardly be possible to explore the interior in one attempt up to the Dutch border, as Hansemann expected. The *Papua*, the Company's new steamer, had been lost, and the employees complained that they had been promised too much, that the prices were too high and the salaries too low, that there was too much red tape, too many Europeans and not enough coloured labourers. Those who hoped things would improve after Schleinitz's arrival, found themselves disap-

pointed. 'The Administrator sits the whole day in his office and answers innumerable letters from the Company. . . . There do not seem to be many things he can decide himself' (Schellong, 1934, 83).

In December 1886 it looked as if things would change overnight. Schleinitz sent a triumphant telegram to Berlin that gold had been found in the Huon Gulf. Hansemann's secret hopes seemed to have come true. But the 'gold' proved to be no gold at all, and the disappointment was great. At Christmas Schleinitz had an even greater disappointment. S.M.S. *Adler*, visiting Finschhafen after the annexation of the northern Solomons, refused to salute the Administrator and former Admiral because the commanding officer treated him as the representative of a private company. There were also more tangible problems. During 1887 nearly fifty of the small number of Europeans in Kaiser Wilhelmsland, among them Schleinitz's wife, died. Many of the most experienced employees, including the three original station managers, gave notice and Schleinitz himself began to think of handing in his resignation. All this did not hinder Hansemann from acting as if everything was developing according to plan. Maps for the projected townships in Finschhafen, Constantinhafen and Hatzfeldhafen were sent to New Guinea for comments, a tobacco and a cotton specialist were engaged, a set of land laws was enacted, and on 15 February 1888 the Neu Guinea Kompagnie published 'General Conditions for the Transfer of Land to Settlers' which were clearly designed to make the best out of what Hansemann regarded as a seller's market.

Schleinitz did not share Hansemann's optimism. A proclamation, published in Australian newspapers in December 1887, which ostensibly opened German New Guinea in a very limited way to settlers, appears to have been rather aimed at discouraging them.

It is at present still impossible to open up the whole colony for the purpose of colonisation. However, land in certain areas can from now on be leased, but only by settlers who have some capital at their disposal. The land is not being sold at present. Further, it is not leased for more than five years, although it may be agreed that the land will be sold after this period. Settlers have to provide for all their requirements themselves; this includes labourers who are not available in Kaiser Wilhelmsland. The Neu Guinea Kompagnie can only supply small quantities of food, because it imports supplies only for its own use and not for sale. Unskilled persons as well as artisans and labourers cannot be employed. On the whole employment can not be guaranteed (*D.K.Z.*, 1888, 8).

Schleinitz was due for leave in October 1887, but the Neu Guinea Kompagnie had difficulties in finding a suitable person to act as Administrator and asked him to remain on his post. In February 1888 Kraetke, a high official from the Postmaster General's Department, arrived to relieve him. Schleinitz left on 19 March 1888. He explained his views to Hansemann, but without success and resigned because—as the Annual Report for 1888 put it—'differences of opinion regarding the conducting of the business and the required expenditure have become apparent which cannot be expected to be overcome'.

On 18 September 1888 Kraetke, who had become Schleinitz's successor, officially opened German New Guinea to settlers. His proclamation presented a very different picture from the one given by Schleinitz a year earlier.

The administrative and economic organisation in the colony of the Neu Guinea Kompagnie is now sufficiently advanced to open the country to settlers . . . Preparations for the opening of a school in Finschhafen have been made . . . Several . . . Company steamers guarantee regular and adequate connections . . . with Australia and within the colony . . . [T]he tariffs are . . . cheap, especially for the import of food. On the mainland the construction of roads and bridges has made progress. The soil has been thoroughly tested by scientific authorities as well as in practice and has been found very fertile and highly suitable for vegetables and all tropical plants. The climate is favourable for tropical conditions. Notifying the public of the above facts, I invite interested persons to apply for land (*D.K.Z.*, 1888, 394).

However, very few applications were made, and in the Annual Report for 1889, Hansemann had to admit that his settlement policy had been based on false hopes. With the same enthusiasm he now turned to a different aim. He cut German New Guinea's links with Australia and looked instead towards the Dutch East Indies, Soerabaya taking the place of Cookstown. If Kaiser Wilhelmsland was not to become a flourishing colony of small settlers it was to be developed by large plantation companies using coloured labour.

Although the Neu Guinea Kompagnie preferred to share in separate companies founded for the economic exploitation of the country rather than to become a plantation company itself, it was clear that it was becoming involved in economic activities in competition with other firms it governed. Hansemann realised this was not a very satisfactory state of affairs, and asked the Reich to take over the administration of the colony on the basis that the Company would bear the

costs, in particular of the salaries of the Imperial officials. On 23 May 1889 a corresponding agreement between the Reich and the Neu Guinea Kompagnie was signed, which came into force on 1 October 1889. The Consul-General in Samoa, Rose, was appointed Imperial Commissioner and H. Arnold, who had been in charge of the Company's head office in Berlin, was sent out as its director-general.

In 1890 the Kaiser Wilhelmsland Plantation Company was founded in Hamburg with a capital of \$50,000, the Neu Guinea Kompagnie taking over one-eighth of the shares in exchange for 8500 acres of land. The purpose of the Company was to plant cocoa and coffee in the Astrolabe Bay. L. Kindt who had previously been in charge of a cocoa plantation in Trinidad was engaged as manager. He arrived in Finschhafen on 10 October 1890 with twenty-two Malays and 18,000 cocoa seeds and seedlings and established shortly afterwards a station at Gorima. A year later an expensive (but rusting) cocoa drier and some wire-netting, with which Kindt had intended to protect his seedlings from (non-existent) monkeys, was all that remained. Kindt had treated his labourers so badly that the Neu Guinea Kompagnie refused to supply him with more, and when the local natives threatened to kill him if he was not immediately removed, he was dismissed and had to leave New Guinea. The Astrolabe Kompagnie, founded in 1891 with a capital of \$240,000, made a more promising start. But this was about the only good news for the year.

In January an epidemic broke out in Finschhafen killing 40 per cent of the white population, including the new director-general, Wissmann; Arnold had died of fever in 1890. In March Finschhafen was evacuated. Only the Lutheran missionaries of the Neuendettelsau Mission Society, who had been spared by the epidemic, decided to remain on their neighbouring station, Simbang. Their Protestant brethren of the Rhenish Mission Society were less fortunate. Having founded their first station in Bogadjim, near Constantinhafen in 1887, they decided in 1891 to establish a station in Malala, some ten miles east of Hatzfeldhafen. The relations between Europeans and natives in this area had been far more tense than in Finschhafen or in the Astrolabe Bay; but the missionaries Boesch and Scheidt were given a friendly reception when they arrived in Malala in May 1891. They easily found help to clear the plot which had been selected for the station and Scheidt had no misgivings about returning to Hatzfeldhafen to get building materials. When he returned a few days later with an official of the Neu Guinea Kompagnie and a number of

labourers, the natives, having killed Boesch in the meantime, attacked. Only two labourers escaped. The Imperial Commissioner led a punitive expedition during which twenty natives were killed and more than a hundred canoes destroyed, but the Neu Guinea Kompagnie did not feel safe any longer and the station in Hatzfeldhafen was abandoned.

This reduced the Company's field of activity in Kaiser Wilhelmsland to the Astrolabe Bay, where the Astrolabe Kompagnie was to take over the planting of tobacco around Stephansort. The Neu Guinea Kompagnie itself was left with Constantinhafen, where a little cotton was planted, and Friedrich Wilhelmshafen, which had been selected as the new capital. Under these circumstances Hansemann decided to terminate the 1889 agreement with the Reich because 'the central administration . . . [of the Company] is now so much reduced that it can be reunited with the administration of the colony which will simplify the management and reduce its costs' (*N.K.W.L.*, 1892, 17-18). The German Government agreed, and from September 1892 the Neu Guinea Kompagnie again governed German New Guinea.

The Astrolabe Kompagnie had at that time four tobacco plantations (Stephansort, Jomba, Erima and Maraga) and the Neu Guinea Kompagnie two stations (Friedrich Wilhelmshafen and Constantinhafen). In 1894 the first two tobacco plantations (Jomba and Maraga) were closed. In 1895 Constantinhafen ceased to be administered as a separate station. The same happened to Friedrich Wilhelmshafen in 1896, when the third tobacco plantation (Erima) was closed and the Astrolabe Kompagnie merged with the Neu Guinea Kompagnie.

The Annual Report for 1892/3 had still been optimistic although it hinted already at one of the major problems: the difficulties in recruiting skilled Asian labour, then so essential for tobacco planting and processing. Other aspects were equally significant. Firstly, the Report indicated that it was the policy of the Astrolabe Kompagnie and its new head manager, C. von Hagen, to concentrate its forces. Secondly, it placed much greater emphasis on developments in the Bismarck Archipelago than in previous years. (It even praised the progress made by other firms.) Thirdly, the Report admitted that the reunification of the economic and political administration in 1892 did not work satisfactorily. The Report for 1893/4 gives a very different impression. As a result of administrative difficulties in the Bismarck Archipelago, in the course of which the Imperial Judge Brandeis was recalled and the Administrator Schmiele dismissed, the



German Government had agreed to the political administration of the Archipelago being taken over by the new Imperial Judge.

Hansemann was now convinced that the Neu Guinea Kompagnie as well as German New Guinea could develop only if the Reich were to take over the entire political administration, including all costs, and indicated that he would begin negotiations to achieve this aim. The economic section of the report was of comparatively little importance, although two points are worth noting: the interest shown for the first time in coconuts, and the poetic caution with which Hagen's successes were praised: the tobacco plantations 'will in all probability, despite many difficulties, develop into flowers which promise fruits, provided there are no catastrophies and labourers of good quality can be recruited' (11-12). The Report for 1895/6 shows that this caution was well justified. Drought had affected tobacco production and a large number of coolies, many of whom were already ill or crippled on arrival, had had to be sent back, so that the Astrolabe Kompagnie decided not to import any more Asian labourers for the time being. As a result less tobacco was planned for 1897, while 25,000 coconut palms were to be planted in Stephansort alone. Tobacco and grandeur were on the way out, coconuts and modesty on the way in.

Yet, Hansemann could not live without a castle in the air. This time it was the opening up of the interior of Kaiser Wilhelmsland. Hopes had been raised by Lauterbach's Ramu expedition

which clearly proved that the interior did not consist of rough and uninviting mountains, as previously assumed but that an enormous area of land, suitable for all crops, stretched between the Ramu and Sepik. This plain could be successfully managed from healthy settlements in the foothills of the Bismarck Range, thus opening a new and unexpected perspective for the exploitation of Kaiser Wilhelmsland, not to mention the fact that the geological structure of the mountains indicates the existence of gold (Annual Report 1895/6, 9-10).

This was Hansemann at his best, but past disappointments had left their mark: 'how comforting and encouraging the aspects of future successes are for those who work for the benefit of generations to come, at present they are nothing but hopes which do not help to overcome existing difficulties'.

Hansemann had intended the post of station manager in the Bismarck Archipelago as a reward for Finsch, but the conditions offered were such that Finsch, who gave himself the entire credit for the acquisition

of German New Guinea, withdrew, deeply offended. By engaging J. Weisser, a former purser of S.M.S. *Hyaene*, in his place, Hansemann showed that he held a somewhat different view of Finsch's importance. Before Weisser arrived in the Archipelago, the new regime had entered the scene in the person of Georg Schmiele, the Imperial Judge, who managed in a surprisingly short time to be on bad terms with everybody. E. Hershheim (n.d., 131) described him as a Napoleon in miniature with measured demeanour and repulsive manners who would have brought all trading to a complete standstill had he but had the means of enforcing his decisions. Fortunately for the settlers he depended entirely on German warships which turned down most of his requests for assistance.

Matupi Island had been selected in Berlin as the best place for the Company's main station, but Weisser discovered on his arrival in February 1887 that he could acquire land suitable for a larger settlement neither on Matupi nor at any other point on Blanche Bay. Instead he suggested establishing the station on Utuan, in the Duke of Yorks. But this island was also claimed by other Europeans and before Weisser could make a new choice he died, in August 1887. After his death the surveyor Rocholl became acting station manager and he and Schmiele spent most of their time until the arrival of Graf Pfeil quarrelling together. Pfeil established a station on Kerawara, another small island in the Duke of Yorks. His main duty was to recruit labourers in the Archipelago for the Company's plantation in Kaiser Wilhelmsland, but he had little success and the Company was glad when the opportunity arose in 1889 to engage Parkinson.

Once Ralum Plantation was running smoothly, Parkinson had lost interest and the management had passed gradually into the hands of his wife, Phebe, Queen Emma's sister. At about the same time Queen Emma had officially taken charge of trading activities under the firm Forsayth & Co., having made very favourable arrangements with the Australian creditors of Farrell, who had died in Sydney in 1887. This left Parkinson free to accept the Neu Guinea Kompagnie's offer, apparently with Queen Emma's blessings. He still recruited labour, and with more success than his predecessors; his prime duty, however, was to establish a plantation in Blanche Bay which was to become the Company's economic headquarters for the Archipelago. The main problem was that all suitable land was already claimed by Europeans; but since Queen Emma was the largest claimant, Parkinson was the right person to solve it. Besides, the Company was this time deter-

mined to have its way. This showed when it turned out that the best land for constructing harbour facilities was claimed by the Sacred Heart Mission. The missionaries, who did not use the land, were bluntly informed that it had been taken over in exchange for an adjoining block of equal size. The missionaries were not in a position to put up much resistance but were also not altogether unhappy since they felt they had a secure title to the new land whereas Farrell had disputed their claim to the old. Land to start a plantation was bought from Queen Emma and Mouton. This, however, was only the coastal section and soon Parkinson began to acquire many thousands of acres further inland. In 1891 he planted the first hundred acres with cotton and coconut palms. By April 1892 the area had been increased to nearly 300. Shortly afterwards Parkinson left the Company's employ.

His successor was Paul Kolbe, a former Prussian officer, who had been assistant manager of the—at this time promising—cotton plantation in Constantinhafen. Kolbe took over in February 1893, but was more successful with Queen Emma than with the Company's cotton, wedding her before the year was out. This marriage to a rich middle-aged half caste with a dubious past seriously compromised Kolbe's honour as an Imperial officer in the eyes of Administrator Schmiele who did not hesitate to tell him so. Kolbe retaliated by horse-whipping Schmiele who promptly challenged him to a duel. When W. Frobenius, the physician of the Rhenish Mission, heard this, he considered himself obliged to inform Schmiele that a duel was murder in the eyes of the Lord. Schmiele took offence and challenged him as well. When Frobenius refused, Schmiele approached A. Hoffmann, the Mission's Senior, threatening that he would deport him and Frobenius if he did not make sure the latter gave him satisfaction. Hoffmann answered, in view of his bad health he would welcome a trip to Germany where he could take the matter up with the Government. In the end no duel was fought, but Kolbe was dismissed by the Company and took over the management of Ralum.

While these affairs of honour were going on, the Europeans in Blanche Bay were at war with the Tolai, whom the native Talarai had covered with a bullet proof paint he had invented. The invulnerable natives began to pull out the cotton in the plantations and to challenge the labourers. On 18 July 1893 they attacked Herbertshoehe. The attack was repelled and Kolbe conducted a successful punitive expedition inland. During August the plantation labourers were again

harassed. After a second major clash on 21 August, the Neu Guinea Kompagnie made a peace offer. An amnesty was promised on the condition that four of the leaders paid a fine of shell money and Talarai was handed over for punishment. This was rejected and Herbertshoehe again attacked on 6 September. The settlers answered with a second punitive expedition which would have ended in disaster had Talarai not been shot. His death caused a general flight and Mouton cut his ears off to be shown as a proof of his death and the ineffectiveness of his magic paint in other villages. The Europeans believed that the uprising would now collapse but on 16 September several hundred natives tried to storm Herbertshoehe as well as Mouton's plantation. The Europeans made a new peace offer which was countered with the demand that Kolbe be handed over. At this stage Schmiele intervened. His attempts to arrange peace were unsuccessful although there were no further open hostilities. When S.M.S. *Sperber* arrived in the Archipelago in December, Schmiele asked for military assistance and a full-scale battle was planned, after a final peace offer had been rejected: two parties of European settlers and plantation labourers were to outflank the natives forcing them down to the coast where they would be received by marines landed by the *Sperber*. The battle did not take place because Kolbe's party got lost in the bush and was even shot at by the marines when returning to the beach. When the *Sperber* began shelling the inland villages, paralysing one native with fright, the others were sufficiently impressed to surrender. Early in 1894 the last fines were paid. Life returned to normal and Schmiele could concentrate on his fight with Louis Couppé, the head of the Sacred Heart Mission.

When Couppé arrived in 1889 to take charge of the separate Vicariate formed for German New Guinea, Administrator Kraetke informed him that he and his brethren were not to engage in any mission activities for the time being and indicated that they might even have to be expelled because of the Anti-Jesuit legislation in force in Germany. Owing to bad shipping connections it took about a year before the decision arrived from Germany (the Reich having taken over the political administration in the meantime) that the Sacred Heart Mission could stay. At the same time Couppé was informed of plans to allot separate districts to the Sacred Heart and Methodist Missions in order to avoid tensions. In May 1890 Schmiele, then as Imperial Chancellor responsible for the administration in the Archipelago, indicated that Couppé had either to leave the Gazelle for

another part of the colony or to give up all claims to mission stations or former mission stations in the north-east of the peninsula which was to be allotted to the Methodists. Couppé decided to go to Europe to muster all the support he could get. He was partly successful. The German Foreign Office decreed on 10 January 1891 that the north-east of the Gazelle Peninsula was the domain of the Methodists but allowed the Sacred Heart Mission to maintain its existing stations. Similarly the Methodists could continue their stations in the Catholic domain in the south.

Couppé returned in February 1892 with additional missionaries, the first group of sisters and the promise of generous financial assistance. Full of energy he began to make up for lost time but his activities soon led to conflicts with Schmiele who had just been appointed Administrator by the Neu Guinea Kompagnie.

In 1892 the Sacred Heart Mission owned only a few small blocks of land which, with the exception of the new headquarters in Vunapope, near Herbertshoehe, were all within the Methodist domain. According to the Decree of 10 January 1891, Couppé was allowed to maintain stations in Vlavolo and Malaguna within this area, but the plots in both places were too small for development. Moreover, the vicinity of Vunapope was already served by several Methodist stations so that Couppé had to found new stations before mission activities could begin in the Catholic domain.

Couppé's inquiries revealed that Queen Emma claimed almost all the land on which the natives in the southern Gazelle Peninsula lived and she formally refused to grant him any of it. Being unable to establish new stations within the accessible and densely populated parts of his own domain, it became all the more important for Couppé to develop the existing stations in Vlavolo and Malaguna in the Methodist domain. He applied to Schmiele for a small area adjoining the plot in Vlavolo which he needed as a landing place and for a convent for the sisters. Schmiele did not directly refuse but advised Couppé that a decision had to be made in Berlin. As months went by without an answer, Couppé became convinced that he could not expect to be granted any land by the Neu Guinea Kompagnie either. He therefore eagerly took the opportunity when the mission's neighbour in Vlavolo, the trader Dupré, decided to leave German New Guinea and offered his land for sale. In April 1893 Couppé thus acquired several thousand acres along the north coast of the Gazelle Peninsula. J. B. Oldham, Chairman of the Methodist Mission, was

most upset and argued that neither of the missions was entitled to acquire land in the domain of the other. Couppé rejected this argument and claimed that he wanted this land for plantations only and had never intended to use it for mission stations.

The development of the station in Malaguna now became vital. After the Vlavolo experience, Couppé did not approach the Neu Guinea Kompagnie again but leased, on 1 September, about three acres of land adjoining the block in Malaguna for ninety-nine years from the native To Belleram, the rent of about \$1.50 for the whole period being paid at once. When Kolbe (between the natives' attacks on Herbertshoehe) heard of this contract, he was suspicious. He first ordered Couppé not to carry out any mission activities on the leased land and argued later that the lease was invalid because the Mission was, according to the Decree of 10 January 1891, entitled to maintain but not enlarge its station in Malaguna. Couppé could easily dispose of these arguments since the Decree had nothing to do with the acquisition of land. But there was another weak point which Schmiele was quick to attack when taking up the matter in October (while trying to negotiate peace with the natives). He accused the Imperial Judge Brandeis, who had certified the lease agreement, of having taken part in an act which seriously violated the laws of the colony because the leasing of land from natives infringed the land monopoly granted to the Neu Guinea Kompagnie by the Imperial Charter of 17 May 1885. Brandeis could not deny that the lease was legally invalid and suggested that Couppé approach Schmiele who would surely be willing to grant him the land in the name of the Company. Couppé followed this suggestion but was not surprised when Schmiele replied that the Sacred Heart Mission could be granted the land only with the Methodist Mission's consent which he (Schmiele) would try to procure. This, as Schmiele must have known, was not at all what Couppé wanted. He was firmly convinced that he had a right to the land and did not want to owe it to the good will of the Methodist Mission. Although Schmiele was instructed by Hansemann early in 1894 to grant Couppé the land, this was not the end of the matter. A new dispute arose because Couppé had underestimated the size of the block for which he had applied and Schmiele was prepared only to grant him the acreage he had asked for instead of the actual block. Couppé was unwilling to accept this and had built on the section not granted to him a hen-house which Schmiele promptly had pulled down by police boys. It was not until after Schmiele had been dismissed and the German

Foreign Office had intervened that Couppé achieved his aim early in 1895. Although the atmosphere improved after the departure of Schmiele who died on his way to Germany (poisoned by his Malay mistress as local rumour had it), it is not hard to understand that Couppé was as keen as Hansemann for the Reich to take over the administration of German New Guinea.

At the same time the Neu Guinea Kompagnie had probably more reason for being optimistic than ever before. Hagen had reorganised the plantations in Kaiser Wilhelmsland. The plantation in Herbertshoehe had again, after an interregnum of several years, a competent manager in H. Geisler. The Company began to engage successfully in trading with natives in the Bismarck Archipelago as well as in Kaiser Wilhelmsland, where it took over the business its former employee, Kaernbach, had founded in 1894 in Berlinhafen (Aitape). Moreover, the new Imperial Judge, Albert Hahl, was a keen and pragmatic administrator. All the prerequisites for making a new start in developing German New Guinea along more realistic lines were given, but the Neu Guinea Kompagnie was preoccupied with negotiations for an agreement with the Reich which would relieve it of this responsibility. When Hagen was shot in 1897 while trying to recapture two native prisoners, it was not the enthusiastic Hahl who was appointed Administrator but the rather dull Skopnik, who could be trusted not to show any unwelcome initiative. This stopped neither Hahl from becoming active in the Bismarck Archipelago nor the Neu Guinea Kompagnie from praising his activities; but what Hahl achieved he had to achieve without much actual support. On the other hand, Hahl administered the Archipelago—though still under the Company's Administrator—as an Imperial Official and not as a Company employee. The transfer of the Archipelago's political administration to the Imperial Judge was intended as a first step towards the Reich taking full control over German New Guinea. Hahl's administrative activities between 1896 and 1898 were thus an unintentionally long prologue to the period of Imperial administration rather than the coda of Company administration.

Although the Neu Guinea Kompagnie's report for 1893/4 indicated the beginning of negotiations, it appears that they did not get really under way before the end of 1895. Then, however, the matter was treated as rather urgent. On 13 March 1896 an agreement was signed without once having been discussed by the Colonial Council, a body

formed to advise the German Government in colonial matters. Further, the agreement was to take retrospective effect as from 1 April 1896 in case the legislature gave the necessary approval for the Reich's financial commitments after this date.

From the outset it was clear that an agreement like that of 1889 was not sufficient. It was satisfactory neither for the Reich to exercise sovereign rights which were still held by the Company, nor for the Company to continue to bear the costs of the administration. The only solution was for the Company to renounce all rights and duties vested in it by virtue of the Imperial Charters of 1885 and 1886 in favour of the Reich which would thus become fully responsible for the administration of German New Guinea, including all costs. But the Neu Guinea Kompagnie was not satisfied with being relieved of the financial burdens of administration, it felt entitled to be compensated for part of the \$1,000,000 or so it had spent in the past. The Government accepted this claim but believed that a cash payment, as suggested by the Company, had no chance of being approved by the legislature. Instead the Agreement compensated the Company in kind. German New Guinea was divided into a western and eastern section. The western section comprised Kaiser Wilhelmsland and New Britain outside the Gazelle Peninsula, the eastern section the Gazelle and the other larger islands. The Neu Guinea Kompagnie was to keep most of its economic privileges in the western section for seventy-five years, in particular its mining and land monopoly. It did, however, have to transfer land required for public purposes and also for economic purposes, unless it could be shown that the Company itself would start to use it within a certain period. The Reich was entitled to redeem the Company's privileges between 1900 and 1905 against a cash compensation beginning with \$400,000 and increasing yearly by 3 per cent.

The agreement was debated in Parliament as part of the Supplementary Budget on 2 June 1896 and attacked from all sides, either on grounds of principle or because it was regarded as too favourable for the Neu Guinea Kompagnie. As a result the Supplementary Budget was referred to the Budget Committee and when the latter unanimously recommended to reject the item dealing with German New Guinea, the fate of the agreement was sealed. The Company, much embarrassed by the attacks in Parliament, circulated a lengthy memorandum, defending the agreement and its past policies, but also expressing its willingness to enter into further negotiations.

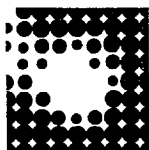


Although a new agreement was at about the same time suggested by the Colonial Council, it was not before mid-1898 that the Foreign Office invited the Company for new discussions. Both sides substantially accepted the earlier proposals of the Colonial Council and on 7 October a new agreement was signed. German New Guinea's budget for 1899 based on this agreement had no difficulties in passing Parliament in March of that year with two minor amendments.

Comparing the two agreements it is difficult to see a reason for this change in attitude. The Company was now to be compensated in cash instead of kind, but the cash compensation was the same as the Reich would have paid when exercising its right of redemption under the 1896 Agreement, that is \$400,000. Moreover, whereas the Company lost its privileges completely in a case of redemption according to the 1896 Agreement, it was now granted an additional 125,000 acres of land and mining concessions along the Ramu. On closer inspection the picture changes somewhat in favour of the Reich. Firstly, the mining concession was granted in recognition of expensive exploration work the Company had carried out after the 1896 Agreement had been signed. Secondly, the \$400,000 which had to be paid at once according to the 1896 Agreement were now paid in ten interest-free instalments. Thirdly, the Company which had been free to distribute the money for instance among its shareholders was now obliged to spend each instalment within four years on economic ventures in the colony. Fourthly, the land concession (only half as large as suggested by the Colonial Council) has to be seen in connection with the cash compensation: it was made on the assumption that the Company did not have enough land to be developed with the yearly payments from the Reich. Besides, Parliament further limited this land concession by restricting the period during which the land had to be selected from ten to three years and by reducing the area within which it had to be selected to Kaiser Wilhelmsland, whereas the original version had included New Britain outside the Gazelle Peninsula. Still, all this did not make the 1898 Agreement essentially more favourable for the Reich than the 1896 Agreement. The real explanation is that times had changed. In 1899, the year in which the Samoa Treaty was signed and Germany bought the Pelews, Carolines and Marianas for \$1,600,000 from Spain, it was clear to everybody that the days of the Neu Guinea Kompagnie as a chartered company were over, that the Reich had to take direct responsibility and that it was better to bring the matter to a conclusion as quickly as possible

instead of continuing to bargain in the hope of bringing the price down. The Agreement of 7 October 1898 came into force on 1 April 1899 and German New Guinea came under Imperial administration.

This history of German New Guinea under the Company might give the impression that everything went wrong and that no progress was made; yet, between 1885 and 1899 imports and exports doubled to \$140,000 and \$110,000 respectively. Instead of fifty the European population was now 250 and the area cultivated by them had increased from 150 to 5000 acres. But a large part of these increases was achieved by the settlers in the Bismarck Archipelago. Exports from Kaiser Wilhelmsland amounted to only about \$12,000 in 1899. Since the Neu Guinea Kompagnie had spent a large portion of about \$1,000,000 on opening Kaiser Wilhelmsland, this is not a very impressive result. How disappointing it really was becomes apparent when seen in relation to the progress the settlers in the Archipelago had made between 1875 and 1885 with a small fraction of the Company's investment. They had exported four times as much in 1885 as the Neu Guinea Kompagnie from Kaiser Wilhelmsland in 1899. On the other hand, considering that exports had already been more than three times as great in the heydays of tobacco planting in the early 1890s, the risks the Neu Guinea Kompagnie took were possibly worth taking.



When the Reich took over, Hahl was in Berlin advising the Foreign Office. Yet, it was not Hahl (then only thirty) but Rudolf von Benningsen, formerly Treasurer of German East Africa, who was appointed Governor. Hahl became Vice-Governor and responsible for German Micronesia, which was at this stage only loosely connected with German New Guinea. However, he became Acting Governor in 1901 and Governor in 1902, holding this post until early in 1914. The period of Imperial Administration was thus largely a period of Hahl Administration. But during this time, German New Guinea reached a stage where the days of dominating individuals came to an end. The technocrats and managers began to take over from the pioneers and things became less personal and more specialised. Had 1914 not seen the occupation of German New Guinea by the Australian Armed Forces, it would have still marked the end of an era. New Guinea was not what it had been. Harnsheim had left as early as 1892. Hanseemann had resigned as Chairman of the Neu Guinea Kompagnie's Board of Directors in 1900. Queen Emma, who had been thinking about selling out for a long time, finally did so in 1910. From 1908 onwards Mouton spent most of his time in Sydney. District Commissioner Franz Boluminski, who had colonised the north of New Ireland almost single handed, died of a heart attack in 1913 and Hahl retired in 1914. Couppé and the equally indestructible Flierl of the Neuendetelsau Mission were the only leading members of the old cast who survived the change of stage management.

In contrast to the Neu Guinea Kompagnie, the Imperial Administration concentrated at first on the Bismarck Archipelago, selecting Herbertshoehe instead of Friedrich Wilhelmshafen as the new capital.

The expansion of government control was still much slower than in Papua. This was mainly due to the comparatively even greater lack of staff and finance. Hahl could not send his few men on long patrols to make friendly contact with natives. Other administrative duties, caused by the more advanced economic development, tied them to the centres of European settlement. Besides, to carry out patrols which were often not repeated for many years, would have been of little use under the conditions existing in German New Guinea. The problems of opening up the country ahead of private European activities, however, were largely theoretical. In practice it was impossible to catch up with the expansion of European settlement. The demand for government vessels became the *ceterum censeo* of every Annual Report.

Still, progress was made. The first new government station, Kaevieng, was established for the north of New Ireland in 1900. In 1904 followed Namatanai for the south of the island and in 1905 Kieta for Bougainville and Buka. But until 1906, when a station was opened in Aitape, Friedrich Wilhelmshafen remained the only government station in Kaiser Wilhelmsland. Economic development during this time was hardly spectacular either. The area cultivated by Europeans increased from 5000 acres in 1899 to about 40,000 in 1907, but most of it—coconuts still being the main crop—was not yet productive. Exports thus grew from about \$110,000 to only \$170,000 and dropped in 1908, owing to a fall in copra prices, by about \$35,000. The search for minerals on the basis of the Ramu Concession, granted to the Neu Guinea Kompagnie in the 1898 Agreement, and the Huon Gulf Concession, granted to a separate syndicate founded by Hansemann in 1901, did not lead to the discovery of paying deposits. It was only poor comfort that Schlechter, sent out by the Committee for Colonial Economy, established the widespread existence of rubber producing plants.

Such was the situation when the newly formed Colonial Office demanded that Hahl increase local revenue, then about \$36,000, so that the yearly grant from Germany could be reduced. This had gradually grown from about \$26,000 to about \$70,000 (excluding the yearly payments of \$40,000 to the Neu Guinea Kompagnie under the 1898 Agreement). In 1908 a new tariff was introduced, said to be the highest in any German colony. It drastically increased the import duties and stipulated an export duty of \$1.00 per ton of copra although an earlier duty of \$0.40 had been abolished on Hahl's initiative. The tariff raised a storm of protest and the way in which it

was introduced resulted in a serious loss of confidence in Hahl. The unofficial members of the Advisory Council (*Gouvernementsrat*), which had unanimously rejected the tariff, resigned in protest and a planters' association was formed as an organised pressure group. Parliament in Berlin discussed the tariff in February 1909 in connection with the budget for German New Guinea and—again—a shipping subsidy which it had rejected the previous year. The tariff was strongly attacked although the import duties had already been reduced. In the end the attackers made a deal with the Government. They approved the shipping subsidy and the tariff, whereas the Government guaranteed that the freight for copra on the subsidised shipping line would be kept so low that it would make up for the export duty. This sweetened the tariff for the planters and pleased the Colonial Secretary because it gave the budget for German New Guinea a more positive appearance: the export duty boosting the local revenue and the shipping subsidy not forming part of the local expenditure. The loser was Hahl. The Colonial Office cut the grant by the expected increase in local revenue, and Parliament the planned expenditure by nearly ten per cent. Hahl faced a dilemma. The settlers protested against higher taxes and duties because the economy was not sufficiently developed. Hahl needed money to speed up economic development, yet the Colonial Office insisted on cutting the grant from Germany. The introduction of head tax for natives was only a drop in the bucket and even the budget marriage with German Micronesia and its rich dowry of phosphate royalties did not help decisively. The local revenue jumped from \$74,000 to \$132,000 but the grant was at the same time cut from \$106,000 to \$72,000.

This did not seriously hamper the organic economic growth. The area under cultivation increased by 50 per cent between 1908 and 1912—the same increase as during the four preceding years—and exports almost trebled to about \$500,000, helped along by rising copra prices. But the expansion of government control came to a comparative standstill. The yearly increase of about ten per cent in local expenditure was hardly sufficient to open stations in Morobe (1910) and on Manus (1911), which had both been long overdue. The opening of the interior of the large islands, Kaiser Wilhelmsland in particular, was under these circumstances still out of the question.

About 1912 views in Germany on the future of German New Guinea again changed. The aim was still financial independence, but there was now an almost general consensus of opinion that this could

be done only if the German grant was substantially increased for a limited period. A development program for 1913/14, requiring a grant of \$300,000, was drawn up and approved by Parliament. At the time of Hahl's departure in 1914 the second stage of the program had been worked out in New Guinea. It extended over three years and would have cost the Reich almost \$750,000. This development program was in a way Hahl's political testament, and is strongly reminiscent of Hansemann's plans in 1884. But the two programs were separated by thirty years of practical experience in colonisation. Though equally ambitious, Hahl's plan had thus a fair chance of success. Yet, it shared the fate of that of Hansemann: it was never realised.

Hahl's development program was concerned with both expansion and intensification of government influence. The main aim of expansion was to open the interior of Kaiser Wilhelmsland by establishing stations along the three main rivers, the Sepik, Ramu and Markham. In 1913 the first of these stations was founded in Angoram on the lower Sepik. The next step, only partly completed when the War broke out, was a station at the mouth of the Markham. For 1915 a station was planned on the middle Ramu and for 1916/17 one on the upper Markham. It was also planned to open up New Britain outside the Gazelle Peninsula by establishing a station on the south coast in 1915 and the north coast in 1916/17. Besides it was intended to divide existing administrative districts. Kaevieng was to be assisted by a station in New Hanover, in the Solomons a second station was to be opened in Buin and, in the Sepik district, stations were planned for Vanimo and Wewak.

Intensification of government influence meant an increase in general administrative staff and the creation of specialised departments. Preparations were made to set up a department of mines and a forestry department, the number of surveyors was to be substantially increased, but the main emphasis was placed on public health and agriculture. Medical and agricultural officers were to be attached to each government station and, in addition to the Botanical Gardens in Rabaul, where experiments had been carried out since 1906, the following agricultural stations were planned: a station for general agricultural experiments under inland conditions on the Ramu, a centre for animal husbandry in Kaevieng, a station specialising in coconut palms and copra processing in Rabaul and finally an agricultural laboratory, also in Rabaul, which was to concentrate on plant diseases and fertilisers.

There was too little time before the outbreak of World War I for any major positive or negative results. Even so it was clear in 1914 that German New Guinea was an economic and administrative success.<sup>1</sup> The European population had increased to over 1600. The total trade amounted to more than \$1,600,000, exports being nearly as high as imports. About 80,000 acres of land were cultivated by Europeans and most of it had still to become productive. Outside capital flowed into the country and even the Neu Guinea Kompagnie paid its first dividends. Although the economy still depended almost entirely on copra, there was a good chance that this would change. Cocoa as well as rubber had proved successful, and tobacco planting was to be revived. Besides, oil had been found near Aitape in 1913 and a new syndicate was about to begin dredging for gold in the Waria.

Whereas the Neu Guinea Kompagnie intended to develop Kaiser Wilhelmsland by establishing European plantations, the economy of the settlers in the Bismarck Archipelago was at the time of the annexation mainly based on trading with natives. It was not only the result of Company policy that such a trade was so slow to develop in Kaiser Wilhelmsland. With the exception of the Aitape area, the natives along the coast did not produce enough coconuts or other goods to make trading worthwhile. On the other hand, it was doubtful when the Reich took over, whether the Bismarck Archipelago outside the Gazelle Peninsula could be developed into a plantation colony. This applied even to the north of New Ireland which, as a trade centre, was as important as the Gazelle Peninsula. The settlers generally believed the soil to be unsuitable for plantations, but Bolu-minski, who established the government station in Kaeviang in 1900, did not share this view. He started a government plantation which after a year comprised about 12,000 palms, that is an area of approximately 300 acres. Nine thousand of the palms had been planted by neighbouring natives at an expense of \$100. After planting, the natives were allotted sections of the plantation where they had to tend the palms, using the land between them for gardening which saved them the work of clearing bush for the same purpose. This arrangement worked so well that the Annual Report for 1900/1 concluded: 'In case Europeans are not prepared to invest in planta-

<sup>1</sup> The following figures do not include German Micronesia as most official statistics for that time do.

tions, it will be possible to gradually develop plantations with and for the natives in the villages' (9). Boluminski was not content with this prospect. His aim was to encourage European planters by making the government plantation a success. He gained an ally in Julius Ruge, a local trader, who was paid a government subsidy of \$1000 to develop a coconut plantation on Neuwerk Island (about 1000 acres) which was leased to him rent free until the palms became productive. A year later the Administration would not have dreamt of offering land under such generous conditions. The applications for land had increased so rapidly that it became necessary to enact special regulations for the acquisition of land in north New Ireland 'in order to prevent that unfair advantage is taken of the natives' inexperience' (Annual Report 1901/2, 2).

In 1899 there were hardly any small planters in German New Guinea, but then the traders realised 'that it was possible . . . to establish a coconut plantation without extra expense because the European and coloured staff required [for trading activities] was usually not fully occupied' (Annual Report 1899/1900, 8). These traders, usually former employees of the large companies, formed for a number of years the largest group of applicants for land, financing with their trading the period until the plantation became productive. But they had still to rely heavily on the companies, because there were neither independent banks, which could give them loans, nor independent shipping lines, which could collect their copra and provide them with trade goods.

This gradual organic growth, using the manpower and capital available in German New Guinea, prevailed until about 1907, increasing in speed when the North German Lloyd established local shipping connections and improved those with Europe in 1905. This led also to a certain decentralisation, largely owing to the fact that the natives showed a growing dislike for work in other parts of the country if they could find employ as casual labourers on nearby plantations. However, for the small planters this decentralisation was limited to the Bismarck Archipelago since it was impossible to finance a plantation in Kaiser Wilhelmsland by trading with natives.

Hahl tried in 1904 to speed up development by reforming the anachronistic conditions the Neu Guinea Kompagnie had issued in 1888 for the transfer of land. But, as shown by the example of Papua, where at least since 1906 land was offered under even more favourable conditions, a secure title to cheap land is not sufficient. It is rather the



belief that a colony has in general a promising future which attracts settlers and capital.

The German Consul in Brisbane, von Ploennies, was one of the first to believe that New Guinea under Imperial Administration was bound to be an economic success. In 1901 he informed Hahl of his intentions to found a German-Australian land settlement company and asked for a concession of between 100,000 and 200,000 acres. Hahl referred the matter to the Foreign Office. The Neu Guinea Kompagnie objected to the granting of such a concession. Although Hahl expressed his support, the Foreign Office decided in 1903 against it 'because the present members of the syndicate [formed by Ploennies] are no sufficient guarantee that . . . the promise to settle industrious German elements will be fulfilled and that the settlers will be safe from capitalistic exploitation' (*D.K.Z.*, 1903, 369).

Despite this decision neither Hahl nor Ploennies dropped their plans to settle Queensland-Germans in New Guinea. As the number of inquiries and applications for land increased substantially, Hahl received permission from Berlin in 1904 to go ahead and prove that European farmers could live and work on higher altitudes without coloured labourers. This had been Hahl's favoured project since a visit to the mountain station of the Neuendettelsau Mission, about 3000 feet high on the Sattelberg near Finschhafen. For practical reasons the project had to be watered down considerably before it could be put into effect. The most suitable place was an area in the Baining Mountains, close to Rabaul, but it was merely 600 to 1200 feet high, so that the settlers had, at least for the first years, to be supplied with coloured labour. This almost doubled the costs of the project, an increase Parliament did not approve. Financial support from other sources made it only possible to carry out a small scale experiment. In January 1906 a group of about thirty men, women and children, led by Ploennies arrived in Rabaul. Some of them, including Ploennies, died of malaria and others left. A good number succeeded. In the end, however, they moved down to the coast, establishing coconut plantations with coloured labour like the rest of the settlers.

The few small plantations of these Queensland-Germans did not influence the economic growth of German New Guinea significantly. What was needed was outside capital. But outside capital showed little interest. This meant a lack of serious competition which led to a closer co-operation between the few established firms. They tried to

concentrate on different areas and, where their interests overlapped, they even combined forces, as on Pak Island, east of Manus. Forsayth, Hershheim and Rudolf Wahlen, the last of the economic pioneers who turned into the most successful of the new type of managers, formed a separate company for the joint exploitation of the island.

After shipping connections had been improved by the North German Lloyd in 1905/6, the situation began to change. The Lloyd itself led the way. When it began to develop the harbour in Rabaul, it acquired a substantial area of land adjoining the pier, so that it became the landlord of nearly all the town when the capital was shifted from Herbertshoehe to Rabaul. Besides, the Lloyd planned to establish a tobacco plantation, first on Bougainville and later, when the soil proved unsuitable, near Friedrich Wilhelmshafen. Others were in a greater hurry. In 1908 a rubber syndicate was formed in Berlin. It was one of the many colonial companies the Mertens concern tried to float at that time in Germany, where speculators suddenly became interested in German colonies in general. When Mertens heard Queen Emma intended to sell out, he gave up his plans to develop a new venture and formed the Bismarck Archipelago Company 'for the purpose of acquiring the plantations, the trading business and the land holdings of the Firm E. E. Forsayth' (*D.K.Z.*, 1909, 174). The negotiations with Queen Emma developed into a race between the new Berlin-based speculators and the established Hamburg-based firms. Hershheim, Wahlen and the D.H.P.G. again formed a united front and, with the backing of the Warburg Bank and other firms, won the race. In 1910 a Forsayth Company with limited liability and a capital of \$200,000 was formed and shortly afterwards transformed into a share company, the H.S.A.G. (Hamburg South Sea Company), of which Wahlen became managing director. Mertens returned to his previous plans. The Bismarck Archipelago Company started a rubber plantation of 5000 acres on Bougainville (Aropa) and an oil palm plantation of 4000 acres in the south of New Ireland (Bopire). When the latter had to be sold after a year because of the shortage of funds, he had no difficulty in doing so for the substantial price of \$24,000.

The founding of the Bismarck Archipelago Company had been the signal for which new capital had waited. In 1913 alone a Bremen South Sea Company, a Hamburg South Sea Plantation Company and a German Farm and Plantation Company were founded by German interests. The development was not restricted to Germany. Several

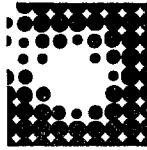
successful sugar planters and businessmen, dissatisfied with conditions in Queensland, were so impressed by the settlement scheme in the Baining Mountains that they submitted plans in 1908 for a sugar mill surrounded by 8000 acres of share farms run by additional settlers at Weberhafen. But Hahl was now in a strong bargaining position and not at all keen to grant them the tax and other concessions they sought. On the contrary, he became seriously worried about the speed with which Australian and even British capital invaded German New Guinea. During 1912/13 the Choiseul Plantation Company and the Vella Lavella Plantation and Trading Company expanded from the British to the German Solomons, a Buka Plantation and Trading Company was founded and Burns & Philps' Walter Lucas gained a first substantial foothold by acquiring about 8000 acres in Bougainville.

The small settlers kept pace with the development. Their ranks were swelled by a growing number of former members of the Imperial Navy and the merchant marine. S.M.S. *Cormoran* reported to the Emperor after a visit in 1911 that of the six plantations along the south-east coast of New Ireland two were owned by retired navy men and a third by a former engineer of the North German Lloyd. Further, a change in European fashion opened Kaiser Wilhelmsland for the small settlers. Birds of paradise became the thing on ladies' hats and their price climbed so high that it became feasible to finance the development of a coconut plantation by hunting them. Hahl quickly realised the possibilities. He not only raised export duties and the fees for shooting licences, making birds of paradise the second largest source of local revenue, but he also issued licences only under the condition that the holder brought 125 acres of land per year under cultivation. In this way about a dozen plantations were begun along the coast of Kaiser Wilhelmsland, mostly by former employees of the Neu Guinea Kompagnie, working together in teams of two or three, one partner looking after the plantation while the other(s) went on a shooting expedition.

The small settlers in the Archipelago also found it advantageous to pool their resources. They formed a number of local companies. Some of them, like the Kalili Company, with a capital of over \$25,000 and land holdings of about 4000 acres, were of quite substantial size, because the leading employees of the large companies used them to invest their savings. The climax was reached when Erzberger, who had been a leading anti-colonial member of Parliament, applied, en-

couraged by the Divine Word Mission, in 1913 for 250,000 acres of land for a settlement scheme in the Toricelli Mountains, inland of Aitape.

According to the Annual Report for 1911/12 it became now one of the main duties of the Administration 'to investigate in each case whether a transfer of land was compatible with the interests of the natives and to make sure that enough land remained for a strong and healthy native population' (148). This might give the impression that Hahl believed the transfer of land to European settlers had to be drastically reduced or even stopped altogether. However, this applied only to a very few areas: the Duke of Yorks, the coast of Blanche Bay and Talili Bay in the Gazelle Peninsula and the surroundings of Madang in Kaiser Wilhelmsland. Generally speaking, Hahl did not fear the over-alienation of native land but only an over-recruiting of the native population. From his point of view, there was more than enough land to develop European plantations and native cash cropping side by side. The problem was that the native work force was too small to do both. 'The labour question', Hahl wrote, 'necessarily created tensions [between the Government and the planters] because the promotion of native agriculture . . . kept the men in the villages' (1937, 244-5). But the problem was more serious than that. 'All efforts for a progressive development of the colony were overshadowed by the concern for the future of the natives . . . Despite all efforts their numbers did not increase significantly' (*ibid.*, 246-7). Hahl was not worried that there would be natives without land, his fear, shared by many colonial administrators in the Pacific at that time, was to see vast stretches of land bare of any native population.



Although overalienation was not seen as a danger, the alienation of land to Europeans was often made responsible for native unrest, for instance in the case of the Madang uprising in 1904, the Kaiser Wilhelmsland counterpart of the unrest in the Gazelle Peninsula in 1893. According to the Annual Report it 'was obviously a result of the expansion of the plantations in . . . Astrolabe Bay'. The natives, it was suggested 'not knowing the future limits of the plantations, [possibly] began to worry about their livelihood' (1904/5, 2). At that time the Government believed the difficulties would be over, once the boundaries of the alienated land had been marked, since the completion of the most important surveys in the Gazelle Peninsula the year before had 'essentially increased the natives' willingness' in their relations with the Europeans (Annual Report 1903/4, 1). Eight years later, however, it was the alienation of land as such and no longer the uncertainty of boundaries which, according to the Government, caused renewed unrest in Madang. 'In August 1912 a conspiracy developed among the native villages in the vicinity of Friedrich Wilhelmshafen. The reason was the natives' dissatisfaction with the purchase of part of their land' (Annual Report 1912/13, 171). On the other hand, the Government not only felt that the alienation was justified because it 'could not be avoided if one was not at the same time prepared to give up any plans for the development of this town'. It was also convinced that the natives had objectively no reason to worry since 'sufficient reserves for the natives were proposed in the envisaged subdivision'.

In 1893 a confrontation over the land question developed out of a smallpox epidemic in Friedrich Wilhelmshafen. To prevent it from

spreading, the Administrator Schmiele decided to establish a quarantine station on one of the islands protecting the harbour. The Siar people who had planted fruit trees on it and used the surrounding reefs for fishing, were not prepared to accept this. The Protestant missionary on Siar tried in vain to mediate. Schmiele made a last attempt to persuade the Siar to give in before actually occupying the island, but they took up arms promising him that they would rather die than accept its loss. When the quarantine barracks were erected the following day, however, there was no sign of resistance. Nor were the natives on any other occasion prepared to die in defence of their claim to a particular piece of land. A number of reasons had to come together before native dissatisfaction exploded into violence. This even applied in the Gazelle Peninsula where land was (and still is) blamed for almost everything.

The natives regard the early sales of land as one of the worst evils the 'whiteman' introduced. At the time of the sale they did not realise what consequences it would have for them. They were only interested in the fire arms and the ammunition they got for the land and which gave them superiority over their enemies. But now that the guns are confiscated by the Administration and they have to leave their hamlets and move together in small reserves, their embitterment is great. More than once they have tried to regain the possession of their land by force and to murder all foreigners (Kleintitschen, 1907, 119).

When the natives 'sold' their land around Blanche Bay at the time of the annexation, it did not influence their life at all. They continued to live on the land and to use it as before. By 1893 the European plantations had grown so much that the first natives were expelled from their hamlets and pushed further inland. But there were other reasons for the growing unrest, for instance the behaviour of the native plantation labourers from the Solomons and New Ireland towards the Tolai. 'They misused the Sabbath rest to roam through the bush robbing the natives of their only wealth, their . . . [shell money] or committed even far greater wrongs' (M., 1894, 103). These unnamed wrongs were what Phebe Parkinson described as 'pulling bush maries' (Mead, 1960, 195), that is the raping of Tolai women working in their gardens or on their way to the market. However, the event triggering off the hostilities was apparently of a different kind again: the Neu Guinea Kompagnie prohibited the use of native medicines and imprisoned a native woman whose patient had died

after her treatment. This interference with their internal customary life proved too much and the natives decided to kill all Europeans. They probably had made similar decisions in the past, but this time things were different because the native Talarai claimed to have invented a bullet proof paint with which he treated large numbers of people in return for a substantial payment of shell money.

In 1900 R. Wolff bought land near Mount Varzin, inland from Kokopo, for a plantation. When he began to clear the slope of a hill near the hamlet of To Kilang, trouble started. The District Judge investigated the matter and decided in favour of Wolff. Wolff tried to come to friendly terms again with his native neighbours and was confident of his success only to find one morning his wife and small son murdered, he himself barely escaping an ambush. In this case too the land question was at first made responsible: 'It is alleged that it was the revenge of natives who had lost in a boundary dispute in court' (Annual Report 1901/2, 7). Recent native evidence suggests a number of other reasons (for instance, that native huts and fences had been destroyed during road constructions in the vicinity or that Wolff's goats and cattle had damaged native gardens). Later European accounts blame the fact that Wolff had desecrated a *marawot*, a meeting place of the *ingiet* society.

The 1904 uprising in Madang was, for the Government, 'obviously the result of the expansion of the plantations in . . . Astrolabe Bay'. For H. Meier, a lay employee of the Neuendettelsau Mission, who was at that time in hospital in Friedrich Wilhelmshafen, the matter was equally clear, though different. 'What induced the people to attack was simply their bloodthirstiness and rapacity: the Neu Guinea Kompagnie's large stores, the beautiful coconut plantations, all this would have become their possession had the Europeans been killed.' The editor of the *Kirchliche Mitteilungen* when publishing Meier's account was more cautious and added in a footnote: 'According to the last annual report of the Rhenish Mission . . . the Siar people have already been punished once for refusing to pay a fine and to help with the road building.' (1904, 76). W. Wendland, at that time government physician in the Gazelle Peninsula but with extensive experience in the Madang area, also regarded compulsory labour for the Administration as the main reason: 'The system of four weeks' compulsory labour per year for every healthy man not employed by Europeans had proved successful in the Bismarck Archipelago. But the proud . . . Tamuls [whom he calls a *Herrenvolk* in contrast to the Tolai] . . . were not

prepared to put up with being forced to work for the Europeans' (1938, 180). Recent native evidence confirms that compulsory labour was an important factor in the 'conspiracy'. Contemporary Rhenish missionaries, however, named again a number of other reasons or they concluded, overcome by resignation, that the innermost reasons would probably always remain hidden (Hoffmann, 1948-9, vol. I, 336). E. G. Hannemann, one of their successors, attempted about forty years later to analyse the motives from the native point of view.

To the Madang natives it appeared as if it would be their lot to work for the *tibud* [European] almost all the time and thereby neglect their own villages and gardens . . . They had never been anybody's *begabeg* (servant) . . . But now they were fast developing into the labour gangs of a handful of *tibud* who came without asking whether the natives would allow them to live there . . . What the Madang natives desired was self-rule without the whites . . . Now was the time to deal with the insistence, impatience and acquisitiveness of the whites regarding land and labour and their solicitude regarding socio-religious teaching . . . So the plan was made to kill all the whites, including the missionaries (1945, 26-7).

Native 'conspiracies', it appears, were not so much the result of particular wrongs particular natives had suffered at the hands of particular Europeans, but attempts of *the* natives to get rid of *the* Europeans whose presence threatened the traditional way of life. They were preventive measures rather than acts of revenge, attempts of an organism to expel a foreign body which were bound to happen at certain stages during the process of colonisation, although in a more or less determined and violent form, depending on the natives' willingness to change and on the way in which the Europeans tried to bring about these changes.

When the news of Mrs Wolff's murder reached Herbertshoeche, Hahl had an attack of blackwater fever and was out of action. R. Wolff's namesake, the District Judge E. Wolff, took charge. A recent arrival, he was unable to control the revengeful settlers who were supported by several hundred native plantation labourers and apparently also the Tolai around Herbertshoeche who thought the chance to have a go at their traditional enemies, the Papatatava, was too good to miss. Chaos reigned for several days. Before the activities of the irregular punitive expeditions and the coastal Tolai could be stopped, a large number of innocent natives had been killed and many gardens and hamlets had been destroyed and looted. The regular police now concentrated on



capturing those who had actually taken part in the murder. After a week the hiding place of the Papatava was discovered in Wairiki. The police learned that To Kilang, his sons and To Vagira of Tamairiki had been the instigators, but they had fled further inland to the Taulil, the arch-enemies of the inland Tolai. The police pursued them and surprised a group of Taulil eating To Kilang's sons. To Kilang himself and To Vagira had escaped. Later both of them were shot in the bush and their heads were exhibited in Herbertshoehe. But this was not the end of the matter.

The Papatava tribe, which was largely responsible for the unrest, was limited to half of its original area. The remainder was taken into possession for the Government. The establishing of a police post at Toma (Papatava) secures peace for the expanding plantations as well as among the quarrelsome natives themselves (Annual Report, 1902/3, 1).

At the time of the 1904 uprising in Madang, Hahl was visiting German Micronesia, so that again he could not influence the immediate measures taken by the Government. District Commissioner Stuckhardt, however, was quite capable of handling the situation himself. Although only saved in the nick of time by a unit of police boys, his first order to them was not to shoot at the natives who were already in full flight. Sergeant Beyer who was in charge of the police also kept his nerve, so that only one native was shot during the whole operation of 27 July. On 29 July Stuckhardt arrested the first natives to question them. When they confessed their plans, he began to arrest the ringleaders, to confiscate weapons and to demand fines in the form of pigs and food which were at the same time to serve as peace offerings. Only on Bilibili Island he had no success because the entire population had fled to the Rai Coast. On 9 August Stuckhardt sent four prisoners on the Neu Guinea Kompagnie's *Siar* to Herbertshoehe and reported that the situation was under control. The other Europeans were less optimistic and sent with the same boat a petition to the Acting Governor, Knake, asking for immediate help and energetic action. Knake decided to intervene. When he arrived with additional police on 17 August, everything was quiet. About to return to Herbertshoehe, he was informed the native plantation labourers had been involved in the conspiracy as well. This called for more drastic measures. Knake proclaimed martial law. A court martial sentenced six ringleaders to death. They were publicly executed on *Siar* the same day and Knake left with ten more ringleaders who had been sentenced

to imprisonment. This closed the affair for the natives of Siar and Kranket. The proposal to banish the whole groups from their islands was rejected by Hahl. But Bilibili Island, still deserted, was confiscated. The Bilibili were ordered to settle permanently on the mainland and to hand over fifteen men who were to serve terms of three years' hard labour in Herbertshoehe. It took until the end of 1905 and two punitive expeditions, during which a dozen Bilibili were killed, before peace was made.

At the time of the alleged uprising in Madang in 1912 Hahl was almost on the scene. Tultul Tageri of Bilibili informed District Commissioner Scholz of the plot on 23 August and Scholz had just begun to arrest the ringleaders named by Tageri when Hahl passed through on the Lloyd steamer *Coblentz* on 24 August, taking the first prisoners with him to Rabaul. On 25 August Scholz continued his investigations. When Nalon from Beliao, who had betrayed the 1904 conspiracy, corroborated Tageri's evidence, Scholz called an emergency meeting of the District (Advisory) Council to discuss what measures should be taken.

The Europeans were greatly agitated so that it was decided with the unanimous approval of all available members of the District Council to remove the guilty villages to other places. The inhabitants of Siar, Beliao and Panutibun were taken with all their belongings to Medise, the inhabitants of Jakob to Jaimas. These places are situated at the Rai coast and linked by close friendship with the removed villages. Half of the Kranket people were brought to Megiar (near Cape Croisilles) and to Karkar Island, the other half to Gisik on the Rai Coast. The removal of the villages which partly corresponded with the natives' own wishes (probably the result of their guilty conscience) took place quietly [between 27 and 29 August]. They will be supported with food for the time being. Their future is in the hands of the Governor. Public peace has been completely restored (*D.K.B.L.*, 1912, 994).

In the meantime the ringleaders had told Hahl that they had been falsely accused and were returned to Friedrich Wilhelmshafen with S.M.S. *Condor* on 5 September. Scholz reopened the inquiry and 'a lot of contradictory evidence was given' (*ibid.*). On 13 September Scholz again called a meeting of the District Council to which two officers of the S.M.S. *Condor* were also invited. The meeting concluded 'that it has been proved beyond any reasonable doubt that a widespread conspiracy had existed . . . which aimed at murdering the whole white population'. But it decided against judicial proceedings since it thought

that none of the relevant laws covered the situation adequately. The District Council approved the decision to banish the ringleaders for life. It declared further than the removal of the 'guilty villages' should only be regarded as a temporary measure 'since it was possibly not sufficient to guarantee lasting peace'.

On 14 September Scholz informed Hahl of these decisions and asked whether the land of the 'guilty villages' was to be confiscated. Hahl replied on 24 September that the banished ringleaders and their families were to be settled in the Gazelle Peninsula and that the land of the 'guilty villages' was to be occupied and registered as government property. However, it was not until July 1914 that a formal deed of occupation for certain lands of the 'guilty villages', mostly islands, was drawn up.

As a result of the 1893 uprising in the Gazelle Peninsula, the Neu Guinea Kompagnie decided that it was time to develop an active native policy.

In the interest of justice and humanity as well as in the interest of a peaceful development of European ventures . . . it is in the future hardly sufficient to leave the natives alone as long as they are peaceful and to punish them when they become aggressive. It will prove necessary to enter into closer contacts with these tribes by winning men whom one can trust and who can maintain order in their districts, thus laying the foundation for an indirect rule of these tribes . . . Thus it will be possible to establish lasting peace and to enter into fruitful relations with these industrious tribes of agriculturalists (*N.K.W.L.*, 1894, 68).

Like many other of the Company's plans, this reads well, but it was not until the arrival of Hahl in 1896 that the first government chiefs, called *luluai* or *kukurai*, were appointed. This, however, did not work miracles as the Company expected. Native unrest still occurred and Hahl saw it, right up to 1914, from the political rather than legal point of view. Acts of native violence, even if they consisted of individual murders, were in these cases not treated as criminal offences but as acts of war—and not even as acts of civil war. Hahl's aim was accordingly to restore and secure public peace and not to mete out punishment. Though 'punitive' expeditions were carried out and martial law was proclaimed when regarded as necessary to stop unrest from spreading, bloodshed was avoided as far as possible. (The general killing and looting after the murder of Mrs Wolff was clearly

an accident.) Even after public peace had been restored, matters were not dealt with in court but by political or administrative measures among which banishment and the confiscation of land figured most prominently.

The confiscation of land in cases of this kind was apparently introduced by Hahl during his office as Imperial Judge. It was first used when he tried to put an end to the raids of the north-coast Tolai on the Baining. In 1898 Hahl took certain lands in the Massawa area into possession for the Neu Guinea Kompagnie because the natives of Wunangulip and Giretar did not fulfil his ultimatum to hand over their Baining slaves but instead fled. What such a confiscation meant is illustrated by the history of the mission plantation in Mandres.

In 1897 Couppé had received permission from the Neu Guinea Kompagnie to acquire 250 acres of land in the Baining region. He discussed the matter with Hahl who suggested Mandres as the most suitable place. Until 1886 the coast around Mandres had been uninhabited. At that time Tolai from Kambaira fled after a punitive expedition across Weberhafen, built several hamlets, made gardens and planted coconuts. They also continued raiding the Bainings in the mountains behind them—as they had always done from the safety of the other side of the bay. After some time the Baining united and forced them back across the water. This was the situation when Couppé asked Hahl how he should acquire the land. According to Couppé, Hahl's advice was to take possession without any payment. He gave the following reasons. Firstly, the land had been ownerless in 1886. Secondly, the Tolai did not acquire ownership when they settled there because they intended to return to their villages when the danger was over. Thirdly, when the Baining drove out the Tolai in self-defence they terminated all rights the Tolai might have acquired—without establishing claims of their own, as they did not use the land. Finally, in case the Tolai had acquired ownership in 1886 and did not lose it through being driven out by the Baining, the Administration could confiscate the land as punishment for the murder of Europeans which had caused the punitive expedition in 1886.

Couppé took the land into possession for the Neu Guinea Kompagnie in March 1897 which sold it to him in June. Soon afterwards difficulties arose, because the Tolai in Kambaira continued to harvest nuts from the palms they had planted ten years earlier. When Hahl's successor Schnee investigated the matter in 1899, Couppé claimed to have compensated the Tolai for their palms. Schnee's investigations

confirmed this, but also revealed that the native to whom Couppé had given the compensation in the form of knives for distribution, had kept them all for himself. Although a new payment was made, trouble arose again in 1901. The Tolai threw the knives they had received in 1899 on to the beach at Mandres, landed and began to peg out the land they claimed. The brother in charge of the plantation thought they were about to attack. A fight ensued during which four of the Tolai were wounded. Hahl held an inquiry but declined to take action so as 'not to endanger the public peace which had just been established among these previously much feared natives' (Hahl to Foreign Office, 5 April 1904, Z.A., 2577).

The matter was again discussed in 1904 when the Sacred Heart Mission complained to the German Government about Hahl. In his report to the Foreign Office, Hahl pointed out that the quarrels over the coconut palms at Mandres were the result rather than the cause of the tensions between the Mission and the Tolai of Kambaira and Livuan. The latter feared the Mission would cut their access to the taro produced by the Baining in the mountains behind Mandres which was of vital importance to them as well as the Mission. Hahl also gave his version of the acquisition of the land.

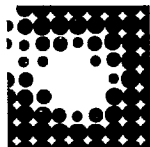
To bar the way from Mandres to Gawit for the [Tolai] slave hunters, I seized their coconut groves in Mandres in 1897 and encouraged Bishop Couppé in 1898 to purchase the adjoining land and to start a plantation . . . The seizure was later disregarded, perhaps even treated as having been revoked, since, in any case, I could not give it permanent effect (*ibid.*).

In other words, the 'confiscation' had been a temporary, political rather than a permanent, legal measure.

When public peace had been restored after the Wolff murder in 1902, Hahl's aim was to secure it by establishing a police post in the area. It is certain that he regarded it as justified to take the land required for this purpose from those who were responsible for the murder. But it is equally certain that he did not decide that the confiscation of a certain acreage was an adequate punishment for this murder. When the Papatava sent a deputation to him, he was quite prepared to reduce the area which had been 'confiscated'. The 'confiscation' was more of an annexation as part of a negotiated 'peace treaty' than the punishment for a crime.

The 'confiscations' near Friedrich Wilhelmshafen as a result of the

'conspiracies' in 1904 and 1912 belong in a different category because they were not independent measures but only the consequence of the banishment of the groups involved. Still, they were just as much political and non-permanent as the others. During a visit to their mainland village in 1907, Hahl allowed the banished Bilibili to return to their 'confiscated' island. Although the 'confiscation' in 1912 was carried out in a more formal manner, it is by no means certain that the 'guilty villages' would not also have been permitted to return to their land after a number of years. The 'confiscation' of land as a punishment in German New Guinea was not a means of acquiring large areas of land which could then be subdivided among European settlers and the area 'acquired' that way was negligible.



When G. Brown landed in Port Hunter, in the Duke of Yorks, on 15 August 1875, Topulu decided to 'adopt' him as friend and ally. Brown was pleased with this development and thought it 'very desirable to secure Topulu's favour' (1908, 90). The problem was that Topulu wished Brown to live in his village on Makada Island whereas Brown regarded the site as too low and unhealthy. Finally an acceptable solution was found by deciding 'to fix the station on a fine high piece of land in Port Hunter [on the main island opposite Makada], in which Topulu also had an interest' (ibid.). The land was surveyed in the presence of 'all the chiefs who [had] any claim to it', after the offered purchase price had been shown to them (n.d.a, 18 August 1875). Then the land was bought and Brown got a 'properly executed conveyance' for it from Topulu and his brothers Waruwarum and Nara-gua. 'Having to pay separately the three claimants for the land', Brown commented, 'the aggregate price paid was more than it was really worth, but we all felt it best to let the natives see that we wished to act fairly and honestly with them' (1908, 90).

This seems a promising start for land dealings between Europeans and natives—the only dubious point being that the 'chiefs' were regarded as the sole claimants—but the situation was probably somewhat more complex. According to recent native evidence, Topulu and his brothers grew up in a village called Maren near Port Hunter. The village was controlled by two men known as 'the doors' (*bakup*) because 'they were so strong that no one could come into their place and start a fight'. Relying on their strength, the two 'doors' did as they pleased until one day they went too far. Their neighbours combined against them, attacked Maren, killing everyone except Topulu

and his brothers who fled to Molot village. By the time Brown arrived the three refugees had established themselves as 'big' men who between them dominated much of the northern section of the group. They felt in any case strong enough to give Brown his 'fine piece of high land' although it was taboo 'to all except the Tolai warriors as this was the place where they came to get strength for their fights' (D.O. Rabaul, File 34-3-33). The first permanent European settlement in New Guinea was thus probably situated on a 'sacred place' which had been 'sold' by three 'chiefs' who probably had no right to the land and only a doubtful claim to leadership.

Brown soon became less cautious in his land dealings. The church and the teacher's house in Raluana, Blanche Bay, for instance, were already long completed before Brown tried to 'buy' the land. According to Danks, who on this occasion got his 'first lesson in handling natives', he had some difficulties. However, at last 'the land was bought at what seemed to me a ridiculously small figure, but the people were abundantly satisfied' (Deane, 1933, 21-2). This sounds straightforward enough but once more there are indications that things were not quite so simple. Brown mentions in another context that the church and the teacher's house in Raluana had 'unfortunately been built on sacred ground, i.e. on ground on which no woman or any of the uninitiated boys can go'. Brown persuaded the men 'to remove the taboo by paying them for it'—the 'purchase' mentioned by Danks?—and afterwards he had to convince the women that it was now safe for them to enter the church (1908, 293).

Even if the Europeans neither dealt exclusively with 'chiefs' nor tried to acquire sacred places, buying land proved to be a tricky operation. After lengthy negotiations Danks bought land for the second main mission station in Kabakada on the north coast of the Gazelle Peninsula in 1879, paying a number of 'families' for the land. A house was built and Danks moved in without any objections, but one morning he found that 'the fence had been removed several yards within the proper boundary line'. He decided to ask some men to put the fence back where it had been, paying them 'somewhat liberally' for their work. The next morning the fence had again been moved, but Danks kept on putting it back until it remained. He found later that 'one discontented family' had caused the trouble, spending nearly all their share of the purchase price 'in trying to prevent our occupation of that which they themselves had freely sold'. Danks does not



state how this change of mind had come about. Instead he concludes this episode with a general comment:

When, later, I knew the character of the people I was devoutly thankful for that leading which taught me to act as I did. Nothing in the islands brings trouble upon strangers sooner than a tactless method in connection with the buying and occupancy of land (Deane, 1933, 25-6).

Danks found that the question of European land acquisitions also required some tact among Europeans. Explaining the tensions which had developed between Danks and the traders during his absence—mainly due to Danks's decision to 'enlighten' the natives on the labour trade—Brown wrote on 29 March 1880 to the General Secretary of the Mission, that the advice to the natives not to sell all their coconut land to traders had been another cause of offence. 'We tell them [the natives] that it is not right to impoverish themselves and deprive their children of the means of subsistence for the sake of a Musket or some merely temporary gratification'. On the other hand, Brown emphasised that the missionaries did not advise the natives against selling uncultivated lands. 'There are thousands of acres of land which we would gladly see sold and cleared'.

Although E. Hemsheim and his brother discussed at that time plans for establishing the first plantation in New Guinea and bought about 6000 acres in the north of New Ireland (n.d., 82), it appears that otherwise very little land was bought by Europeans for the purpose of cultivation, unless one counts the 'purchase' of the south of New Ireland by the Marquis de Rays's representative Rabardy in 1881. He bought more than a million acres for a pound of tobacco, twenty-five clay pipes and a few handkerchiefs from Maragano, who had been chased away from his village as a notorious adulterer and lived with a few followers on the off-shore island Lambon. Yet his master was way ahead of him, having sold over seven million acres for hard cash to prospective settlers and investors in Europe.

As Brown's letter suggests, the Europeans were at first mainly interested in existing native coconut groves, and their immediate aim was usually not so much to exploit these groves themselves, but to monopolise the copra trade with natives. J. M. Mouton (senior), for instance, complained that he lost a fortune because he did not have the arms to harvest the coconuts on his 'properties': 'for the moment there are only the natives to do this and we have to pay for the copra

as if the ground and all that grows on it did not belong to us' (Letter to Mrs Sapart of 18 March 1886).

One of the few Europeans not satisfied with monopolising the copra trade was T. Kleinschmidt, who had come to the Duke of Yorks in 1879 as a 'naturalist' employed by the Godeffroys. Danks describes him as a man with a decided liking for natives but very short-tempered with them. One of the things which irritated him particularly was the traditional distinction between right to land and rights to trees growing on the land. Possibly as a reaction to Danks's attempts to show the natives the foolishness of selling their coconut land for some trifles, he wrote angrily that the Mission should [instead?] tell the natives 'that land bought and sold according to rules all over the world elsewhere means the ground and trees, fruit etc., on the land and that whites will buy land only with that or some such understanding'. Not long afterwards Kleinschmidt went to Utuan Island in great wrath 'and there, losing control of himself, he did things which brought swift destruction upon himself and his two companions' (Deane, 1933, 152-3).

Was Kleinschmidt the first victim of a clash between primitive and Western land law? Did he die for the Western concept that trees are part and parcel of the land on which they grow? According to H. H. Romilly of the Western Pacific High Commission, who investigated the punitive expedition following Kleinschmidt's death, it was rather the usual mistake of dealing exclusively with 'chiefs'. When Kleinschmidt bought Utuan Island, Romilly claims, he paid only one 'chief' for it. 'As a matter of course, the island did not belong to the chief but to a tribe and the tribe did not consider that they had sold it, whatever the chief did'. However, the trees also come into the picture. Since the 'tribe' did not accept the sale by the 'chief', the natives continued picking nuts on the island and objected to Kleinschmidt doing so. 'On this Kleinschmidt sent them a message that he would shoot anyone picking coconuts there'. Then he went to Utuan with two of his men and while 'they were there, they were all three killed' (1893, 160).

This description fits very neatly into Danks's sketch of Kleinschmidt's character. Nevertheless, Danks himself gives a different version of Kleinschmidt's death. According to this version, which is confirmed by R. Parkinson, the death had no direct connections with Kleinschmidt's land dealings, but was the result of a dispute over the maxim that contracts have to be fulfilled. Kleinschmidt, Danks says, had arranged with the natives who 'sold' him Utuan that they would

serve as a crew in his boat whenever he wished. One Sunday [instead of going to church] Kleinschmidt asked them to take him to Birara on the Gazelle Peninsula but 'they refused and were very impudent' (Deane, 1933, 153). Parkinson points out that they had good reason for not wanting to go to Birara, since the people there were their arch-enemies. This, however, was irrelevant in the eyes of Kleinschmidt who 'angry in the extreme . . . decided to set an example'. He went to Utuan and began to burn down the houses and to destroy the canoes when he and his companions were attacked and killed by the natives who had hidden nearby (1887, 19).

This is not the only theory rivalling that of Romilly. I. H. Niau claims that Kleinschmidt bought 'a beautiful little island opposite Méoko' from 'some kanakas' in order to work undisturbed at his collections. The island had no real owner and Kleinschmidt was unaware that, under these circumstances, he had to pay 'all the neighbouring chiefs on the mainland'. Moreover, according to Niau, the buying of land involved, under native law, only 'the buying of the *products* of the land, not the land itself; [the] natives still retain[ed] the right of traversing it at will'. This last point, Niau says, was responsible for Kleinschmidt's death. The natives—from their point of view—still felt entitled to cross the island, whereas Kleinschmidt, who wanted to have peace and quiet while sorting out his collections, finally resorted to force in an attempt to expel intruders, 'but in the *mêlée* that ensued he received a crushing blow from a native club which split his skull' (1936, 77). All the familiar elements are there, but, as it were, standing on their crushed skulls.

Kleinschmidt was possibly the first to buy land as an investment but he was soon outdone by Farrell and Queen Emma. They began by buying the south of the main island in the Duke of Yorks and continued on a much larger scale in the Gazelle Peninsula after Farrell had left the employ of the D.H.P.G. in 1883, selling this firm his and Queen Emma's previous land claims with a profit of about 1000 per cent for more than \$2000. This was the first sign that land could mean big money and it is thus not surprising that a land buying epidemic broke out when the German flag was hoisted.

Queen Emma and Farrell bought all the land they could lay hands on. The D.H.P.G. instructed its agents, with less success, to do the same for the Neu Guinea Kompagnie. HERNSHEIM, although he did not believe in a boom, nevertheless bought large areas in the north of New Ireland in an attempt to secure his firm a trading monopoly

there. The land buying fever was not restricted to the three large firms. Their traders and agents pressed for changes in their contracts which had so far prevented them from doing business on their own account, hoping to sell the land they would buy later at a great profit to new settlers and especially to the Neu Guinea Kompagnie. At least HERNSHEIM'S employees succeeded, though rather late in the game when prices had gone up. J. M. Mouton (senior) complained that his land in the Gazelle Peninsula had cost him \$200, for which amount he could have bought 'almost the whole of New Britain' three or four years earlier (Letter to Mrs Sapart, 18 March 1886). His son, Octave, gives a vivid description of the situation in his *Memories*.

He and his father noticed that Farrell was buying land from the natives. Since others were doing the same, they decided to follow suit. Because he was well acquainted with the language and the customs of the natives, Octave had no difficulty in buying land. The only problem was to have their contracts with HERNSHEIM altered to allow them to do so. 'Fortunately HERNSHEIM was not inclined to buy land at that time, had we been with Farrell we [would] never have been able to buy land he wanted it all for himself'. Octave managed to buy about 5000 acres along Blanche Bay. He wanted to buy more and had already made preliminary arrangements but his father, who, Octave claimed, 'could not see further than his nose', was against it and Farrell bought the land. 'It was mortifying to me because I kept the natives from selling to Farrell I had all the names done and it was only a matter of payment and make an agreement.' On the other hand, Octave was lucky to get what he got since their neighbour, Brandt, had instructions from the D.H.P.G. to buy the land. However, he did not get the necessary trade goods in time and 'was not too anxious to see the firm having the land'. He therefore did not even bother to buy what was left. He still 'could have had a good slice, but when he got the goods to buy Farrell was a head, Parkinson made a bid sweep for several days he was busi buying for Farrell' (53-5).

As a result of this hectic land-buying the natives began to believe that all the land would be taken over by the German authorities—and it is not unlikely that certain settlers encouraged this belief. In the Duke of Yorks, for instance, the natives crowded around the Methodist Mission station 'pleading with Mr Rooney to protect their property'. Until then the Methodists had been unable to secure sufficient land for mission purposes 'but now the people would have sold us the whole island trusting us to reserve the land for their use'.

The Mission did not buy the whole island or what was left of it, but they did purchase 'a large tract' from the natives 'under these conditions' (Deane, 1933, 279-80).

While the settlers in the Bismarck Archipelago were almost falling over each other, Finsch had the north-east coast of New Guinea to himself in his efforts to acquire land for the Neu Guinea Kompagnie on 'the largest possible scale'. In Constantinhafen he made a start by buying 'a piece of land on which we built a house and landed some coal'. But already during his next stop, in Friedrich Wilhelmshafen, he found that it was 'impracticable' to buy land 'because the natives only laid claim to their gardens'. Besides 'it would hardly have been possible to find the owners since several settlements share one garden' (*N.K.W.L.*, 1885, 4-5).

From then on Finsch mentions no further attempts to acquire land in the published accounts of his journeys. However, these accounts are misleading. Finsch not only acquired one—seemingly—quite small block of land in Constantinhafen, he made seven other, large acquisitions in strategic positions along the coast. He had only stopped trying to *buy* land, instead taking 'ownerless' land into possession. He began doing this in Friedrich Wilhelmshafen and continued in Adolphhafen (Morobe), Deutschlandhafen (Finschhafen), Dallmannhafen (Wewak) and Angriffshafen (Vanimo) which was, even by today's standards, not a bad selection. He also acquired 'ownerless' land at the mouth of the Kaiserin Augusta River (Sepik) and, his weakest point, on the Hansemann Coast (between Sepik and Wewak) which he wrongly regarded as particularly promising.

For all his acquisitions Finsch used elaborate forms which had been issued by the Neu Guinea Kompagnie, although the land was officially acquired in the name of the D.H.P.G. According to the form for the purchase and sale of land certain—named—headmen sold and transferred to the D.H.P.G. in the name of their villages and tribes, acting for themselves, their heirs and successors certain lands—shown on an attached sketch—which had been hitherto their full and inheritable lawful property, including the foreshore, riverbanks and all reefs and islands within the distance recognised by international law, as well as all rights, claims and prerogatives of any kind attached thereto. The sellers also confirmed that they had already put the purchaser into possession of the sold property and declared that they would from now on only possess it for the purchaser. They further

explicitly agreed to the sold property being registered in the name of the purchaser as well as being placed under the protection of the Reich. In this context the sellers renounced all public and sovereign rights, including all mining rights, they held with regard to the sold property. Finally, the sellers agreed that the purchaser entered into possession and acquired ownership of all land between the Dutch border and the Huon Gulf 'which can at present be shown to be neither owned nor occupied by natives' (a phrase also used in the form for the taking into possession of ownerless land).

Considering this form one can only admire the genius of Finsch who certified on 17 October 1884 in Constantinhafen that the document had been read and translated to the sellers (six natives from Bongu, three from Gumbu and one from Korendumana) who had affirmed in his presence that they had fully understood its contents, comprehended the concluded contract, had received the purchase price (about \$15 worth of trade goods) and were fully satisfied.

The settlers in the Bismarck Archipelago did not use quite such elaborate forms, but also took care to get 'properly executed conveyances'. On 10 December 1881, for instance, five Duke of York natives subscribed their names on a document in witness of having received from Queen Emma \$104 in trade goods for about 1,500 acres of land in the south-east of the main island 'with all apertences thereto . . . including the foreshore', at the same time declaring that they were 'the right and lawful owners of the above described land'.

This was the situation according to the European documents; but, as Hensheim's *Memoirs* show, it had little to do with what actually happened when land was acquired.

In the olden days land was bought by pointing at it or, at best, by walking around it. Then one would hand over some trade goods to the natives and would make crosses with a pen they had touched under the document establishing the transfer of the land. These crosses were certified by another European who had witnessed the signing of the document. It was, of course, impossible to prove that the natives who signed the document were the owners of the land or that they understood the meaning of the document. Only actual occupation could guarantee the possession of the acquired land (80).

A deed of purchase and sale was important only among Europeans, in particular for the relations between the purchaser and a future colonial government. To give the documents additional weight, the

acquisitions were therefore 'registered' at the nearest national consulate, in the case of Queen Emma the American consulate in Sydney or with her father in Apia, in the case of HERNSHEIM in his own office on Matupi, since he was himself German consul for the Bismarck Archipelago.

HERNSHEIM illustrates how the acquisition of land continued after the deed had been signed and 'registered'.

I succeeded with some difficulty in acquiring a large block of land . . . at Simpson Harbour [Rabaul] . . . or rather, I was able to induce the natives to respect me as the owner of this land, since the concept of land ownership was known to them only in so far as cultivated land inside the tribe's sphere of power was concerned. As soon as the harvest was over, the individual right of ownership was terminated in the same way as it was probably terminated in Germany a thousand years ago, when there was, besides the cultivated fields, only the common of the tribe. I fenced the whole block with barbed wire as a manifestation of my possession which was later accepted and respected, after some 'owners', who had once planted bananas on the land or had cut a path across it, had been satisfied with some payment (n.d., 112-13).

The view that the natives in New Guinea had no concept of ownership of land as such and that all uncultivated land was therefore ownerless, was probably widespread among the early European settlers and colonial officials. But there were others who claimed, like Miklucho Maclay, the Russian anthropologist who made himself the spokesman of the natives of the 'Maclay Coast' at the time of the annexation, 'that each piece of ground, each useful tree of the forest, the fish in each stream etc., etc., *has a proprietor*' (Greenop, 1944, 164).

This difference of opinion was mainly due to different interpretations of the relations between a 'tribe' and its 'sphere of power'—which Maclay regarded as legal ownership whereas HERNSHEIM saw it as a purely political matter. Yet, this difference was of little practical importance, since those who shared HERNSHEIM's view still 'bought' the 'ownerless' land, partly because they wanted to have a purchase document vis-à-vis other Europeans, and partly because they realised that it was in any event necessary to compensate native claimants in order to establish and to maintain friendly relations with the local population. What is important, however, is that all Europeans knew their beautiful deeds were meaningless pieces of paper for the natives

and that the acquisition of land was a process which really began when the land was occupied.

As long as Europeans bought only small blocks of land for a mission or trading station and immediately erected buildings and fences, the natives knew what had happened, although they might not have fully understood that this meant a 'sale of land' and what a 'sale of land' meant according to Western law. But when Europeans began to buy large areas of land which they did not take into use, the natives simply had no idea what was going on. Moreover, most Europeans, instead of trying to 'enlighten' them, kept them in the dark as long as possible. Rather than trying to make the natives aware of the clash between primitive law and Western law, they tried their best to prevent it from becoming visible. They did not want to risk being killed like the short-tempered Don Quixote, Kleinschmidt, because they insisted on what, according to the face value of a document, were their legal rights. They preferred to conceal from the natives the consequences Western law could accord to a cross made upon a deed. At least as long as there was no strong colonial government to protect them, the settlers did not regard the acquisition of land as a legal transaction but as a game played according to political rules. They were not yet strong enough to insist on their 'rights'; they only prepared the ground by establishing paper claims, and they established about 500 claims to an area of approximately 700,000 acres, ranging from a claim to nearly 400,000 acres by Farrell and Queen Emma to the, at that time, negligible claims of the Sacred Heart Mission to probably not more than 10 acres.

One of the first measures and indeed the main activity of the Imperial Commissioner Oertzen was the preliminary registration of these claims. Having registered claims of German nationals on a voluntary basis since late in 1884, Oertzen issued on 19 February 1886 regulations which made it compulsory for all Europeans to present their titles for examination and possible registration. The settlers, in particular Farrell and Queen Emma, tried to treat this aspect of acquiring land as much as a political game as their relations with the native 'sellers'.

When J. M. Mouton presented his titles, Oertzen refused registration allegedly on the grounds that the land had previously been bought by Farrell. 'This was very clear to father', writes Octave in his *Memories*, 'that Farrell again was behind the scene and with his Samoan girls and champagne he he bribed the poor fool Van Ortzen'

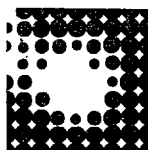


(56). Not satisfied with this success, Farrell persuaded Oertzen to send a man-of-war to destroy some huts the Moutons had built on the land for their native traders, which was probably not too hard since Oertzen was 'quite wild with father' who had told him to his face that he was being used by Farrell (*ibid.*, 57).

On the other hand Oertzen claimed, for instance, that he had protested vehemently, though in vain, to Farrell, after the latter had taken over a number of HERNSHEIM'S trading stations in New Ireland by force (KOSCHITZKY, 1888, vol. II, 242). Maybe it was Farrell's part to use pirate tactics whereas Queen Emma concentrated on more female weapons, the 'Samoan girls' being hers rather than Farrell's. This was at least the impression of HERNSHEIM, who regretted not being able to compete with her in this field rather than censuring her from a position of moral superiority. 'Queen Emma', he claimed, 'realised what was wanted and brought out a number of nice and approachable nieces and cousins from Samoa who did not fail to make Ralum the centre of attraction for all unmarried employees of the Neu Guinea Kompagnie'. Queen Emma herself, 'like the Empress Elizabeth of Russia, could accomplish miracles in love making and drinking' (*n.d.*, 152).

Even these miracles, however, had geographical limits and did not affect Hansemann in Berlin. In March 1886 Parkinson wrote to Le Hunte that the Neu Guinea Kompagnie had 'tried hard to overthrow our titles'—but 'it did not come to anything as all natives invariably agreed that they had sold the lands to us'. According to local tradition it is not impossible that Queen Emma's female weapons had something to do with this 'invariable' result, not to mention the somewhat different kind of influence exercised by her sister, Mrs Parkinson.

In the end the Moutons also succeeded in having their claims entered into Oertzen's preliminary register. It is characteristic of the atmosphere at that time that they found it necessary to smuggle out a letter asking the Belgian Consul in Sydney for protection, instead of posting it officially. They feared it would otherwise be censored and suppressed either by Oertzen or by Farrell or HERNSHEIM on whose vessels the mail travelled to Sydney. The Belgian Foreign Office took the matter up with Berlin and Oertzen was instructed to list the Moutons' claims (Mouton, *n.d.*, 57-8). The European Governments played the land game too according to political rules and did not regard the courts as obvious referees.



When New Guinea became a German colony, German colonial law did not yet exist. It came into being when, early in 1886, the Government introduced a Bill regarding the laws in the German colonies. The Bill followed the example of the older colonial powers by transferring the general power of government to the head of state, the German Emperor. The legislative bodies were left with an indirect control via the budget which governed the expenditure of the Reich in the colonies and required their approval. But this indirect control had little significance for New Guinea since the Neu Guinea Kompagnie was to pay for the administration of this colony so that no Reich expenditure was involved.

Despite the aim of enabling the Emperor to govern the colonies with their different and changing conditions by way of decree, the Bill did not give him full legislative freedom. Instead, it directed that the 'Statute regarding Consular Jurisdiction' of 10 July 1879 should also apply in the German colonies.

The Bill was passed and came into force on 16 April 1886 as the 'Statute regarding the Laws in the German Colonies'. This Statute did not of itself introduce any laws into New Guinea. This was done by the 'Ordinance regarding the Laws in the Colony of the Neu Guinea Kompagnie' of 5 June 1886 which became effective on 1 September 1886. This date thus marks the beginning of a colonial land law in New Guinea. It was a modest beginning indeed since Prussian land law was transplanted without major changes, although it was to apply to natives only in so far as especially directed.

This situation was not very satisfactory and the Neu Guinea Kompagnie began to press successfully for changes as soon as it had

established itself. By the Statute of 7 July 1887 the Emperor was authorised to regulate the law of real property in the colonies by way of ordinance and in doing so to vary the Prussian law which was otherwise to apply. Less than two weeks later, on 20 July 1887 the 'Imperial Ordinance regarding the Acquisition of Ownership and the Charging of Land in the Colony of the Neu Guinea Kompagnie' was enacted. It came into force on 1 October 1887 and formed the basis of colonial land law in New Guinea until 1 April 1903.

The 1887 Ordinance was still based on the principle that Prussian land law should apply in New Guinea, though, as a rule, again only to the European population. But this principle was modified in various ways because of the different local conditions. An equally important object was to make special provisions for the land acquisitions Europeans claimed to have made prior to the annexation.

Theoretically the Emperor could have enacted laws declaring all these acquisitions invalid. The historical development of German interests in the Pacific, however, made this unlikely. Moreover, the Emperor had already legally bound himself to protect European land claims. The Imperial Charter granted to the Neu Guinea Kompagnie on 17 May 1885 stated that the German Government would issue regulations regarding the preservation of land rights which had been acquired *bona fide*. Besides, the English/German Declaration of 10 April 1886 stated specifically that all disputed land claims by a British subject in a German possession (and *vice versa*) had to be examined by a mixed commission to be nominated for this purpose.

Since the Imperial Charter of 17 May 1885 had granted the Neu Guinea Kompagnie the exclusive right to acquire land, the 1887 Ordinance had first of all to fix precise dates, after which land acquisitions of other Europeans were to be regarded as invalid because they infringed this monopoly. The dates chosen were the 21 May 1885 for Kaiser Wilhelmsland and the Bismarck Archipelago (the day when the Imperial Charter had been published—although the monopoly had been granted four days earlier) and the 28 October 1886 for the northern Solomons (the day when S.M.S. *Adler* had proclaimed German sovereignty—although the monopoly was granted about six weeks later on 13 December 1886).

The rules according to which it was to be decided whether the acquisition of land by Europeans prior to these dates was valid, were set out in Section 7.

As regards the taking possession of ownerless land the claim to ownership is valid, if the ownerless land has actually been taken into possession . . . and if the possession has not been relinquished or otherwise lost in the meantime.

As regards the acquisition based on agreements with natives it is required that a contract has been concluded in writing or orally between the owner and the acquirer with the intention to transfer and to acquire the ownership and that the possession has been transferred and has not been relinquished or otherwise lost in the meantime. [This meant that actual occupation could be replaced by an agreement with the owner to possess from now on for the acquirer.]

Before reaching Section 7 the European claimant had to take several other hurdles. Firstly, Section 10 directed that claimants forfeited all rights if they did not apply for the registration of their ownership in the Land Titles Register (Ground Book) prior to 1 March 1888. This provision was made to enable the Neu Guinea Kompagnie to ascertain which lands were already owned by Europeans and which it could acquire in exercise of its monopoly. For this reason it applied only to claims which had so far not been registered at all. If a claim had been listed in the provisional register established by Oertzen—a course which had actually been followed in most cases—it was for the Company to take the initiative. It could ask the Registration Office to summon a claimant by special order to apply for registration, warning him that he would otherwise forfeit all rights.

When an application for registration was made, the Registration Office had to inform the Neu Guinea Kompagnie which could raise objections on the ground that its monopoly had been infringed. If an objection was made, the claimant had to take court action against the Company, otherwise the Registration Office had to examine the remaining aspects of the claim. This meant primarily the claimant had to satisfy the Registration Office that he (or a predecessor) had acquired the land in accordance with the rules laid down in Section 7. The Registration Office could also investigate the matter *ex officio* and was expected to do so unless the claimant had been in undisturbed possession of the land for at least three years.

Land acquisitions the Neu Guinea Kompagnie made in exercise of its monopoly after the annexation were governed by the 'Directions regarding the Acquisition of Land by the Neu Guinea Kompagnie', issued on 10 August 1887. They were not drafted as abstract rules but

as concrete instructions for the agents of the Company actually acquiring land.

The Directions distinguished between the (direct) acquisition of ownerless land and the (indirect) acquisition of native land. The first duty of the agent was to find out whether land was native land or ownerless. For this purpose the agent had to investigate carefully:

- (a) whether the land was cultivated or otherwise used by natives,
- (b) whether it was marked in a traditionally recognised way as belonging to an individual or a community, and
- (c) whether, because of this, ownership of the land was claimed by certain persons.

If the inspection revealed signs of any existing claims of ownership, the agent had to interview the natives living nearby to find out which persons claimed the land and what kind of claims they made. For this interview and the following discussions the agent had—if possible—to call in an interpreter who knew the local language. The course of the investigations, especially the questions and answers relating to the existence of native claims, had always to be recorded in writing.

If the investigations showed that land was subject to native claims, it was not to be taken into possession. Instead the agent had to obtain instructions as to whether or not he should open negotiations with the allegedly entitled persons regarding a transfer of the land. In case no signs could be found that the land was in native possession, or in case it proved to be impossible to establish the meaning of such signs, either because no natives lived in the vicinity or because they could give no explanation, all observations as well as any attempts to get information had to be recorded in detail. Only after all that had been done could ownerless land be taken into possession. For this purpose it had first of all to be marked with posts, stones, fences or other signs which made it apparent that a certain area had been taken into possession. Afterwards the taking into possession had to be certified. The certificate had to describe:

- (a) the position and the approximate size of the land,
- (b) possible natural boundaries, and
- (c) the number and kind of marks which had been used to manifest the taking into possession.

The certificate had further to be accompanied by a sketch map showing as precisely as possible the position of the land and that of the individual boundary marks.

A second round of investigations started when the agent was instructed to negotiate for the acquisition of land claimed by natives. He had to begin by finding out:

- (a) which person or persons were, according to the natives involved, entitled to decide whether or not the land was to be transferred permanently,
- (b) what traditional procedures had to be adhered to to make such a transfer valid and
- (c) to whom the agreed price had to be paid in order to discharge the purchaser from his stipulated duties.

If the investigations revealed:

- (a) that the right to sell or to receive the purchase price was held by more than one person or
- (b) that the sale of land in the possession of an individual needed the approval of other persons in order to be valid,

all interested parties had to take part in the negotiations. If possible they had to be assembled at one meeting. Otherwise the agent had to fix a date by which the seller had to procure the approval of all other persons with interests in the land.

When agreement had been reached, a deed of transfer had to be drawn up which fulfilled all prerequisites stipulated by German law for a valid contract of purchase and sale. The most important were repeated in the Directions. The deed had:

- (a) to describe the land which was to be transferred in such a way that it could be clearly and easily recognised,
- (b) to certify the intention of the seller(s) to transfer the ownership and the intention of the buyer to accept this transfer,
- (c) to state the purchase price and when and to whom it was to be paid or had been paid,
- (d) to state when the possession was to be or had been transferred.

In addition the deed had to certify that the meaning of the transfer of the land had been explained to and understood by the native seller(s). In particular he had to understand:

- (a) that he and his family would lose for ever all rights to the land,
- (b) that he could not transfer the land again, but
- (c) that the buyer could use and dispose of the land at will.

This deed had to be signed by the agent and by the native sellers

(with their mark as long as they had not learned how to write), after the agent had explained to them that their signature would make the agreement binding. The agent was instructed to take care that all co-owners, usufructuaries and persons whose consent was required for the transfer put their marks under the deed.

If possible the agent had to call in an interpreter and at least a witness had to be present throughout the negotiations who had to certify that he was convinced the seller(s) had understood the implications of the transfer. His presence gained special importance when the native seller(s), though willing to transfer the land, refused to sign the deed for other reasons. In this case the transfer became valid if the witness certified on the deed that the seller(s) had agreed to the transfer and that his refusal to sign the deed was for other reasons.

As a rule the possession of the land had to be transferred and the purchase price had to be paid at the same time as the deed of transfer was signed. If transfer or payment took place at a later date, it had to be recorded in a separate document for which the same procedure as that for the deed of transfer of ownership had to be followed.

From a legal point of view nothing would have prevented the German authorities from disregarding all native land rights. This had indeed been the attitude of European colonial law, at least since 1493 when Pope Alexander granted the King of Spain full ownership of all lands west of a certain line which at that time had not been in the possession of a Christian King or Prince.

This attitude was closely connected with the ideas of feudal land tenure which made no clear distinction between sovereignty and ownership. As a result it became a principle of colonial law that all lands in areas not governed by sovereigns recognised by international public law were also ownerless and became the (private) property of the crown (state) which annexed such an area as a colony.

Theoretically this principle was still in force when New Guinea was annexed by Germany, but times had changed and its application was unlikely. At the Congo Conference which took place at that time in Berlin, the American representative even attempted to have it formally abolished by moving 'that the right of indigenous tribes to dispose freely over their hereditary lands should be guaranteed'. This motion was not carried since it raised many delicate questions the conference would not be able to answer, as the German chairman, the Assistant Secretary of State, Busch, pointed out (Stengel, 1904, 309). This did

not mean that the German Government was unwilling to protect native land rights in the German colonies, but rather that it hesitated to formally adopt a general principle without a detailed discussion of its practical consequences.

For this reason none of the documents relating to the annexation of German New Guinea contained a solemn promise to protect native land rights (as did Commander Erskine's proclamation in Papua). Instead, the Imperial Charter of 17 May 1885 only announced that the German Government would enact regulations necessary for the protection of natives. Such regulations, however, were not enacted during the period of the Neu Guinea Kompagnie. The Imperial Ordinance of 20 July 1887 only reserved the right to restrict the ownership of land acquired by Europeans 'to protect the natives or other public interests'.

Still, the Charter, the Ordinance and especially the Directions issued by the Neu Guinea Kompagnie on 10 August 1887 show clearly that native land rights were to be respected. Neither the Reich nor the Neu Guinea Kompagnie acquired a 'basic title' to all land in German New Guinea (as the British Crown probably did with the annexation of Australia). The annexation had only the effect that New Guinea came under German sovereignty but did not influence private rights to land. This applied not only to land which was subject to native or European rights, but also to ownerless land. The concept of 'crown land', even restricted to land without a private owner, was not part of German colonial law. It merely recognised the exclusive right of the state to appropriate ownerless land. However, this could not be done by a general proclamation. The land had in each case actually to be taken into possession.

In the case of German New Guinea this prerogative was transferred to the Neu Guinea Kompagnie by Imperial Charter. The grant was confirmed by the Ordinance of 20 July 1887 which directed that no other person could acquire ownership by the occupation of ownerless land after 21 May 1885 (or 28 October 1886 in the northern Solomons). This gives the impression that these dates were decisive for the question whether or not land was ownerless, but this is only partly correct, since the colonial land law applied in principle only to Europeans. The Neu Guinea Kompagnie's appropriation monopoly thus only excluded other Europeans but not natives from the appropriation of ownerless land. As to whether land was ownerless or native land, the critical date was not the 21 May 1885 (or the 28 October



1886), but the date the Company actually acquired the land by appropriation. Natives could continue to establish traditional claims to ownerless land until it was formally appropriated by the Company.

It is the main characteristic of the Imperial Ordinance of 20 July 1887 and the Directions of 10 August 1887 that they regarded the acquisition of land by Europeans in New Guinea as an exclusive and fairly simple legal matter. This was possible because they were both based on the assumption that there was a traditional system of land law in New Guinea which was essentially the same as that in Germany. This assumption was a result of the theory of the evolution of law. According to this theory primitive law was not basically different from Western law but only less sophisticated. There was only one law, the law of mankind. The differences between legal systems in different parts of the world were due to the fact that the peoples and their institutions had reached different levels of development. The introduction of Western law in New Guinea could thus not be regarded as the forcing of an alien system of law upon people who had legal concepts of their own. Rather it was a humanitarian act, the gift of a more highly developed form of their own law, a gift similar to the higher religion brought by the Christian missionaries.

All one had to do when applying this theory to land acquisitions in New Guinea, was to reduce the prerequisites for a valid transfer of land according to German law to a minimum. These basic rules, it was thought, could then be applied without major difficulties to land dealings between Europeans and natives since their traditional laws (according to the theory) contained the same elements beneath their exotic surface.

This view comes out particularly clearly in the Imperial Ordinance. The draftsmen did not even attempt to take into account possible differences between German and traditional law. Without having to know anything about the traditional law they could (according to the theory), for instance, be quite certain that it was bound to contain a concept of land ownership, though probably in a rudimentary form and possibly dressed up with all sorts of barbaric customs. Nevertheless, the basic concept had to be there, and that was all that mattered since the concept 'ownership' used in the Ordinance was not used in the technical meaning it had acquired in Germany by 1887, but was *the* concept of ownership forming part of each and every legal system.

From this point of view there could be no clash between two

basically different systems of law which made it necessary to treat the acquisition of land either as a political problem or to develop an elaborate set of conflict norms. The acquisition of land could be treated as being governed by one straightforward set of colonial land laws. If an acquisition was valid according to these laws it would stand, and if it was not, it would fall. In consequence the Ordinance made provisions neither for accepting a European land claim *extra gratia* nor for the rejection of such a claim, for instance when no fair price had been paid to the native owners. There was no need for equity, the law was sufficient.

The Directions were less extreme. They show a great degree of consideration for native custom, although it appears in retrospect somewhat ironical that, for instance, provisions were made for the special case of custom not allowing natives to *sign* a contract of purchase and sale, whereas the possibility that custom might not recognise the permanent transfer of land at all was disregarded. However, considering that the Directions were issued in 1887, the draftsmen succeeded surprisingly well in feeling their way into custom. Instead of speaking of 'tribes' and 'chiefs', they avoided these terms and spoke cautiously of 'heads of families and other similar groupings in so far as they exist'. They not only distinguished between individual and communal ownership, but also saw the possibility of an individual owner requiring the consent of other persons before he could dispose of his land, and they made eager use of first reports that natives in New Guinea used certain marks to manifest their ownership.

Still, it was largely a guessing game which resulted because of its ambitiousness in a set of rules so poorly drafted that it makes a systematic analysis virtually impossible. The draftsmen distinguished between ownerless and native land, but defined neither of these concepts and made provisions suggesting that the agent was in practice supposed to distinguish instead between land which was claimed by natives and land which was not subject to native claims. On the other hand they distinguished between claims of ownership and other claims and between alleged entitlements and actual possession. In the end, however, all these distinctions were disregarded and the agent was instructed to find out who could decide whether land was to be transferred.

The rules regarding the form of transferring native land provide another illustration of the draftsmen's attitude. The agent was instructed to investigate which requirements had to be fulfilled to make

a permanent transfer of land valid according to native custom. But the draftsmen shrank from taking the consequences. They did not direct that a transfer *had* to be valid according to native custom. Instead they withdrew onto the safer ground of German law. German law and German law alone was to decide whether or not a transfer of land was valid. The agent merely had to make sure that the native sellers understood the meaning of such a transfer.

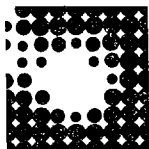
This withdrawal was not caused by a hidden intention to disregard native land rights. It was mainly the result of not really knowing what to do with traditional law. The draftsmen were convinced that native land rights could be adequately protected within the framework of German law. However, what the Directions—as well as the Imperial Ordinance—did not do, was to protect native (economic) interests. The colonial law acknowledged native land rights but did not prohibit the voluntary sale of land the natives required for themselves.

On the other hand the Directions did not provide for the compulsory acquisition of native land either; legally the natives were free to decide what land they wanted to sell. Legally they were regarded as equal to Europeans and capable of looking after their own interests and not as minors under the guardianship of an administration which decided for them where their best interests lay. The days of an all embracing colonial paternalism had not yet come for German New Guinea, although the Imperial Ordinance intimated that they were not too far away by indicating that the protection of natives was not a matter of justice but of public interest.

This did not mean that the Neu Guinea Kompagnie was not prepared to leave the natives sufficient land as a matter of policy, but it believed that there could and should be a strict division between land law and native policy. To decide whether and how much land should be acquired was a question of policy, but the acquisition of land itself was exclusively a matter of law. This was at least the theory, but even the Neu Guinea Kompagnie's Board of Directors was worldly enough to have some doubts as to whether it would work. It had misgivings about leaving it to the courts to decide whether or not a land acquisition was valid and a considerable interest to place the title to any land it acquired beyond any possible legal attack.

## Land Dealings under the Neu Guinea Kompagnie

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Although Finsch had formally taken possession of the harbour and all adjoining ownerless land in Finschhafen in 1884, the expedition sent out by the Neu Guinea Kompagnie to found a station there acted as if no land had been acquired. The Company men investigated the harbour, selected the tiny island Madang as the most suitable place and bought it 'with all trees and plants growing thereon from the natives Jessari and Aru, using the forms placed at our disposal' (*D.K.Z.*, 1886, 97).

The natives later told missionary J. Flierl that this first purchase had, from their point of view, not been a very formal affair. They could only remember that the Europeans had put an axe in their hut and had said: '*gigia*', which means 'gone' (1929, 97). The natives found this behaviour rather amusing and the Europeans continued buying land around the harbour. Between 5 November and 17 December 1885 they made seven purchases, but the total area so acquired was probably not larger than 100 acres. Moreover, after the two Company steamers had left for Australia, war canoes gathered in the harbour and there was the familiar warning from a 'friendly' native that it was planned to kill all Europeans.

By January 1886 the relations again became friendly and the Europeans decided to profit from the existing harmony by trying to acquire land on a larger scale. They told the natives of the neighbouring village Suam 'frankly and plainly and distinctly' that they wanted 'to buy more land, much more land, as much as we indicated by drawing a circle with our hands. Strangely enough', the Company's medical officer O. Schellong entered into his diary, 'no one was surprised. On the contrary, they were full of enthusiasm . . . or at least pretended to

be.' The 'alleged land owners' accompanied the Europeans back to the station and it 'was delightful to watch how much fun they had when signing the luxurious form of our contract of purchase and sale' (1934, 49-50).

This was in March; at the beginning of November 1886 Schellong recorded that the natives of Suam and Ssiu had moved their gardens further away from the station. He believed that this was done solely for agricultural reasons (*ibid.*, 102). Three weeks later he realised he had been wrong.

Today the village Suam passed into our hands. The natives probably did not feel safe any longer because of the large number of coloured labourers we now have on the station. They seemed fully satisfied when we paid them one axe and two pieces of iron for each hut. . . . They are not worried about where to go. . . . Unfortunately it becomes apparent again that the Europeans always displace the natives, despite all the consideration with which we treat them (*ibid.*, 103).

Most of the Suam people moved a short distance east to the Lange-mak Bay where they founded the village Kamlaua. The Europeans followed them and established an agricultural station. A year later, on 30 November 1887, the Neu Guinea Kompagnie bought the new village with the surrounding land and J. Flierl of the Neuendettelsau Mission in nearby Simbang began to press for native reserves, especially for those natives 'who had sold all their land' (*K.M.*, 1886, 76).

Finsch's only land purchase was also disregarded when a second station was established in Constantinhafen in 1885. But the Neu Guinea Kompagnie found it more difficult to buy land there than in Finschhafen. Administrator Schleinitz reported in 1886 that the natives highly valued the land they used and were not prepared to sell any of it. On the contrary, they had offered the station manager 'many pigs and the like' to get back a small plot he had previously bought for agricultural experiments. Schleinitz could only express his hope that it would be less difficult 'to acquire the grass land which is also available and that the natives do not object to the cultivation of the bush country' (*N.K.W.L.*, 1887, 36).

The tone of the reports changed when J. Kubary, a former 'naturalist' with extensive experience in Micronesia, became station manager in 1887. During the next two years he succeeded in acquiring most of the land bordering the Astrolabe Bay, an area of about 80,000 acres.

On 7 October 1889 he informed the Administrator that further acquisition of useful land was impossible if a friendly relationship with the native population was to be maintained (Phillips, 1932, 13).

Kubary began in the vicinity of Constantinhafen where he reached an agreement with the natives as a result of which they fully recognised a large complex of four to five square miles as property of the Neu Guinea Kompagnie (Z.A., 2942). On instructions from Berlin he then worked his way west and north to Friedrich Wilhelmshafen. The first large purchase was concluded with the natives of Bogadjim and is described in the Company's journal in the same idyllic way in which Schellong described the purchase of Suam village the year before.

The cession of the land caused neither discussions nor differences of opinion, young and old agreed. All spoke against the northern part, all favoured the southern part and pointed out areas which were particularly suitable for cultivation. When the payment was spread out before the elders, they showed no desire for more and did not follow the suggestion to distribute it. The adult males, who sat in front of the house, came in and grabbed things in handfuls and carried them outside . . . until everything was gone. Then the discussions about who should get more and who should get less began. The elders sat in the meantime quietly inside . . . and commented jokingly that they themselves had not got anything, which was promptly answered with several additional gifts. The women performed a cheerful intermezzo. Angry with the men who greedily divided a large bowl of pearls among themselves, unwilling to share with the pleading women, they went to Mrs Kubary and asked her innocently whether she was interested in buying coconuts for pearls. When she agreed the women disappeared and returned after an hour with 300 nuts which they sold as their personal property independent from the men. Triumphant they took the pearls . . . which were distributed, and began with a great deal of laughter to string them on necklaces (*N.K.W.L.*, 1887, 21-2).

Neither the Imperial German Administration nor Mr Justice Phillips who investigated the matter in 1932 could see anything idyllic in the agreements of 9 November 1887 and 13 September 1888. In these Kubary acquired the land between the River Gogol and the Gum River from the Bilibili, and the land between the Gum River and Friedrich Wilhelmshafen from the Jabob. Phillips found that the Bilibili as well as the Jabob, both groups of potters living on small offshore islands, did not own any of the land they sold and that they probably did not understand that they were supposed to have sold land at all.

Although Kubary held different views, he was fully aware that he had not concluded straightforward purchases of land. In a report on 13 September 1892 he summarised how he had understood the land acquisitions in 1887-8.

. . . it was at first only a question of acquiring rights to the land of the natives well disposed towards us in order to pave the way to a friendly understanding with them. More detailed explanations as to the acquisition could only come in time as a result of the land being taken into use. In the meantime the only thing that mattered was to maintain friendly relations with the vendors and thereby preserve the rights acquired (Phillips, 1932, 13).

Kubary knew that 'with these kinds of acquisitions of land subsequent arrangements are more or less inevitable', but he still regarded them as a useful start which could prevent many misunderstandings by familiarising the natives gradually with the idea 'that later many white people would come and settle on the land sold' (*ibid.*).

In his comments when forwarding this report to the Board of Directors in Berlin, the new Administrator Schmiele did not go that far. Still, he did point out that 'in spite of careful purchase, subsequent rights over small areas will [probably] be found'. He strongly recommended that in such cases 'subsequent compensation be granted, instead of provoking bad feeling and the enmity of the natives by taking possession which, in their eyes, would appear to be a breach of their right' (*ibid.*, 14). Despite these warnings Administrator Ruediger certified in March 1896 without any restrictions, that the Neu Guinea Kompagnie had become the owner of the land and the Imperial Judge Krieger registered the Company's title as a matter of course without any investigation.

When Couppé found that the Sacred Heart Mission had to expand inland because Queen Emma, who claimed most of the coast, would not allow him to establish stations on her property, he made several expeditions in a southerly direction. During one of them he discovered a large uninhabited area north of the Warangoi River. He informed the Neu Guinea Kompagnie which in May 1893 took an inland area of about 15,000 acres as ownerless into possession.

On 27 July Couppé asked the Board of Directors to grant the Mission about one third of the land so that it could establish a Christian native village for the 'orphans' it brought up in its boarding

schools. Couppé emphasised the part the Mission had played in the acquisition of the land which he described as inaccessible and thus of no value to the Company, but the Board was not impressed. About a year later it answered that it could not comply with Couppé's request, since reports had stressed 'the rich stock of valuable eucalypts' and drawn attention to the fact 'that the transport of the timber will be made much easier by the nearness of the [Warangoi] river' (Linckens, 1921, 22).

The Company's appetite had been whetted. When announcing that possession had been taken of the ownerless land north of the Warangoi, it also reported that preparations had been made to preserve for the Company an area of about 25,000 acres along the coast between Cape Gazelle and Cape Palliser 'which has been abandoned by a previous occupant' (*N.K.W.L.*, 1893, 26). The 'previous occupant' was Queen Emma who claimed to have acquired the land prior to the annexation but had omitted to have her claim registered in time.

It appears that the area was acquired in two stages. In 1896 about 13,000 acres of 'ownerless' land between Cape Gazelle and the Warangoi were registered for the Neu Guinea Kompagnie whereas the less important 'ownerless' land between Warangoi and Cape Palliser, comprising about 37,000 acres, was registered four years later.

The registration of Kubary's land acquisitions in the Astrolabe Bay and the land between Herbertshoehe and the Warangoi in 1896 finalised the land acquisitions the Neu Guinea Kompagnie intended to make before handing the administration over to the Reich. But then the proposed agreement was defeated in Parliament in 1896 and the debates showed that the majority was strongly opposed to granting the Company further land concessions. Nevertheless the Company claimed that, far from using its monopoly to acquire as much land as possible before it was too late, it had shown great restraint since it had opened negotiations with the Reich (*N.K.W.L.*, 1898, 6). On the other hand the influential *Koelnische Volkszeitung* claimed on 23 September 1899 that the Neu Guinea Kompagnie had given orders to buy the entire coast of Kaiser Wilhelmsland before the Reich took over.

The Company was defended by the former Imperial Judge Krieger (who had registered Kubary's land acquisitions). Krieger claimed the Company had acquired only a negligible area and supported his claim with a summary of (what he said were) the Company's land holdings



at 1 April 1899 when the Reich finally did take over. According to Krieger the Company did not own a single piece of land between the Dutch border and Berlinhafen. In the vicinity of Berlinhafen it owned about 35,000 acres. The land holdings around Hatzfeldhafen, Finschhafen and in the Astrolabe Bay added up to a similar total. Between Finschhafen and the Papuan border only land for a trading station had been acquired. Apart from this only a few small areas had been bought for stations connected with Lauterbach's Ramu Expedition in 1898 (*D.K.Z.*, 1899, 380).

Though the Neu Guinea Kompagnie probably gave no orders to buy the entire coast of Kaiser Wilhelmsland, the journalistic exaggerations of the *Koelnische Volkszeitung* probably come closer to the truth than Krieger's 'sober facts'—the area of the trading station in the Huon Gulf, for instance, proves to have been almost 4000 acres. However, it is just possible that Krieger was unaware of things having changed in New Guinea after he left. The land bought for a station at the mouth of the Ramu in 1898 may have comprised only a few acres but during the last week before the Reich took over four additional blocks of altogether about 50,000 acres were bought.

Although it is likely that P. Luecker who made most of these acquisitions acquired more land than he was supposed to, there is little doubt that the Neu Guinea Kompagnie intended to prepare itself for an uncertain future by acquiring land in promising or critical areas. Still, it did show a certain restraint, in particular in the Bismarck Archipelago. It formally took possession of the 'ownerless' land south of the Warangoi. It occupied the western side of Weberhafen in connection with Hahl's attempts to stop the raids of the Tolai on the Baining. It took the opportunity of buying the Vitu (French) Islands because the local trader, Peter Hansen, (who once looked as if he would become as 'King Peter' a rival of Queen Emma) had got into financial difficulties—and there were others who would have gladly done the same. But the Neu Guinea Kompagnie made no attempts to acquire large areas of land in New Ireland, the northern Solomons, the Admiralties or New Britain outside the Gazelle Peninsula.

Even without establishing further paper claims, the Neu Guinea Kompagnie now had a comfortable lead over Queen Emma with about 500,000 acres compared with her mere 330,000. This brought the total of European land claims in 1899 to about 950,000 acres, a figure which would have been well over a million had the Neu Guinea Kompagnie not at that time formally dropped all claims to land

Finsch acquired in Kaiser Wilhelmsland. Moreover the 50,000 acres the Company had acquired between Cape Gazelle and Cape Palliser had previously been claimed by Queen Emma.

Apart from about 1000 acres the Neu Guinea Kompagnie had granted to the Sacred Heart Mission in Weberhafen and a slightly larger acreage granted to the Neuendettelsau Mission on Sattelberg near Finschhafen, hardly any land had been transferred to other settlers. There had also been comparatively few land dealings between settlers. Kleinschmidt's heirs sold most of their claims, but the only person to make a modest fortune out of the land speculations at the time of the annexation was Dupré, who sold his land to Couppé and retired in 1893 on a comfortable pension to France.

The problems caused by the large European land acquisitions were first officially discussed when Couppé was presented in 1894 with the native districts Kalili and Wairiki, about 15,000 acres inland of Herbertshoehe, to enable him to carry out his mission activities undisturbed. The gift was made by R. Parkinson, although it was probably rather the doing of his wife, Phebe, who, in contrast to her sister, Queen Emma, was a strong supporter of Couppé.

Schmiele had (as Imperial Judge) provisionally registered Parkinson's claims to Kalili and Wairiki in 1891. He had also investigated the matter. Although the native evidence had suggested that Parkinson had 'forged' the purchase documents, Schmiele had taken no action. He had not even informed Parkinson (at that time the Neu Guinea Kompagnie's manager) of the accusations which had been levelled against him. In 1894, however, having been appointed Administrator in the meantime, he made a furious attack on Parkinson's title in a letter to the Imperial Judge Brandeis in order to prevent the gift to Couppé from becoming effective.

Schmiele at first argued that the natives had never sold the land to Parkinson. However, when Brandeis questioned them, they 'invariably' confirmed that they had. This did not stop Schmiele from instructing the Company's local manager to object to Parkinson being registered as the owner of the land. He only changed his reasons and now argued 'that the purchase of land which has native villages on it is immoral and as such cannot be fully recognised by the Administration' (Couppé to Hespers, 15 October 1894).

Parkinson answered the Company's objection by bringing an action against it to have his ownership established in court. The case was

decided by Hahl, as Imperial Judge, in December 1896 in favour of Parkinson, but the Neu Guinea Kompagnie appealed and the appeal was still pending when the Reich took over in April 1899. As Hahl's decision did not survive, his reasons and the precise terms are not known. However, on 15 October 1894 Schmiele's attacks caused Couppé to write a lengthy letter on the subject to Canon Hespers in Cologne.

Couppé, like Hahl, accepted the early land acquisitions as legally valid although he was aware that 'the native sellers did not foresee all the consequences of their action'. On the other hand he agreed with Schmiele that it would be highly immoral to take effective possession of all the land and to exile the natives living thereon. Yet, he denied that Schmiele was in a position to pass a moral judgment in this matter. Somewhat overshooting the mark, he argued that the most immoral land acquisitions were not those of Queen Emma, Mouton and Parkinson, but the subsequent acquisitions of the Neu Guinea Kompagnie. When Parkinson had bought Kalili and Wairiki the natives still had the vast tracts of entirely uninhabited land on the Warangoi River which the Company had later taken into possession. The other districts bought by Queen Emma and Mouton had also been surrounded by many other districts which were only sparsely populated, but the Company had again bought them as an extension of the plantation in Herbertshoehe. It was bad to acquire land on which many natives were living, Couppé claimed, but worse to acquire adjoining uninhabited or sparsely populated land because it took away 'from the natives the only land which they had to retreat to and to live upon.'

This argument is hardly convincing, but although it takes up much room in Couppé's letter, it was only a sideline. His main interest was to direct the German Government's attention to the explosive situation in the Gazelle.

In my humble opinion something must . . . be done to reserve for the natives a part of the land which they sold so that they can settle there and live in the certainty of not being forced to leave in the future. If the Government were simply to intervene in a friendly manner I am sure that with the exception of the Neu Guinea Kompagnie all the landowners would willingly make this grant which justice demands. . . . [But the Company] does not worry in the least about the natives' interest . . . especially when its material interests are at stake.

In his letter to Hespers Couppé also claimed, if the Mission should become the owner of Kalili and Wairiki 'far from displacing those [natives] who live in these districts . . . [it] would seek to attract the neighbouring natives into' them. Vis-à-vis the native inhabitants of the Gazelle Peninsula's north coast, where he had actually acquired land from Dupré—though admittedly much smaller areas and for economic reasons—Couppé did not show quite the same generosity.

In a letter of 29 June 1895 Couppé protested to Administrator Ruediger against the insinuation that recent native unrest on the north coast had been caused by the survey and the occupation of Dupré's land. 'The Mission not only did not chase any natives from its land, but even left them freedom to plant what they liked'. During the following year an attempt was made to limit this freedom and to give the natives instead a defined reserve. On 10 September 1896 Couppé wrote to Hahl: '[We] decided to leave the sixty or eighty natives who lived there the land necessary for their livelihood. By doing this we thought to satisfy the needs of simple justice.'

According to recent native evidence the setting aside of a reserve was not merely a sign of generosity but the result of native pressure. '[A] big man, Tomburerau . . . finding that he had lost his land, kept going to Couppé importuning him for payment. This led the Bishop to give the southern block back to the people as garden land' (D.O. Rabaul, File 34-2-7). In any case, it did not satisfy the natives who persistently claimed that they had never sold the land. In answer to an inquiry made by the Imperial Judge, Couppé commented on 21 September 1901:

[If] one listens to such complaints made so many years after the registration, the time when they should have been made . . . there will never be any stability and security for any property in the colony.

Couppé further pointed out that a reserve of 200 acres was more than sufficient for thirty natives (not sixty to eighty as five years earlier). He concluded with a rhetorical question: 'Do they . . . want to have both a reserve and the land that has been sold?'

What had begun as a reaction to the immorality of the early land acquisitions and as a matter of 'simple justice', had developed into a matter of law. The time had come for the Europeans to insist on the security of their titles.

Soon after taking up his post as Imperial Judge in January 1896,

Hahl began to explore the area of Tolai settlement, learning the language and explaining to the natives that blood feud and self-help were forbidden and that they should inform him of their disputes and grievances. On these excursions Hahl noticed that the expansion of the European plantations, which now approached the first native villages, caused serious unrest. 'According to the deeds . . . the natives had sold all their land including their settlements. . . . [But they now claimed] that they had not understood the meaning of these documents and that they also had not thought the Europeans would stay and use the land for plantations.'

Hahl realised that it would be impossible to settle the natives in the 'wide uninhabited areas' further inland, because they could not be separated from their fruit trees which formed an important means of their subsistence and also because 'there was the danger that old blood feuds would revive if the population was concentrated in these areas'. He began to negotiate with Queen Emma and Geisler, the Neu Guinea Kompagnie's manager. Both appreciated the need for setting aside native reserves and were prepared to co-operate.

I simply had to mark . . . with the natives the boundaries they themselves regarded as desirable and then . . . to determine once and for all what land was left to the natives as a reserve. This activity was talked about in the whole area, and I realised from the friendly welcome received from then on, that the people began to have confidence in me (1937, 25).

In reality the setting aside of native reserves did not proceed quite so smoothly. In a report to the Foreign Office on 17 November 1901 Hahl, for instance, complained how degrading and disgraceful it had been 'to have to plead and to bargain in the presence of the natives for each square yard and tree without even the slightest legal entitlement' (Z.A., 2276).

To get this 'legal entitlement' was one of Hahl's most urgent objectives. On 22 July 1896 he reported for the first time on the matter of native reserves to the Administrator. Having described the various voluntary agreements which had been made, were in the process of being made or would have to be made, he argued:

Although the Administration can, for the time being, prevent the expansion of a plantation by force in the interests of the natives [apparently by virtue of its general police powers], I still consider it necessary that special regulations be enacted for the final setting aside of land for natives (*ibid.*).

Hahl enclosed a draft of such an ordinance which did not lay down any rules regarding the procedure to be followed 'since binding rules will prove impracticable in dealings with natives.'

Shortly after Hahl wrote this report, Administrator Ruediger resigned. Hagen, his successor, was preoccupied with reorganising the Neu Guinea Kompagnie's economic activities in Kaiser Wilhelmsland. It was thus not until December 1897 that the Board of Directors received a detailed report on the question of native reserves from Hagen's successor, Skopnik, who, in a bureaucratic way, was very interested in the legal aspect of the land question. The Board's answer, dated 9 May 1898, shows the characteristic mixture of naïvety and good intentions. It stressed first of all that there should be no problems in respect of acquisitions made by the Company after the annexation, if the Directions of 10 August 1887 had been strictly followed. 'However', the Board complained, 'in many cases this was apparently neither done when the land was acquired, nor did the Registration Office ensure that the rights of the natives were preserved when examining the applications for registration.'

The Board felt that the difficulties arose mainly 'from the vagueness of the contracts and from the fact that the natives cannot understand their meaning'. Although it did not think that it would be of great help 'to make legal distinctions', it suggested a legalistic way of overcoming these difficulties. For 'political and legal reasons' the Administration had to assume, unless the contrary was beyond doubt, 'that whenever natives remained in actual possession of land within an area sold . . . the sellers did not intend to give up and cease using such land . . . so that, to this extent, the *consensus* for the sale is lacking'. The legal consequences of this view were clear and simple: 'It follows that this possession is to be protected.'

Having established the general principle, the Board had to admit that it would have to be decided according to the circumstances of each case whether and to what extent the natives' possession of the land was worthy of protection.

It is clear that this [legal] approach can inconvenience those who have acquired large areas of land and that the greediness and the limited capacity of the natives to understand our legal concepts can cause tensions and disputes. To prevent this an amicable agreement should first of all be attempted. . . . If this proves impossible, it may become necessary to enact regulations to protect the natives . . . This prospect will probably make the settlers more inclined to . . . settle differences by agreement (*ibid.*).

Nevertheless the Board agreed that it should already be considered how the matter could be regulated by way of an ordinance and suggested that Hahl should submit a further draft.

Hahl's new draft of 15 September 1898 was more detailed than that he made two years earlier, but, with one exception, very similar in substance. Whereas the 1896 version also envisaged the setting aside of native reserves in areas of ownerless land, the application of the 1898 version was limited to land owned by Europeans. The possibility of reserves in 'ownerless' areas not only throws an interesting light on Hahl's understanding of what 'ownerless' meant, it also shows that, in his first enthusiasm, Hahl had intended to adopt the setting aside of native reserves as a systematic policy, as a means of defining which areas were available for economic development, whereas he now realised that the Company was at best only prepared to use it when the subsistence of the natives was actually endangered.

According to Hahl's new draft native reserves could be created by amicable agreement or, if this proved impossible, by way of confiscation. In the latter case the compensation was restricted to a proportion of the price originally paid to the natives. If the land was confiscated the Neu Guinea Kompagnie (in its capacity as administrative authority) was registered as formal owner of the land but its title was encumbered by an 'inheritable, permanent, unrestricted and gratuitous right of usufruct and residence' for the natives. In case a native reserve was created by amicable agreement the title of the European owner was encumbered in the same way.

These rules applied to all European land, whether acquired before or after the annexation, and included properties which had already been registered. New land acquisitions could only be registered after the rights of the natives had been secured. Moreover, the Administration could, while the negotiations or confiscation proceedings were going on, determine provisional boundaries.

The main object of Hahl's comments was to show that the areas in the Bismarck Archipelago (Kaiser Wilhelmsland was outside his jurisdiction) where native reserves were already 'urgently required' were far larger and the work involved much more time consuming than the Board of Directors realised.

In the Gazelle Peninsula where reserves already existed in Queen Emma's Ralum plantation and that of Mouton in Kinigunan, additional reserves had to be set aside in the following areas: on the land of the Neu Guinea Kompagnie around Herbertshoehe, on the proper-

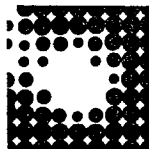
ties of Queen Emma towards Cape Gazelle and Raluana, on the Company's land between Cape Gazelle and the Warangoi, on the lands of the Sacred Heart Mission, Hershheim, Queen Emma and the Neu Guinea Kompagnie along the north coast (including Watom Island) and in Kambaira Bay, where the claims of the last four claimants overlapped—that is to say virtually along the entire coastline of Tolai settlement with the exception of the stretch between Raluana and Nonga; that is the rim of the ancient crater forming the harbour of today's Rabaul which was unsuitable for coconut plantations.

In the Duke of Yorks the situation was not much different. Native reserves were required 'on all islands, in particular on Karawara, Utuan, Kabakon and in the south of the main island'. The same applied to the groups of smaller islands Queen Emma had bought prior to the annexation east of New Ireland and Bougainville (and she had bought almost all of them) and to the French Islands, west of New Britain, the Neu Guinea Kompagnie had recently acquired. Hahl concluded:

In case the claims of the Neu Guinea Kompagnie to the north of New Hanover, those of . . . [Queen Emma] to considerable areas in the east of New Ireland, and those of the heirs of Schulle [Hershheim's former agent] to large stretches of the northeast and northwest of New Ireland are regarded as valid, there will be enough work for many years to come (ibid.).

These prospects probably would have discouraged the Board of Directors at the best of times, but when Hahl made his suggestions, the Company was about to sign the second agreement with the Reich (7 October 1898), and thus had a good excuse to leave it to an Imperial administration to deal with the problem of native land rights. The only direct result of the Board's letter of May 1898 was a Decree issued by Administrator Skopnik on 29 October 1898. It instructed the Company's employees to adhere strictly to the Directions of 10 August 1887 in the future and stressed how most improper it was to argue that it was not really important to comply with legal formalities. In view of Luecker's land-buying activities at the time, it is doubtful whether this Decree can be called a practical result, but this made it a particularly fitting end to the Company's land administration.





Hahl's judgment in the dispute over Parkinson's title to Kalili and Wairiki in 1896 was possibly the only judicial decision regarding the validity of a European land acquisition throughout the period of Company administration. In 1897 he had the opportunity to decide another complex of disputes in which the character of the European land acquisitions played an important though indirect part.

When Hahl tried to accelerate the survey of land in the Gazelle Peninsula, the settlers began to settle their land claims among themselves, partly to consolidate their holdings, partly to find a solution in cases where their claims overlapped, and partly to secure the Neu Guinea Kompagnie's approval for their registration by making certain concessions. The negotiations between Hershheim and Queen Emma and between Queen Emma and the Neu Guinea Kompagnie led to amicable agreements, but the conflicting claims of Queen Emma and Mouton to land at Kabakaul were not as easily settled. Mouton, feeling that he had to take a firm stand, turned down Parkinson's offer to work out a compromise and began to attack Queen Emma's land acquisitions in general with the result that Queen Emma and Phebe Parkinson (her 'Minister for Native Affairs') brought an action for defamation of character against him (C.A., AA 67/83, G. Herbertshoehe, Item Nos. 7-8/97).

Both actions were based on remarks Mouton had allegedly made in July 1896 to various natives when assisting the Neu Guinea Kompagnie's team in the survey of Queen Emma's properties. Queen Emma also sued Mouton for having 'endangered her credit'—according to German law a special case of defamation—by telling the natives in Malaguna that she planned to take possession of the land

she had bought there and would start a plantation under a European manager.

Far from denying the alleged remarks, Mouton expressed surprise that he was forced to prove their truth in court. In a long and somewhat confused letter to Hahl, he explained that Queen Emma and Phebe Parkinson tried to prevent a proper investigation of their land claims by influencing the natives with promises, lies, threats and even fines and that they maintained a network of native spies who kept them informed and stopped other natives from talking. Mouton put most of the blame on Phebe Parkinson. He accused her in particular of three things.

Firstly, he claimed that she made the natives believe any sale of land by a native was valid according to Western law, whether or not he was the owner of the land. ('This strategy was used with Tobulom [whose land was sold by Tovangana] and he really believes that our customs are such and that he has nothing more to say'.)

Secondly, he claimed that she threatened the natives with the Neu Guinea Kompagnie taking away their land if they did not agree to having sold it to Queen Emma. (Tomulai said Mrs Parkinson had told him 'Don't hide any of the pieces of land Parkinson has bought, because the Judge [Hahl] Octave [Mouton] will bring with him will [otherwise] take them in possession and will work [plant] there. You can see his plantation [Herbertshoche] getting nearer, have pity on my sister'.)

Thirdly, he claimed that she only allowed those natives who would speak in her favour to give evidence during an investigation. (Tovurgilo said: 'Mrs Parkinson chose her people, those who spoke as she did, but the rest of us agreed among ourselves not to follow, that is why there [during previous investigations] were always only a few men . . . and why you only heard one story'.) Phebe Parkinson, Mouton claimed, had control of almost all the natives: 'These people are no longer free to say what they think to each other.'

Hahl first disposed of Queen Emma's action for 'endangering her credit' and, in doing so, thoroughly enjoyed the opportunity of unmasking, in a rather playful way, the double standards the settlers showed in their land dealings and for which this case provided an ideal illustration. On the one hand Queen Emma claimed the land in Malaguna as hers, on the other hand she regarded it as a criminal offence if someone informed the natives of this fact. She wanted the natives to realise as late as possible that they had lost their land and

rightly felt it would hamper her economic expansion if they were suddenly confronted with the consequences her claims had for them.

Hahl chose to stick to the deeds and not to proceed with the charge. 'I am unable to see', he argued, 'how it can endanger the credit as the economic aspect of a person's honour, if it is said that this person intends to exercise rights he himself claims to have.'

When Hahl also acquitted Mouton—in a very diplomatic manner—from the charge brought by Phebe Parkinson, Queen Emma withdrew her second charge. At about the same time, however, Mouton informed Hahl that he was now convinced the land he claimed at Kabakaul was Queen Emma's property after all. Once more a compromise between the European parties was regarded as the answer and the façade of colonial law remained intact. Three years later it looked as if it would be abruptly demolished.

On 20 March 1900 Torabel and other natives brought an action against the Neu Guinea Kompagnie. Their aim was to have cancelled the entry on Folio 45 in the Ground Book for the Gazelle Peninsula which showed that the Company had title to about 13,000 acres of 'ownerless' land between Cape Gazelle and the Warangoi. They claimed the Administrator's certificate of 30 May 1896, by virtue of which the property had been registered, was invalid because the land had been (and still was) inhabited by many hundreds of natives. Geisler, the Company's local manager, informed the Board of Directors of this action. Before the letter arrived in Berlin, Hahl's successor Schnee had decided the case in favour of the native plaintiffs. When Geisler received instructions to appeal, the decision had become absolute and Folio 45 was cancelled.

The Company suffered the next blow in Kaiser Wilhelmsland when the Imperial Judge Boether informed the manager in Friedrich Wilhelmshafen on 15 November 1901 that he had ordered *ex officio* to have the Company cancelled as the owner of the islands Njuhi I (Gusop) and Njuhi II (Paris). These islands had been acquired by Luecker in July 1898 but a subsequent examination on the spot had shown that the contracts were void (Z.A. 2279).

Despite this preparation, it must have come as a shock when Boether refused with costs on 30 November 1901 to register eleven land acquisitions of together about 100,000 acres Luecker had made around Berlinhafen. The examination on the spot 'proved in every case that the agreements were for material reasons not valid in law' (*ibid.*). The natives acknowledged only four agreements in which a

total of about 300 acres had been acquired before Luecker's time.

Boether's activities were not restricted to Berlinhafen, he also refused to register the Company's claims to about 25,000 acres in Hansa Bay, 6000 acres in Potsdamhafen, 4000 in Adalberthafen and 2000 in the vicinity of Wewak. There is little doubt that claims to about 70,000 acres in the Ramu area and to more than 15,000 acres in the Huon Gulf would have experienced (or in fact did experience) a similar fate.

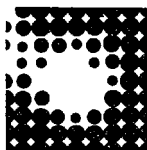
Schnee's and Boether's judicial attacks could have easily back-fired for legal reasons. According to Prussian law, on which these decisions were apparently based, a person, by being registered in the Ground Book as the owner of a previously unregistered piece of land, did not acquire an indefeasible title. His claim to ownership could still be questioned as if he were not registered. Only the good faith of third parties acquiring rights from a registered owner was protected. According to Prussian law the Neu Guinea Kompagnie could thus not acquire a secure title to land it acquired in exercise of its monopoly. The Imperial Ordinance of 1887, however, made special provisions for this case which, the Company claimed, departed from Prussian law.

The Ordinance directed in Section 5 that ownerless or native land the Company acquired was to be registered by virtue of a certificate issued by the Administrator. The wording of this certificate was prescribed in Section 38 of a Decree of 30 July 1887 which laid down the registration procedures. It had to state 'that the Neu Guinea Kompagnie has become the owner of the said property by virtue of the exclusive right granted to it by the Imperial Charters and in accordance with the directions issued in this respect.'

The Neu Guinea Kompagnie argued in a letter to the Foreign Office of 6 October 1900 that this certificate and this certificate alone was the basis of registration and that the courts were bound to accept it at its face value. It had been the purpose of these provisions to make the examination of land acquisitions the responsibility of the Administration and to prevent endless litigation. This had been expressly acknowledged by the representatives of the German Government when the draft of the 1887 Ordinance had been discussed and was clearly manifest in the wording of the relevant sections (Z.A. 2278).

If this interpretation was accepted, and there was a good chance that it would be, the Neu Guinea Kompagnie had in practice an indefeasible title to all land it had acquired in exercise of its monopoly.

whether already registered or not. On the other hand, there was still Section 13 of the 1887 Ordinance, so that the Company's ownership could, despite its possibly indefeasible title, be restricted by regulations enacted to protect the natives. It is likely, however, that the judicial attacks were intended as warning shots rather than as signals for a wholesale legal war. Still, the Neu Guinea Kompagnie was probably pleased when Schnee left for Samoa and even more so when Boether shortly afterwards returned to Germany.

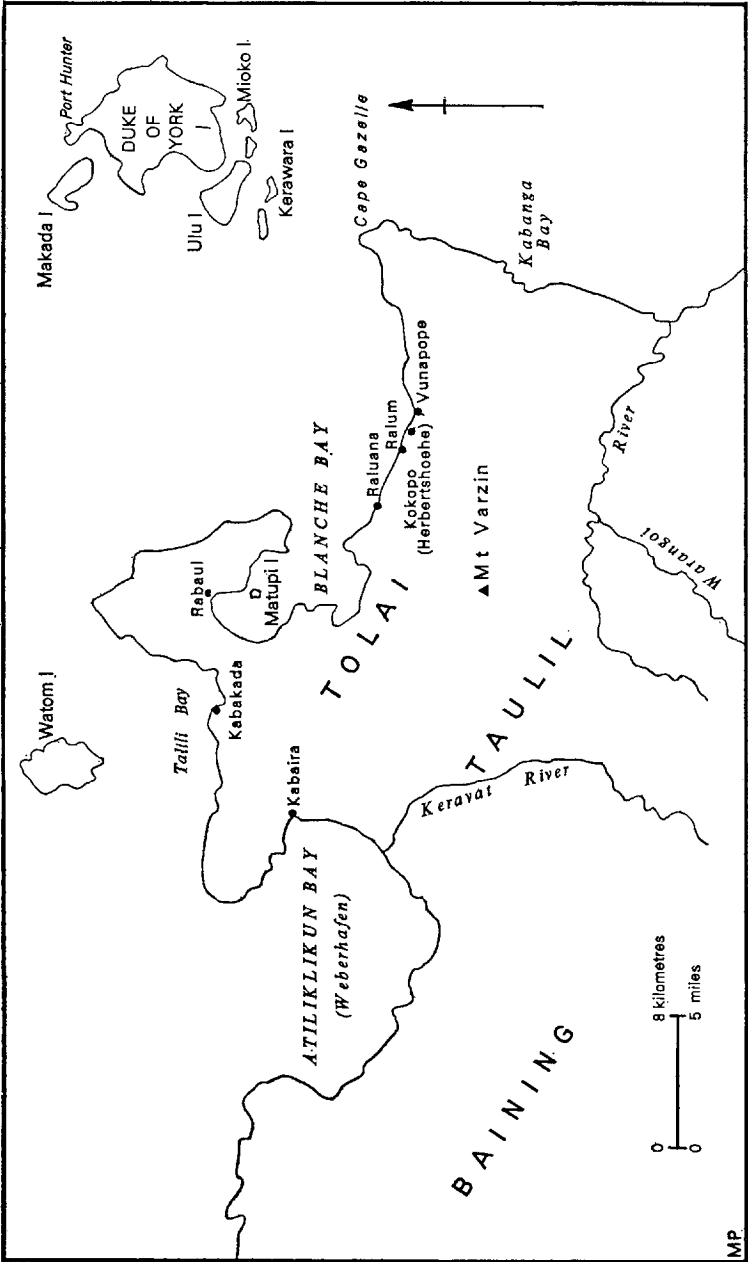


Governor Benningsen regarded it as his most urgent duty to deal with the 'old land claims', the alleged European acquisitions prior to the annexation, few of which had so far been registered in the (permanent) Land Register. On 21 December 1900 he reported to the Foreign Office:

If the Registration Office summons the claimants to apply for registration . . . I object on principle . . . and then try to reach agreement with the applicant . . . by way of compromise. With the exception of very small islands a fixed acreage is conceded. When the land is later selected and surveyed, the registration does not pose problems any longer (Z.A., 2276).

When writing this report, Benningsen had already been confronted with the first difficulties. They were not caused by the settlers but by the Foreign Office which warned Benningsen on 11 October 1900, in another context, that he had no authority to make independent decisions in land matters, although it would be desirable to transfer a limited authority to him. Benningsen, who was about to return to Germany because of ill health and wanted to settle the 'old land claims' before he left, decided not to wait for this transfer, which, it appears, was never expressly made. Instead he made the effectiveness of future agreements depend upon the approval of the Chancellor of the Reich ('in so far as it is required') and asked the Foreign Office for a general approval of all his previous land agreements.

One of the first and most important agreements was reached with Queen Emma on 21 December 1900. It dealt primarily with her claims to land in the Solomons which were estimated to be about 250,000 acres. Queen Emma transferred these claims to the Govern-



North-eastern Gazelle Peninsula.

ment. In return she received 1250 acres for free selection and three named uninhabited islands in Carolahafen on Buka as well as 22,500 acres in one, two or three blocks for free selection on Bougainville. The land had to be selected before 1 January 1903. Native reserves were not to count towards the stipulated acreage. On the other hand, in case the named uninhabited islands were later inhabited, native reserves had to be set aside or the natives had to be compensated in some other way when the islands were taken into use. Moreover, Queen Emma had to bear the costs of acquiring the selected lands, compensation to natives being specifically mentioned (Z.A., 2278).

Four aspects of the agreement are especially interesting:

(a) The claims were not dropped but transferred to the Government—though it is by no means clear whether Benningsen intended to treat the land as government property.

(b) Both parties assumed Queen Emma would have no difficulties in acquiring the land granted to her.

(c) The setting aside of native reserves was regarded as a matter of course.

(d) The decision whether a native reserve was to be set aside was made when the land was taken into use and not when it was acquired. If land was ownerless when acquired but occupied by natives when taken in use, the natives' interests were still protected at the expense of the European's rights. On the other hand, it is also difficult to imagine that Benningsen would have objected against the registration of—deserted—land which had been taken into possession as ownerless when it was (still) inhabited. The relations with the native population were dominated by practical and not by legal considerations, clearly on the basis that the acreage possibly required for native reserves would be negligible.

Benningsen's tactics were not always successful. When he objected to the registration of the Neu Guinea Kompagnie's claims to the northern section of New Hanover, the Company, angry at having lost the land between Cape Gazelle and the Warangoi, was not prepared to negotiate. It relied on Section 5 of the 1887 Ordinance which, it thought, gave it a virtually indefeasible title. Instead of taking up this argument Benningsen pointed out that Section 5 did not apply in this case because the Company had not acquired the land (directly) in exercise of its monopoly but (indirectly) from the D.H.P.G. which was not protected by Section 5. The Neu Guinea Kompagnie was not



convinced and on 12 September 1900 sued the Government to have its claims fully acknowledged.

On 4 November 1900 Queen Emma brought a similar action regarding claims to land in New Ireland because '[a]ll the natives living there well remember that the lands in question have been sold . . . and raise no objections' (C.A., G1, File No. 210). The hearing was suspended until the Foreign Office had decided whether it would approve the agreement regarding the Solomon claims and it was not until 12 September 1907 that an agreement regarding the New Ireland claims was reached. In this 1907 agreement Queen Emma renounced all claims to about 3750 acres in New Ireland in favour of the Government in exchange for the right to acquire 2500 acres near Cape Merkus on the south coast of New Britain without payment to the Government. Queen Emma was further granted a two year option to acquire another 2500 acres adjoining the inland boundary of the first block. For this second block the Government could either demand \$0.20 per acre or the cession of others of Queen Emma's 'old land claims' (C.A., AA 63/83, G. Herbertshoehe, F.G. 31/07).

In February 1908, Queen Emma approached Hahl and asked whether she could get land at Telengaia Harbour in New Ireland, where she had taken about 3750 acres in possession for the Government, instead of the land near Cape Merkus. Hahl offered 1250 acres but Queen Emma was not satisfied. On 13 November a new agreement was reached that she should have 2500 acres at Telengaia Harbour instead of 2500 acres near Cape Merkus, but no option to acquire additional land (C.A., Custodian, T214).

This did not mean that Queen Emma acquired no land near Cape Merkus. Already in 1904 she had been independently authorised to acquire (another) 1250 acres. However, she acquired only 800 and, according to the general rules, her authority to acquire the remaining 450 acres would have become invalid after twelve months. Under an agreement of 19 November 1908 (three years after that time) Queen Emma was given two more years to select the land. Although she had paid the Government for the full 1250 acres in 1908 neither she nor her successor, the H.S.A.G., made use of this authority (*ibid.*, T69, Pt. 1).

The history of these claims may seem confusing, but it is one of the simpler cases. So much bargaining took place over the years, so many agreements were later changed, and claims were so frequently moved over the map of German New Guinea that some of the 'old land

claims' were lost on the way, while others had not been dealt with at all by 1914, so that the new Australian Administration had no hope of keeping the balls in this marathon jugglery in the air. The various metamorphoses of the Neu Guinea Kompagnie's claims to the north of New Hanover indicate that even Hahl got confused.

It appears that the hearing of the Company's action against the Government of September 1900 was also suspended. By August 1901 Hahl and Geisler, the Company's manager, had worked out a draft agreement which was sent for approval to the Foreign Office and the Board of Directors. The Company was to renounce all rights it had acquired on the basis of a series of contracts concluded by the D.H.P.G. in 1885 in favour of the Government. The latter was to transfer to the Company without payment the ownership of an area of half the size, about 18,750 acres, under certain conditions. (Hahl, who estimated the claimed area to be about 100,000 acres, eagerly adopted in this draft agreement the Company's estimate of 37,000 acres.)

The Company could select—within four years—up to 3750 acres on half of the twenty-six offshore islands it claimed along the north coast of New Hanover and the rest either solely on the main island, or half of it in New Hanover and the other half either in New Ireland or New Britain, or one third in each of these islands. The main reason for not limiting the choice to New Hanover was to give the Company the opportunity to re-acquire part of the land it had lost between Cape Gazelle and the Warangoi (Hahl to Foreign Office, 31 August 1901, Z.A., 2279).

One of the main differences between this draft and the earlier agreements with Queen Emma was that land inhabited by natives or required by them for gardening could not be acquired. The other was that the Company only had to acquire the selected land if it had not already been acquired by the D.H.P.G. in 1885; although the Government attacked the claims, it did not treat them as invalid, but acted on the assumption that they were valid at least in part.

The Board of Directors was not satisfied. It insisted that at the same time an agreement had to be reached regarding the land it had lost in the Gazelle Peninsula. The Foreign Office was sympathetic. The contract signed in Berlin on 1 February 1902 consisted therefore of two agreements.

The agreement regarding the New Hanover claims was similar to Hahl's draft. The Company was granted three of the offshore islands

and was promised, on application, small areas for trading stations on others for \$0.20 per acre. It was further granted the right to acquire 15,000 acres, of which it could select up to 5000 acres in one or two blocks anywhere in the Bismarck Archipelago, whereas at least 10,000 acres had to be selected in up to three blocks on New Hanover. The selection had to be made within five (instead of four) years. Hahl's two specific clauses (that land inhabited by natives or required for gardening could not be acquired and that the selected land only had to be acquired if not already acquired under the original agreements) were dropped. Instead it was agreed that native reserves would be set aside where necessary and that the Company had to bear the costs if land was acquired from natives.

In addition, the Neu Guinea Kompagnie was granted the uninhabited section of the land between Cape Gazelle and the Warangoi. The section was to be defined by the Warangoi in the south and a line beginning at the border of the area claimed by the natives south of Kabanga and running north-west until it met the boundary of the Company's land behind Herbertshoehe. In case this area was smaller than 6250 acres, the Company could make up the difference in another part of New Britain (Z.A., 2279).

In 1903 Geisler informed the Government that he had selected the three islands, that he had acquired two blocks of 5000 acres each on New Hanover, and that the Company intended to acquire the other 5000 acres elsewhere (Custodian, T 209). At the same time it had proved impossible to realise the Company's claim to 6250 acres between Kabanga and the Warangoi, even in part.

By 12 July 1904 the Company had decided where it intended to select the 11,250 acres it could claim on the basis of the agreement of 1 February 1902 and a further 2500 granted to it by an agreement of 22 August 1903. It wanted 5000 acres on the south side of Weberhafen, 5000 acres in south New Britain, 3500 acres in the Solomons, and 250 acres on Tabar Island, east of New Ireland. In 1912 the Company had still not acquired any of this land. Moreover, it had approached the Colonial Office offering certain lands or claims for sale in an attempt to consolidate its financial position.

In a report of 2 August 1909 Hahl expressed interest—as far as the Bismarck Archipelago was concerned—in the Company's claim to 5000 acres in Weberhafen, partly for native reserves and partly for small plantations close to Rabaul. Further he suggested the acquisition of an additional 5000 acres for native reserves between Herbertshoehe

and Cape Palliser. Realising he required more information, Hahl concluded by indicating that he would submit a detailed report when the District Commissioners involved had commented on the matter.

District Commissioner Klug sent his comments on 31 October 1909. He pointed out that the only part of Weberhafen where the Company could realise its claim to 5000 acres was the swampy coast between Tombaule and Keravat or the hinterland between Keravat and Wundal which were also unsuitable for plantations, so that the Government had no interest in acquiring this claim. On the other hand, the Government had a strong interest in acquiring part of the Company's land on the west coast of Weberhafen (which Hahl had apparently confused with the Company's claim offered for sale). Though unsurveyed, the land had already been registered and was estimated to be 12,500 acres. Klug also strongly supported Hahl's view that further native reserves had to be set aside in the east of the Gazelle Peninsula.

For the next three years the Government negotiated with the Neu Guinea Kompagnie. On 7 May 1912 an agreement was signed which was to settle all the Company's outstanding land claims in the Bismarck Archipelago.

The Company's claims amounted at that time to 13,750 acres. It had also lost about 1000 acres for native reserves along the north coast of the Gazelle Peninsula and in Weberhafen. Further, it had promised 2500 acres for native reserves in the east. (In reality the Company had lost about 7000 acres, but Hahl again used the Company's own lower estimates instead of the correct figures, in this case the estimated 12,500 acres for the Company's land at Weberhafen instead of the 18,500 shown by the survey.) On the other hand the Company owed the Government about \$2000 in survey costs.

According to the agreement, the Company reduced its claims by 5000 acres, whereon the Government released it from paying the survey costs. The Government transferred two blocks of together about 1700 acres on the Gardner Islands, east of New Ireland, to the Company. The Company was entitled to select within one year 10,000 acres in up to three blocks of at least 2500 acres (Z.A., 2401).

When the Colonial Office received this agreement, the officials shuddered at the idea of an audit court investigating it. Reluctant to give approval, they claimed that Hahl had overstepped his authority in land matters. Hahl denied this, and the agreement was partly carried into effect, although it was never formally approved.

By the end of 1912 Geisler had selected the 10,000 acres in two blocks of 2500 acres each on the south coast of New Britain and one block of 5000 on the north coast. But he had selected a longer beach frontage than allowed in the agreement. The Company thus depended for the recognition of its acquisitions on the goodwill of the Government. District Commissioner Klug promptly suggested to Hahl in March 1913 that the time was favourable for extracting land in addition to the promised 2500 acres for native reserves in the east of the Gazelle Peninsula. Hahl followed the suggestion and reported on 14 January 1914 to the Colonial Office that he had approved the acquisitions after the Company had ceded its land claims between Danmarai River and Cape Palliser up to a depth of about 6000 feet (Z.A., 2401). The process of acquiring land which the agents of the D.H.P.G. had started in the north of New Hanover in 1885 was still continuing thirty years later in New Britain.

In 1906 E. Wolff, formerly Judge and District Commissioner in Herbertshoehe, published an ebullient paper giving some insight into the probable reasons for Benningsen's and Hahl's decision to deal with the 'old land claims' by way of administrative compromise, instead of leaving it to the courts to determine whether or not they were valid.

Wolff begins by describing how a court should have decided these claims. Nearly all of the 'old land claims' were based on agreements with natives. Such an agreement was legally valid if the native owner had transferred the ownership and the (indirect) possession of the land. The first prerequisite for recognition was that the native seller owned the land. Now with the exception of house sites, land was not according to traditional law private property. Unused land could form part of the sphere of political power of one tribe or another, but it was not this tribe's private property. The contracts of purchase and sale were thus legally irrelevant. Most land in New Guinea was ownerless and could only be acquired by being actually taken into (direct) possession and that had rarely been done. In other words, practically all of the 'old land claims' involving larger areas had no legal basis whatsoever and the land had remained ownerless.

Wolff then turns to the administrative aspect. The decision that most of the 'old land claims' were legally invalid did not mean that the claimants should not be given any of the land they claimed. The claims only ceased to be a matter of law. Since most of the claimed

land was ownerless, although possibly subject to non-exclusive native gardening rights, the Government could freely dispose of the land as it thought fit for the common good. From this point of view it would have been foolish not to give some of the abundance of unused land to those who had the capital, the labour force and the intention to cultivate it.

Having completed his theoretical argument, Wolff describes what actually happened: if the conditions in German New Guinea had been the same as in western Europe, the courts would have investigated the land claims from the legal point of view and rejected most of them. Afterwards the Government would have allotted areas of ownerless land to the local firms according to their requirements. The Government would have, as it were, rebuilt what the courts had destroyed. However, the conditions in German New Guinea were different. Firstly, judicial and administrative functions were both exercised by the same persons. Secondly, it was virtually impossible to determine the validity of the old land claims according to strictly legal criteria. The legal distinctions made in the regulations, in particular the distinction between 'owned' and 'ownerless' land, could not be made in practice, and facts could frequently not be proved with reasonable certainty, owing to the lapse of time, the language barrier, the proverbial falseness of the natives, and the difficulties in locating native or European witnesses. There was only one way out of these factual and legal difficulties: the determination of land claims by a court had to be avoided as far as possible and an amicable agreement had to be sought instead. This idea had guided the Government on the whole to the satisfaction of all the parties. Such a flexible approach left room for practical considerations and special wishes of European claimants. On the other hand it allowed the Government to protect the public interest and that of the native population much more effectively. These amicable settlements had prevented numerous embittered lawsuits and serious unrests which would have otherwise disrupted the development of the young colony.

On the other hand, Wolff suggests that European claimants often refused to negotiate believing that they could achieve full recognition of their claims in court. This seems unlikely in view of his earlier statement that most of the early land acquisitions had been legally invalid. The explanation is that the other judges apparently did not share Wolff's view.

Attempts were made to force the impracticable distinction between 'ownerless' land and land 'owned' by natives upon the conditions in New Guinea, by deducing from the previously existing rights of sovereignty that the district of a tribe was its—free and alienable—private property. On this basis it was believed that all the monstrous agreements regarding the transfer of land could and should be recognized, provided they named the most important members of the tribe and put the correct words in their mouths. In this way enormous areas were frequently awarded to Europeans as their exclusive property . . . No regard was shown for possible gardening rights of the native population. After all, the land had been sold! (497).

Although this is almost certainly a gross exaggeration by Wolff, it shows that among the early colonial lawyers the same kind of division of opinion regarding native land rights existed as among other early observers. One group shared Hertsheim's view that the natives did not know the ownership of land, another group shared Miklucho Maclay's view that all land subject to native rights of any kind was legally owned. Both groups agreed, however, that the traditional rights hardly fitted into the existing framework of colonial land law and that it was for this reason better to keep the 'old land claims' out of court. As lawyers they preferred to deal with the 'old land claims' on a non-legal basis because both views on native land rights led to unsatisfactory results if they were applied in court.

Hahl was well aware that this non-legal approach was legally doubtful, but he was prepared to take the risk. District Commissioner Berghausen in Friedrich Wilhelmshafen argued in 1910 that subsequent agreements between the Government and the Neu Guinea Kompagnie could not validate Kubary's invalid land acquisitions since the Government could not bind the native landowners. Hahl answered:

that the question as to whether the arrangements agreed upon between the Government and the Company affected the legal rights of the natives in any way could be left in abeyance, since a final decision on such a question could only be a judicial decision. He [Hahl] explained that the safeguarding of native interests in contentious land matters had hitherto been affected from the point of view that the Government, by virtue of its 'mundium', could give a decision binding or not binding on the natives; and that this attitude rested on the consideration that the raising of questions as to whether lands had been legally acquired from natives, would lead to endless litigation and would seriously affect the progress of the colony (Phillips, 1932, 56-7).

Although Benningsen saw that native reserves had to be set aside, the protection of native rights or interests was not the main reason for his negotiations with European claimants. His aim was to finalise the 'old land claims' as a basis for the Government's future land policy towards European settlers. When Hahl became Acting Governor in May 1901, the question of native reserves became a centre of attention. On 17 November 1901, the month he was appointed Governor, Hahl sent a detailed report on the matter to the Foreign Office (Z.A., 2276).

At that time twelve native reserves existed, eight in Blanche Bay for more than 2000 natives, and four around Talili Bay on the north coast of the Gazelle Peninsula for a few hundred natives. All these reserves were still formally owned by the European claimants, who had not been compensated in any way. Hahl had also acquired Queen Emma's property Matakabang on the north coast, which was fully used by its 210 inhabitants, in exchange for 750 acres of uninhabited land at Weberhafen, and 100 acres on an exchange basis from the Neu Guinea Kompagnie for the 150 people of Ratangor, again on the north coast. These lands were formally owned by the Government.

This, Hahl stated, was only the beginning. In the Duke of Yorks, Utuan Island was to be fully reserved for the natives and in the south of the main island Inolo Peninsula had to be set aside. In Weberhafen reserves were required for 2000 people. Hahl also suggested acquiring the claims of the Sacred Heart Mission and Mouton to Watom Island (off the north coast) on an exchange basis. Finally he pointed out that the Government still had to face the enormous task of protecting the natives from the 'old land claims' in the other parts of New Guinea.

Hahl then developed his reasons for his repeated proposal to enact regulations for the confiscation of land in the interest of the native population. First of all he pointed out that there was an imminent danger that the natives would become bondsmen of the European land owners on whose land their reserves were situated. Problems had arisen when the missions had tried to become active in native reserves against the wishes of the European land owners. Further, the land owners had claimed to possess a trading monopoly in 'their' reserves. They had even begun to press for permission (if necessary by way of an Ordinance) to appropriate all coconuts growing on native reserves which the natives did not require for their livelihood. Hahl believed that strong legislation had to be enacted to prevent these pseudo-feudal



conditions from developing since they were not at all desirable 'for the development of the colony' (Hahl's main criterion).

If we want to preserve a healthy and growing native population, fit to work, we have to secure by way of legislation . . . that they have sufficient land on which they can live and propagate according to their own customs.

Hahl also drew attention to the legal and administrative difficulties connected with the registration of native reserves as encumbrances on European titles. These difficulties stemmed partly from German law which recognised only a limited number of clearly defined registrable rights which did not fit the case, and partly from the fact that the natives followed a quite different, matrilineal system. (European settlement was at that time concentrated in matrilineal areas.) Besides, in the case of an encumbrance in favour of the native inhabitants of a certain property, the line of descent had to be constantly and closely supervised in order to be able to disqualify persons without title—which would not be necessary if the land would be taken from the European owner on a statutory basis and registered as government land reserved for the use of *the* natives.

Hahl's proposals for a 'strong legislation' were similar to those he had made to the Neu Guinea Kompagnie in 1898. He again stressed that the procedures had to be very simple. 'The native cannot understand the meaning of inspections and hearings; he only sees the planter coming closer and closer to his village and the Government apparently doing nothing to help him.'

For many years native reserves were individually set aside whenever necessary. Mainly owing to a shortage of staff it was impossible to survey systematically large areas in order to ascertain what land was already owned by Europeans, what was needed as native land, and what remained as 'crown land' at the Government's disposal—which had been Hahl's aim since 1898. Around 1910 the Government began to develop more ambitious programs for the division of land between natives and Europeans.

The history of the Duke of Yorks provides a good illustration of the development of government policy, the change in European attitudes and the importance of non-economic factors in this field.

In the 1880s three series of comparatively large land acquisitions had been made. Kleinschmidt had bought several of the smaller islands in the south of the group, Queen Emma and Farrell had bought

the southern section of the main island, and the Methodist Mission had acquired—besides numerous small blocks for mission stations—two larger areas in the north. During the late 1890s Parkinson, who administered Kleinschmidt's estate, sold most of Kleinschmidt's islands—Ulu, the largest of them and uninhabited, went to the Methodist Mission—whereas Queen Emma and Farrell had transferred their claims to the D.H.P.G. In a report on 10 October 1898 Hahl had suggested that the Reich should acquire this land for native reserves (Z.A., 2943), but Couppé was faster and bought the land as a plantation. Thus when Hahl returned as Acting Governor in 1901 the two mission societies were the main claimants.

In his report in November 1901 Hahl emphasised that Utuan (which the D.H.P.G. had acquired from Kleinschmidt's heirs) was to be fully reserved and that Inolo Peninsula in the south of the main island had also to be set aside. Hahl succeeded in acquiring Inolo from Couppé; this being more urgent since the Mission wanted to plant up the land whereas the D.H.P.G. did not intend to use Utuan whose native inhabitants in any case made their gardens on the main island. Inolo soon proved too small, and in 1903 the natives of Utuan and Mioko asked Hahl to get them more land from the Catholic Mission. Hahl suggested a reserve of about 100 acres on an exchange basis, but Couppé showed little inclination to accept this offer. In 1904 an agreement was reached that the Mission would grant the natives a right of way through its property so that they could make their gardens in the uninhabited centre.

In 1905 most of Utuan was acquired from the D.H.P.G. as a native reserve, and in 1909 District Commissioner Klug proposed that Kerawara Island be acquired from the Neu Guinea Kompagnie, pointing out that the island would be economically useless once a reserve for its 124 inhabitants had been set aside. Klug suggested dividing the island between the inhabitants of Kerawara and their neighbours on Kabakon who also suffered from a severe shortage of land (Z.A., 2400).

Kerawara was apparently acquired in 1910, but this was still not sufficient to overcome the land shortage in the south of the group. Moreover, land shortage became visible in the north where W. Eichinger and O. Stehr had established two small plantations and were trying to acquire more land.

Eichinger acquired 150 acres without first obtaining permission. The Government refused to approve the purchase. It also proposed to turn all the land in excess of sixty acres Stehr had acquired into a

reserve for the natives of Urukuk. However, in contrast to Eichinger, Stehr was on good terms with his native neighbours who declared that they did not desire the return of the land. Eichinger's neighbours on the other hand complained that he had altered the boundary marks of his plantation in his favour. As a result Eichinger was sentenced in 1912 (on appeal of the prosecution) to one day's imprisonment. This sentence was probably primarily a gesture addressed to the (black and white) public in a situation which the Government (Hahl's Second in Command presiding over the Appeal Court) viewed with some concern.

In the Duke of Yorks there exists a general shortage of land for the natives. The Government therefore always carefully considers whether land . . . can be transferred [to Europeans]. Eichinger had . . . continually pressed for more land. He did not hesitate to use unlawful means. He told the District Office, for instance, a Chief To Bua was prepared to sell land to him, but when an inspection was made on the spot, it was found that the native did not want to sell the land at all. On the contrary, he complained about Eichinger having constantly pestered him because of the land. On one occasion, when he wanted to buy a pair of trousers [in Eichinger's trade store], Eichinger had, for instance, refused to accept money urging him to give the land instead (C.A., AA 63/83, O. G. Herbertshoehe, Gen. O.G. No. 3).

In 1910 the District Synod of the Methodist Mission resolved that part of Ulu Island, where the natives of the surrounding islands had been allowed to make their gardens for a number of years, should be formally leased to them. The Board of the Mission in Sydney agreed in January 1911, but shortly afterwards the District Synod changed its mind. On 3 March 1911 it informed the Board that it did not want to carry the resolution into effect because the Government might then step in and make the land a 'crown reserve'. 'As soon as one of the officials heard of our decision', wrote H. Fellmann, the Synod's Chairman, on 25 June 1911 to Danks, then the Mission's General Secretary, 'he spoke to me . . . and wrote even afterwards to say that he wished this piece of Ulu as a government reserve. I am glad to say that I was able to ward this off'. Fellmann was not unduly worried that the natives might not have sufficient land because the Government is 'going to secure planting ground on the mainland of the group and meanwhile we can let the natives plant on Ulu for a small rental as we have done so far—quietly'.

Three months later Fellmann even suggested acquiring two addi-

tional (small) islands from Kleinschmidt's heirs. Although he intended to use one of them, uninhabited Ruruan, as a pig run, his main motive was to prevent the twenty-five native inhabitants of the second island, Mualim, from 'falling away on account of offers made by the 'popi' [Catholic Mission] in regard to planting ground' in the south of the main island. Moreover, although the natives on Mualim 'have scarcely a legal right (claim) to the place, we could not drive them away'.

The Government, on the other hand, was not satisfied with having created a native reserve of about 600 acres in the interior of the main island but wanted more land. Early in 1912 Hahl wrote to Fellmann.

You are aware of the fact that the pieces of land at Urukuk . . . and Molot [in the north of the main island] are inhabited and planted by natives and that they could not be deprived of them without taking away from them their means of existence. . . . I therefore take it for granted that . . . the Mission is willing to transfer the land . . . for native reserves [in exchange for land elsewhere] (translation enclosed in Fellmann's letter of 8 June 1912, see below).

The land at Urukuk and Molot was that acquired by Rooney at the time of the annexation to be held in trust for the natives. Fellmann's letter of 8 June 1912 can be fairly taken as representing the Mission's views thirty years later.

I never had any doubt as to the necessity of giving back some land to the natives, . . . in fact I believe a good deal of it was only purchased with a view of keeping undesirable settlers out. . . . [O]ut of about 410 acres we would have only 20 acres entered in the Ground Book as freehold . . . [which is not sufficient]. I do not believe that there is a [good] reason for such a 'grasping' more on the part of the Government, much as we appreciate their taking care of the native population and securing for them all the land they can. I do not think all that land is made use of by the natives at present and is not likely to be in the future. Further there is good planting ground at not too great a distance from them towards the middle of the island. . . . In transferring practically the whole of our land, as proposed, . . . there is the danger . . . of having soon the R.C. Priests among the people—a prospect which certainly is not pleasing. Otherwise, I think . . . the proposal is acceptable.

According to the 1898 Agreement the Neu Guinea Kompagnie had the right to acquire 125,000 acres of land in Kaiser Wilhelmsland without payment to the Government. The land was to be selected before 1 April 1902 and the Company had to notify the authorities within a year of each acquisition it had made. On 24 April 1900, after

the first year had passed, Benningsen reported to the Foreign Office that no notification had been received. Neither had the Company applied for land in the Bismarck Archipelago. Still, Benningsen felt he should inform the Foreign Office of his decision to grant the Company from now on only small blocks which it immediately required for the expansion of its trading activities (Z.A., 2944).

The Foreign Office did not agree and pointed out that it was not within his powers as Governor to make such a decision. However, in this context the question remained theoretical since the Neu Guinea Kompagnie never applied for substantial new land grants in excess of the 125,000 acre concession. The Neu Guinea Kompagnie as well as the other two large firms acquired most land as a result of agreements regarding their 'old land claims'.

When the Neu Guinea Kompagnie began to acquire land on account of the 125,000 acre concession shortly after Benningsen's report, it met with difficulties which caused the Board of Directors to approach the Foreign Office on 4 January 1902 (Z.A., 2279). The Board raised three main points:

(a) It was doubtful whether the 125,000 acres could be acquired before 1 April 1902 and within a year of selection. Parliament (which had shortened the period) had disregarded the peculiar and difficult conditions in New Guinea, in particular the fact that the natives could not be forced to cede any land.

(b) Because of the hostile attitude of the Registration Office in Friedrich Wilhelmshafen and its insistence on examinations on the spot which caused long delays in registration, the Company could not be certain which of the land acquisitions made prior to 1 April 1899 would be accepted, so that it was not sure whether it had already secured desirable areas or whether it still had to acquire them.

(c) District Commissioner Stuckhardt and Hahl had insisted that at least five acres of land in the areas selected by the Company had to be set aside for each adult male native inhabitant, so that the Company—which doubted that such a condition could be stipulated—did not know how much land it had acquired until the native reserves had been excluded.

On this basis the Board asked that all acquisitions which were approved after 1 April 1899, but related to land which had been previously (though possibly invalidly) acquired should not count towards the 125,000 acres and that the Company should also be permitted to select land in excess of 125,000 acres to be used if other

lands the Company selected could not be acquired or were afterwards reduced to less than the calculated acreage by the setting aside of native reserves.

It appears that both requests were granted. The Company was in particular given permission to select an additional 20,000 acres which it could acquire—if necessary—until 31 March 1906. On 8 February 1902 Hahl was accordingly instructed.

In May 1903 he felt the main difficulties had been sorted out and issued a certificate in favour of the Neu Guinea Kompagnie in accordance with Section 5 of the 1887 Ordinance. The certificate showed that the Company had become the owner of twenty-three blocks of land (described in an attached list)—subject to certain conditions which had to be registered on the titles. These conditions, Hahl explained in a report to the Foreign Office (Z.A., 2280), had been included partly to prevent future complaints from the Neu Guinea Kompagnie and partly to secure the rights of the natives. The clause designed to protect the natives read:

Dwelling places and gardens of the natives existing at the time of the survey [again not the time of the acquisition] remain their free property. The natives have to remain in possession of at least two and a half acres of land per head of population irrespective of age or sex. Further all fishing rights are retained by the natives. The boundaries of the native land and the fishing rights are determined in each case by the District Commissioner in Friedrich Wilhelmshafen as the survey progresses.

A list compiled by District Commissioner Stuckhardt on 25 June 1903 (Z.A., 2280) reveals that some of the acquisitions included in Hahl's possibly 'indefeasible' certificate of 15 May 1903 had at that time not yet been investigated. Other land had not even been acquired but only selected and in such a vague manner that the Government reserved the right to transfer land in the same general area to other persons, provided enough land was left to satisfy the Company's claims.

What a change since Boether's activities two years earlier! Boether had investigated the Neu Guinea Kompagnie's claims in order to determine whether the alleged acquisitions were legally valid. He had refused to recognise any acquisition which was not valid in law. For Hahl the legal validity of a land acquisition was largely irrelevant as long as sufficient land remained for the natives. He was not so much interested in how the land was acquired, but in how the land was

divided between Europeans and natives. This does not necessarily show a disrespect for the law. Hahl might have felt that it was impossible to acquire land in New Guinea in accordance with Western law or that, even if this were possible, such an acquisition would not be just, or that justice was not a suitable criterion for a 'justification' of the European land acquisitions—which he regarded as necessary if the colony were to develop.

All mission societies active in German New Guinea decided sooner or later to supplement their income by establishing plantations. The Catholic Divine Word Mission under Father Limbrock was probably the most determined in this respect. When Limbrock arrived in Kaiser Wilhelmsland in 1896, he faced considerable difficulties. Not being welcome in the Astrolabe Bay where the Protestant Rhenish Mission had been active for ten years, Limbrock accepted an invitation to establish his first mission station near Kaernbach's trading station in Berlinhafen. But Kaernbach died shortly afterwards and Luecker, who took charge for the Neu Guinea Kompagnie, was less sympathetic. Besides acquiring land himself, he informed Limbrock in 1898 that the 200 acres the Mission had acquired without previous permission in 1897 could not be granted to it, and that the Company 'takes possession of the same for itself by making restitution to you of the cost price.' Instead Luecker offered a lease of up to eighty acres for three to five years (Wiltgen, 1969, 333).

Limbrock anxiously awaited the beginning of Imperial Administration. When Benningsen passed through Berlinhafen on his way to Herbertshoehe, he informed Limbrock that he was not in favour of the Mission acquiring much landed property. Limbrock turned to Germany for help. Since nothing seemed to eventuate, he went to Herbertshoehe in August 1900 to try to convince Benningsen to grant him more land. Possibly as a result of pressure from Berlin (*ibid.*, 344), Benningsen first authorised 125 acres and then 'let himself be persuaded to authorise 1,250 acres' (quoted *ibid.*, 341).

Encouraged by this success Limbrock, in January 1902, approached Hahl, from whom he expected more understanding, asking for a grant of 25,000 acres for plantations (*Z.A.*, 2576). In his answer Hahl pointed out that usually areas of up to 25 acres were sufficient for mission stations, but that he would recommend to the Foreign Office that the Mission be granted one larger area for plantation purposes.

In the relevant report of 9 May 1903 (*ibid.*), Hahl described Limbrock's request for a grant of 25,000 acres as extravagant. He only considered it appropriate to grant the mission 'as much land as it requires to finance its activities, or as much land as it can cultivate with the means at its disposal during a definable period, for instance 50 years'. He suggested an agreement could be reached similar to that concluded with the Sacred Heart Mission on 30 December 1902 regarding land at the Toriu River on the west coast of the Gazelle Peninsula.

The Toriu agreement (C.A., AA 73/83, G. Herbertshoehe, FG. 1899-1905) which was intended as a model for the Government's land policy towards all missions was closely connected with the 'old land claims'. In an agreement of 6 July 1901 the Sacred Heart Mission had acquired the first 500 acres in exchange for its land claims in Ponape in German Micronesia. The first stage of the agreement of 30 December 1902 was to grant the Mission a further 1000 acres in exchange for its claims to Watom Island. But the agreement went further. Firstly, the Government bound itself to sell a second block of 1250 acres on condition that cultivation started within five years. Secondly, the Mission could buy within fifty years another five 1250 acre blocks further inland, each as soon as the previous block had been cultivated. This then was Hahl's plan: to grant the missions up to 25 acres for each mission station and to reserve for each mission one large area where it could acquire up to about 10,000 acres of land, depending on the speed with which it developed its holdings. However, the plan did not work and was soon forgotten, although the first negotiations with Senior Flierl of the Neuendettelsau Mission probably still began along these lines.

Early in 1903 Flierl, aware that he would have to face strong internal opposition, inquired confidentially under what conditions the Government was prepared to grant the Mission 1250 acres for a plantation. He sent a copy of this letter to the Mission's headquarters in Germany, which approved his plans, provided the land was not too expensive. Flierl did not have any worries on this score because Hahl decided to grant the land without any payment to the Government. Flierl also had fewer difficulties than he expected when he confronted his colleagues with the facts at the yearly conference. Nevertheless, he felt it necessary to present the case as if the wish to pay for mission activities with money earned from the plantation, were unimportant. 'If the Lord blesses . . . our plans and the Mission can sell copra in



the future, then this is a gift of the Lord himself' (1931, 56). Instead he stressed in particular the educational functions of a mission plantation. The Mission had to do all it could to prevent 'our natives' becoming economically dependent on the Mission or large plantation companies. It had to educate them in such a way that they would become more and more self supporting farmers who produced goods which they could exchange for the modest but growing requirements of the Christian community they would form in the future. 'This is the only way to save them from ruin and final extinction' (*ibid.*, 57).

Twenty years later missionary Lehner wrote that 'many idealistic motives can be named [for the establishing of mission plantations], but looking closely none of them holds good' and that the Mission should only burden itself in a case of emergency with plantations (Report of 1921). In 1912, however, he, like most of the other missionaries, supported Zwanzger's motion to acquire plantation land near Lae as a matter of urgency.

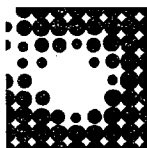
The time for the opening up of New Guinea has begun. Only a few places are suitable for larger plantations. This is one of the best and when a planter sees it, he will take it. We have to act before all the suitable land has been taken up. We have not enough land for plantation purposes. The Government will—possibly after some hesitation—give us the land. We should secure not less than 1,250 acres and preferably considerably more. If we have not planted it all within 15 or 20 years, it does not matter. The Government will listen to reason [although the improvement conditions are not fulfilled], if it sees that we did not buy for speculative purposes, but seriously intended to develop the acquired area. . . . The matter is urgent, since it is possible that during the following favourable season Europeans will again come . . . [to look for land] in the Huon Gulf.

Zwanzger was probably correct in assuming that the Government would not enforce its improvement conditions. He was certainly right in claiming that the speed of economic development would increase drastically—Andexer and Merseburger acquired in 1913 2000 acres of land just north of the land the Mission had selected. But he could not foresee that the outbreak of the First World War would considerably delay the opening up of New Guinea. Still, between 1912 and 1914 about 50,000 acres of land were transferred to new companies or settlers who established a chain of plantations along most of the coasts of German New Guinea.

The judicial attacks of Schnee and Boether and of Benningsen's and Hahl's bargaining had drastically reduced the land claims made by Europeans in 1899, especially those of the three large firms. Despite the additional 125,000 acres granted to it in 1898, the claims of the Neu Guinea Kompagnie had decreased from about 500,000 to about 350,000 acres. The claims of Queen Emma or, in 1914, the H.S.A.G. as her successor, had been reduced from about 330,000 to a little over 60,000 acres. Hershheim, who had claimed about 80,000 acres in 1899 had now only a little over 8000 acres left.

Ignoring all new land acquisitions (save those which were the result of land 'exchanges'), the claims had probably been reduced by almost two thirds of the 950,000 acres claimed in 1899. Most of this land did not 'revert' to native or ownerless land but was transferred to the Government. On the other hand it was clearly not treated as government land in the same sense as land required for government stations or plantations and the like. It thus appears justified not to count it as land claimed by Europeans. The same applies to the land formally set aside for native reserves. Still, by 1914 there existed about 30,000 acres of straightforward government land, and this figure was likely to increase rapidly since the Government tended more and more to lease land instead of selling it to settlers.

The new companies or settlers accounted for the largest portion of land sold to Europeans between 1899 and 1914. Their claims increased during this period from about 60,000 to about 180,000 acres and very little of this was made up of land included in the 60,000 claimed in 1899, since many claims were dropped or reduced or transferred to the old firms or missions. Taken together with the 125,000 acre concession to the Neu Guinea Kompagnie and probably about 60,000 acres of ownerless or native land acquired by the missions, this brings the total claim by Europeans (including the Government) in 1914 to just over 700,000 acres. This was considerably less than in 1899 and about the same as at the time of the annexation, a somewhat unexpected result.



When the Reich took over the administration of German New Guinea on 1 April 1899, it inherited the land laws of the Neu Guinea Kompagnie period based on the Imperial Ordinance of 20 July 1887. In 1900, however, when a civil code and other major codifications of Reich law came into force in Germany a beginning was also made to enact a largely uniform body of law for all German colonies. The basis for a new set of land laws was the 'Imperial Ordinance regarding the Rights to Land in the German Colonies' of 21 November 1902.

This Ordinance was, like that of 1887, based on the view that land owned by Europeans should be governed by German law, that native land should—for the time being—continue to be governed by the traditional laws and that special regulations for the acquisition of native and ownerless land by Europeans should be enacted. But instead of being more precise, the rules laid down in 1902 were more flexible than those of 1887. They even included transitory provisions the 1887 Ordinance had not regarded as necessary. The Neu Guinea Kompagnie, for instance, had thought in its initial optimism it would be possible, reasonable and desirable to transplant the German principle that land dealings (between Europeans) were legally valid only if they were registered. Fifteen years later, the draftsmen of the 1902 Ordinance considered it necessary to include a clause that the ownership of unregistered land could be transferred by a simple agreement between the parties. This was less than the 1887 Ordinance had required for valid land dealings between Europeans prior to annexation since now not even a transfer of possession was necessary although this had been an essential prerequisite for a valid transfer of land before a registration system was introduced in Germany.

Just as the 1887 Ordinance had left it to the Neu Guinea Kom-pagnie as the administering authority to draft the rules which were to govern the acquisition of ownerless or native land, the 1902 Ordinance left this task to the Chancellor of the Reich. It also directed that regulations which had been issued in this respect—for instance the Company's Directions of 1887—should remain in force until they were specifically repealed. On the other hand, the 1902 Ordinance expressly abolished for the native population of the German colonies the principle that a person is free to dispose of his property as he thinks fit—which had formed the basis of the 1887 Directions.

If and in so far as it appears necessary in the public interest, the Chancellor of the Reich and with his approval the Governor, are authorised to forbid the acquisition or the use of such [native owned] land by third parties or to make it dependent on special conditions or a permit from the authorities.

Colonial paternalism had officially arrived.

On 27 November 1903 Hahl sent a draft of the regulations he intended to issue in execution of the 1902 Ordinance to the Foreign Office for approval (Z.A., 4982). He felt that detailed regulations for the protection of natives in connection with land acquisitions in the future were not necessary. 'Land which is inhabited, cultivated and required by natives shall be excluded from future acquisition. . . . The decision regarding the demarcation of such land . . . has been reserved for the local administrative authorities.' Hahl not only tried to keep the law out of the question of native reserves he also tried to push it otherwise as far back as possible: 'I do not regard it as appropriate to enact further binding regulations regarding the acquisition of land.'

Hahl found a sympathetic ear and the relevant sections of the regulations issued on 22 July 1904 were thus somewhat shorter than the 1887 Directions they replaced.

1. The Government has the exclusive right to take ownerless land into possession . . . and to make contracts with natives regarding the acquisition of land, real rights to land or the use of land. . . . Land required by the natives for their sustenance, in particular dwelling places, garden land and palm groves, is excluded from any acquisition.
2. [The deed of occupation] . . . must contain a precise definition of the boundaries and a statement of how . . . [the boundaries have been marked].

At his discretion the Governor can determine the further contents of the contracts with natives . . . either generally by issuing contract forms or from case to case.

Whereas the Neu Guinea Kompagnie had tried to enact detailed and binding regulations, now almost everything was left to the Governor. At least in theory, the Neu Guinea Kompagnie had treated the acquisition of land as a matter of law, regulated in the Directions of 10 August 1887. Only the transfer of land to settlers was treated as a matter of policy which was defined in the 'General Conditions for the Transfer of Land to Settlers' of 15 February 1888. In contrast Hahl included the few provisions regarding the acquisition of land in the new 'General Principles for the Transfer of Land' which were designed to implement the Government's land policy and lacked normative force.

Even the wide administrative discretion left by the 1904 Regulations proved too restrictive. The only major legal limit—that dwelling places, garden land and palm groves could not be acquired—was also disregarded, provided the natives agreed to sell such land and the Government felt their needs for land were satisfied. This was probably a politically sound decision since it had proved to be highly undesirable from everybody's point of view to have small enclaves of native land in European plantations—but it was not exactly legal.

The forms for the acquisition of land referred to in the 1904 Regulations were not the first used by the Imperial Government. There existed an earlier form for the purchase of native land based on the form issued by the Neu Guinea Kompagnie in 1887 which in turn had replaced the form supplied to Finsch in 1884.

The main difference between this earlier form and the form issued in 1904 was that the latter included questions dealing with the protection of native interests. The buyer had to certify that the natives living in the vicinity of the sold land remained in possession of sufficient land to guarantee their livelihood. In particular he had to state the size of the sold land, the size of the land remaining to the natives involved and their number.

The contract of purchase and sale itself was phrased very similarly to the earlier form, only the definition of what was sold differed. Whereas the natives had previously sold the land 'including all trees, gardens and buildings', the acquisition of land 'including' these things was now illegal. Nevertheless, the new form directed that it had to be

explained to and understood by the native vendors that 'the buyer was in future exclusively entitled to use and to dispose of coconut palms and other fruit trees growing on the land'. This was hardly consistent with the 1904 Regulations which expressly excluded native palm groves from any acquisition. It also suggests that even in 1904 the rules laid down in the Regulations were not regarded as the final word.

By 1909, when the draft for a detailed set of 'Principles for the Transfer of Land' had been prepared, this was beyond doubt: native palm groves were no longer mentioned as being excluded from any acquisition. This does not mean that the Government was now less ready to protect native interests. On the contrary, the 1909 Principles excluded, for instance, over and above the 1904 Regulations all land required by the natives for the fabrication and storage of their boats and fishing gear, (allowing for the possible use of European type fishing boats in the future). However, the Government wanted to be free as to how to protect native interests.

It took about three years before an amended version of the 1909 draft was published on 24 April 1912, but only about eighteen months until these new Principles were again revised (1 January 1914). Most of the changes were made to adjust the Government's land policy towards European settlers to the changing economic conditions, but there were also changes in the 'rules' governing the acquisition of land, for instance concerning the part private persons could play in this context.

On 1 April 1899 the Neu Guinea Kompagnie's exclusive right to acquire native or ownerless land became vested in the Imperial Government. However, the Government, chronically short of staff, was at first very generous in authorising private persons or companies in general terms to acquire land. When the applications for land in the north of New Ireland suddenly increased, it was thought necessary to establish stronger government control. On 24 January 1902 Hahl issued regulations according to which ownerless land could only be taken into possession by an Imperial official. Regarding the acquisition of native land the changes were not quite so drastic. Private persons could continue to buy native land for the Government but they needed from now on a special authority, probably relating to a certain person and a certain piece of land.

A year later it became necessary to enact similar regulations for Kaiser Wilhelmsland in connection with the Neu Guinea Kompagnie's 125,000 acre concession. In the meantime it had proved unsatis-

factory, however, that private persons could not be authorised to occupy ownerless land and the new regulations were accordingly phrased to make this possible. This was also the view adopted in the form issued for the authorisation of private persons in 1904—which also stipulated: ‘You are not entitled to acquire land which the natives use for gaining their livelihood and such land will under no circumstances be resold to you.’

The 1909 Draft distinguished between the acquisition of land inside and outside ‘organised’ areas—that is areas already or not yet under government control. Land inside ‘organised’ areas (whether native land or ownerless) could only be acquired by Imperial officials, but private persons could be authorised to acquire land outside these areas. In this case, however, the acquisition had to be investigated by an Imperial official before the land was formally transferred to a private person.

The 1912 Principles were less dogmatic. They stipulated that private persons could also be authorised to acquire land inside ‘organised’ areas if ‘the acquisition by an Imperial official is impracticable under the circumstances’. Moreover, instead of directing that such an acquisition had to be investigated by an Imperial official before the land was formally transferred ‘the competent Imperial official had [only] to be given the opportunity to comment on the selection of the land before it was acquired’.

The 1914 Principles corresponded with the 1909 Draft in that they made no provisions for the acquisition of land by private persons inside ‘organised’ areas—the staffing position had in the meantime sufficiently improved to make this unnecessary. On the other hand, the transfer of land acquired by private persons outside these areas was no longer made expressly subject to any official comments or investigations. The form for the authorisation of private persons issued at the same time, however, required that the competent official had to have a chance to disallow the acquisition of a particular area of land which had been selected. But in contrast to the 1904 form, this new form no longer expressly stated that land used by the natives could not be acquired. Instead it emphasised that the granting of an authority to acquire land for the Government did not give the authorised person an enforceable claim to the land. Moreover, if the Government decided for one reason or another not to transfer the land, it did not have to reimburse him for the expenses of the acquisition. He could not even demand that the natives repay the purchase

price (although the Government could). There were many other changes but the aim always remained the same: to strengthen the administrative powers of the Government and to relax the legal rules binding it.

The land laws of the Neu Guinea Kompagnie period made no provision for the creation of native reserves. The Imperial Ordinance of 21 November 1902 also referred only indirectly to them. It made it possible to register all rights regarded as appropriate for the protection of native interests, although the Civil Code permitted the registration of only a limited number of defined rights. It also directed that such registered rights could continue to be governed by the traditional laws, although registered rights—even if held by natives—were principally governed by German law. The 1902 Ordinance thus gave the colonial Governments a free hand to create native reserves in the form which they regarded as most suitable—unhampered by legal rules; but they did not direct that native reserves had to be created.

The Regulations of 22 July 1904 also said nothing specific about native reserves beyond stating that land required by the natives for their sustenance could not be acquired. Hahl's comments of 27 November 1903 indicate that the local administrative authority was to decide in each case how much land was required. Nevertheless, attempts were made to define the size of native reserves in a more general way. It appears that Hahl at first decided to calculate native reserves according to the number of adult males, allowing five acres for each of them. The certificate issued to the Neu Guinea Kompagnie in 1903 stipulated a minimum of 2.5 acres per head of population, irrespective of age or sex. The 1909 Draft added that these 2.5 acres had to be suitable for planting taro or coconut palms. On the other hand, the 2.5 acres were no longer regarded as a minimum: the size of native reserves was to be calculated accordingly.

Before the 1912 Principles were issued, Hahl asked the planters, traders and missionaries for their comments on the size of native reserves. Zwanzger wrote on 15 May 1911 for the Neuendettelsau Mission. According to him two questions had to be considered: firstly, whether the native population increased, decreased or remained static; secondly, whether it was to be expected that 'the natives' way of life will become in time culturally more advanced'.

Zwanzger, more optimistic than most of his contemporaries, believed that the native population at least did not decrease. For this



reason, he argued, reserves should not be too small, since 'it would be difficult to excise parts of a fully cultivated plantation adding them to the reserves if the population does increase', whereas 'it is always possible . . . to transfer parts [of reserves] for plantation purposes . . . [if] it turns out afterwards that they were too large.'

The second question, Zwanzger thought, could also be answered 'with some certainty in the affirmative'.

In some parts it is already possible to notice progress. The people will strive even more to be better clothed, to have better food and to build better houses. This, however, is only possible if the people can produce agricultural goods which they can exchange for civilised articles. For this reason too the reserves should not be too small since the cultivation of coconut palms which would be most suitable for the coastal population, requires large areas. Besides, a reserve should include a piece of bush since the natives need timber for boats and in any case for houses. Should the natives in time be supplied with small cattle, which would be highly desirable, they need pasture. Finally the fertility of the soil is not inexhaustible. Continued planting will reduce the yield, even if fertilisers are used so that fallow periods are required.

For these reasons Zwanzger suggested that 12·5 acres per head of population were required. Hahl probably received less progressive comments. In any case, the size of native reserves was not defined in the 1912 Principles. Instead it was stated that it depended on the local conditions in each individual case. The 1914 Principles fell back on the 2·5 acre proposal but added a clause which made even the minimal size of reserves a matter of negotiations:

When native reserves are excised, 2·5 acres of land suitable for garden crops and coconut palms per head of population is to be set aside, if at all possible.

Hahl was not in favour of having the acquisition of land regulated by binding rules, but he had pressed since 1896 for a statutory basis for the excision of native reserves from European owned land. He finally got it in the form of the 'Special Provisions for the Protection of the Rights of Natives to Ownership and Possession of Land' which were included as Section 32 in the Expropriation Ordinance for the German colonies of 14 February 1903.

The Chancellor of the Reich is entitled . . . to permit the expropriation of land which has passed from the dominion or possession of natives to non-natives for the purpose of reinstating natives into possession in so far as is

necessary, according to the discretion of the authorities, in order to ensure the natives' economic existence and in particular their right to a home.

The compensation . . . of the present owners or possessors of such lands is to be paid by the Government . . . The compensation can be limited to the reimbursement of the costs when the land was first acquired from the natives. The expropriated lands become as crown land the property of the Government . . . which leaves their use to the natives.

The details of the procedure are to be decided in each case by the Chancellor of the Reich after a report from the Governor. The Governor is entitled to take provisional measures regarding the possession of such land until this decision has been made.

When the Expropriation Ordinance was published, Section 32 caused a storm of protests among Europeans. On 30 October 1903, the German Colonial Society, probably the most influential protestor, sent a detailed petition to the Chancellor of the Reich (*D.K.Z.*, 1903, 451ff.). The Society claimed to appreciate fully the humanistic tendency of Section 32 but argued that it was so phrased that it became possible to attack vested rights to land in a way which had nothing in common with the basic idea of expropriation. It also criticised that the Government was given unlimited discretion in determining the amount of compensation which it itself had to pay. This, the Society emphasised, could not only lead to unjust results in individual cases but would necessarily lower the value of most European owned land in the colonies. The Society finally attacked the freedom given to the Government in determining the expropriation procedure. 'It can even make the administrative decisions binding for the courts which is irreconcilable with the idea of a constitutional state'. The Society suggested that the rules which had been laid down in the Ordinance for the expropriation of land for other purposes should also apply in this case, especially the rule that the full value of the land had to be paid in compensation.

The Society did not gain a total victory, but the Decree the Chancellor of the Reich issued on 12 November 1903 in the execution of Section 32 turned it into a comparatively harmless weapon.

A non-native claiming ownership of land could apply at any time for a certificate from the Government that a certain property would not be expropriated under Section 32. The Governor was required to issue such a certificate: if he knew that no natives had justifiable legal or equitable claims to the land, or if an amicable settlement of the claims of the applicant and of the natives had taken place before the

authorities, or if the land had been registered after a public summons according to the 1902 Ordinance, or if the land had not been inhabited or cultivated by natives after 1 January 1899, or if a non-native had acquired the land *bona fide* and had lived on it or cultivated it for three years without objection from the authorities.

In case the Governor decided he could not issue such a certificate, he had to report to the Chancellor of the Reich, who then decided whether the certificate should be issued or whether the land should be expropriated.

Regarding the expropriation procedure, the Decree directed that the Crown Land Ordinance for the German Cameroons of 15 June 1896 was correspondingly applicable. This meant that a Land Commission had to be established whose decisions were subject to appeal. The 1896 Ordinance did not define the size of a native reserve, but only stated generally that the cultivation or the use of the land which was set aside had to guarantee the natives' livelihood, taking a future population increase into account. The compensation was to be determined by the Chancellor of the Reich who had to hear the parties involved and to apply the principles of equity, although his decision was apparently not subject to appeal.

On 20 November 1903 the head of the Colonial Section of the Foreign Office, Stuebel, drew the Governors' attention to the Decree of 12 November (Z.A., 4364). His comments leave no doubt that Section 32 was a result of Hahl's pressures and illustrate at the same time the official German attitude towards the early European land acquisitions in New Guinea.

According to Stuebel, the natives had been first of all injured when Europeans, prior to the annexation, had acquired large areas of land for 'a few pieces of material, tobacco, firearms, liquor and the like—in one case an island inhabited by several hundred people for one axe'. In these cases the natives had been usually left for the time being in possession of the land used by them, whereas the European acquired only the *nuda proprietas*, the naked, formal legal ownership. Since this was frequently not shown in the purchase documents it was difficult to establish at a later date what the intentions of the parties, in particular the native vendors, had been, so that the *nuda proprietas* could easily grow into full ownership, especially if the misleading purchase documents were taken as a basis for the registration of the land.

After the annexation the native population had also been injured, partly because land had been acquired from natives who had no right

to dispose of it, and partly because the Neu Guinea Kompagnie had taken large areas as ownerless into possession although they were inhabited by numerous natives. These lands had been registered by virtue of a certificate of the Administrator according to Section 5 of the 1887 Ordinance. In a few cases the natives had taken successful court action to have these obviously erroneous registrations cancelled. However, in the opinion of the Foreign Office, which was shared by the Ministry of Justice, this should not have been done, because the Administrator's certificate was binding for the courts.

The certificate had thus, if based on wrong facts, the effect of an expropriation of the natives. The most elementary principles of justice demand however, that the natives be reinstated. For this purpose the land had to be taken from the formal owner and made into crown land in favour of its native inhabitants.

This argument shows particularly clearly the embarrassing switch from a liberal judicial to a paternalistic administrative approach (or vice versa) most colonial powers had (and have) to make again and again. The 'most elementary principles of justice demand . . . that the natives be reinstated'—but instead of being reinstated the land is turned into crown land reserved for the use of the natives and even this does not happen if and in so far as an acquisition is unjustified but 'in so far as is necessary, according to the discretion of the authorities, in order to ensure the natives' economic existence'.

On the other hand, if Section 32 was—as the Colonial Society argued—an expression of a humanistic tendency, why was it necessary that the land had to be passed from native into non-native possession and that the natives had a justifiable legal or equitable claim to it? Humaneness clearly demanded that land had to be given to any group of natives whose economic existence was endangered, even if it had no claim to the land in question and independent of whether or not it had once been in native possession. If it was regarded as necessary, however, that the natives in whose favour land was expropriated had a legal or equitable claim to it, why were they prevented from pursuing this claim if the authorities—not they themselves—had for three years not objected to the occupation of the land by a non-native?

Section 32, the petition of the Colonial Society, the Decree of 12 November 1903 and Stuebel's comments contain an almost surrealistic mixture of heterogeneous elements which make them a lawyer's dream and nightmare. Stuebel was aware of this and concluded his comments

by stressing strongly that an expropriation on the basis of Section 32 should only be carried out if absolutely necessary. The German authorities shared Hahl's view that it was not the purpose of this Section to be applied but to improve the Government's bargaining position.

The acquisition of land was still not the result of a legal transaction but a complex historical process—although the social, political and economic motives had essentially changed since pre-contact days. There was layer upon layer of deeds, agreements, registrations, tentative arrangements, gifts and payments, surveys and exchanges of land, but if the situation became critical, they were not tested in court but new negotiations were started. The colonial law was not used for solving the problems caused by the clash between primitive and Western law. If at all, it was used indirectly as a threat in an attempt to prevent this clash by replacing judicial decisions with political compromises. Since this is the traditional alternative to law enforcement, it can even be argued that colonial New Guinea remained until 1914 governed by primitive law. In the meantime the situation has changed. The façade of colonial law is now increasingly backed by the Administration, if necessary by force. But instead of thereby establishing 'law and order', this rather tends to turn primitive law into pseudo-Western lawlessness. The gap is still there, almost as deep as ever, and land in New Guinea remains between two laws.

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