Tito and others v Waddell and others (No 2), Tito and others v Attorney-General (Part 1 of 3)

CHANCERY DIVISION

[1977] Ch 106, [1977] 3 All ER 129, [1977] 2 WLR 496

HEARING-DATES: 8-11, 14-18, 21-25, 28-30 APRIL, 1, 2, 5-8, 12-16, 19-23 MAY, 3-5, 9-13, 16-20, 23-27, 30 JUNE, 1-4, 7-11, 14-18, 21-25, 28-31 JULY, 22-24, 27-31 OCTOBER, 3-7, 10-14, 17-20, 24-28 NOVEMBER, 1-5, 15-19 DECEMBER 1975, 12-16, 19-23, 26-30 JANUARY, 2-6, 9-13, 20, 23-27 FEBRUARY, 1-5, 8-12, 15, 18, 19, 22-26, 29-31 MARCH, 1, 2, 5-9, 13, 14, 27-30 APRIL, 3-7, 10-14, 17-21, 24-28 MAY, 8-11, 14-18 JUNE, 29, 30 NOVEMBER, 1-3 DECEMBER 1976

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CATCHWORDS:

Trust and trustee - Nature of trust justiciable in court - Governmental obligation - Enforcement of obligation - Criteria on which distinction drawn between trust and governmental obligation - Crown colony - Lease by colonial official to mining commissioners - Royalties to be held 'in trust' for islanders - Absence of intention to create a true trust or fiduciary obligation - Whether 'trust' justiciable in courts.

Contract - Stranger to contract - Benefit and burden - Connection between defendant and contract - Mining lease conferring benefit on government appointees - Lease containing an obligation to replant - Change in appointees - New appointees taking benefits of lease - Whether obligation to replant enforceable against new appointees.

Specific performance - Parties - Interested parties not all before court - Form of order - Attempt to cure defect - Form of order leaving views of absent parties to be ascertained - Whether damages a more appropriate remedy.

Contract - Damages for breach - Injury to land - Compensation for work which might not be performed - Alternative basis of assessment of damages - Mining lease containing replanting obligation - Failure to carry out obligation - Damages based on cost of carrying out replanting work if plaintiff established work would be done - Alternative damages based on diminution in market value.

Boundary - Seashore - Beach - Area of beach - Area from low-water mark to high-water mark and area to landward of high-water mark in apparent continuity with beach at high-water mark - Extraction of sand - Agreement permitting extraction of sand from 'beach'.

HEADNOTE:

Ocean Island was located just south of the equator in the Western Pacific. It had a surface area of 1,500 acres and consisted of a coral limestone base overlaid with phosphate. The coral appeared mainly in the form of 'pinnacles' of up to 80 feet high dotted about the landscape. There was little topsoil; most of the vegetation grew originally directly out of the alluvial phosphate. The rainfall was so small as to make even coconuts a marginal crop.

In 1900 the island was inhabited by some 500 Banabans. Phosphate was discovered that year and operations for its recovery were commenced by the PI Co Ltd. The PI Co Ltd applied for a licence from the Crown and a licence granted in 1902 (replacing earlier licences) conferred on a subsidiary company of the PI Co Ltd an exclusive right to occupy the island and to work phosphate. Meanwhile the island had been declared a British protectorate and became part of the Gilbert and Ellice Islands; subsequently, those islands

were given colonial status. At all material times, English law applied to Ocean Island subject to local statute law.

The company made a number of freehold purchases of land on the island, but the King's Regulations 1908 severely restricted such transactions and, in order to protect the inhabitants from exploitation, required the approval of the resident commissioner for any sale or lease of native lands. The impact of the legislation was chiefly avoided by the company by transactions relating specifically to the phosphate and trees under 'P and T' deeds. At this time when land was worked out, it presented a picture of coral pinnacles adjacent to pits in which small quantities of phosphate were left. In some of the pits young coconuts had been planted, with some prospect of their growth. A proposal to level the pinnacles was considered, as was the problem of access to the newly-planted coconuts, without it being suggested that access was impossible without the construction of roadways. It was, however, becoming clear that the progress of the mining raised doubts as to the survival of the Banabans on the island. Various discussions were held between the company, the resident commissioner, the High Commissioner and the Colonial Office. By early 1913, the company and the Colonial Office had agreed that the company's future mining activities should be restricted in specific ways; effect was given to that in negotiations between the company and the Banaban landowners. Following the negotiations, the company signed an agreement with 258 Banaban landowners in the presence of the resident commissioner. The agreement provided that the land to be acquired by the company in the future was to be restricted to certain areas; a Banaban Fund was to be set up from the proceeds of a royalty payable on each ton of phosphate by the company to the government; the fund was to be administered in the first instance for the benefit of the Banaban community; an annuity scheme was also set up for all landowners thereafter leasing land to the company; no indication was given as to how long those arrangements were to be continued; and the company was required to replant worked-out lands whenever possible with coconuts and other food-bearing trees. This became known as 'the 1913 agreement'. The Colonial Office drafted deeds for the use of the company in acquiring land under the agreement. These were known as 'the A and C deeds'. The A deeds were used where the company already had a licence (i e a P and T deed) and was exchanging that for a deed under the 1913 agreement. The C deeds were used where the company was acquiring rights de novo. The parties to the A and C deeds were the company, the respective landowner and the resident commissioner. Both the A and the C deeds stated that the company would replant the land as nearly as possible to the extent to which it was planted at the date of commencement of operations, with trees and shrubs as prescribed by the resident commissioner for the time being in the island. (In fact, no such prescription was ever made.)

in 1920 the company's undertakings, rights, assets and liabilities were purchased by the British Phosphate Commissioners, an unincorporated body consisting of three individuals appointed respectively by the governments of the United Kingdom, Australia and New Zealand. The commissioners changed subsequently without any assignment of rights etc. (The company eventually went into liquidation.) In the year of the first appointments, the resident commissioner, acting on instructions from the Colonial Office, informed the Banabans that the commissioners would work the phosphate in future and that there would be no change in their own relations with the local administration. The company's local manager also informed his labourers that no changes detrimental to their interests would be made. Nothing was said to the landowners of the change from an incorporated company to unincorporated individuals. Over the years, further discussions were held with a view to the commissioners' acquiring more land for mining; but terms could not be agreed with the Banabans. The resident commissioner of the day, who had in effect been negotiating with the Banabans on behalf of the commissioners, wrote a threatening letter to the Banabans advising them to accept the terms offered. Meanwhile the 1928 Mining Ordinance was drafted and enacted. This provided machinery whereby, in effect, the resident commissioner could take possession of land needed for mining in respect of which the commissioners and the Banaban landowners had been unable to agree terms (provided that the resident commissioner regarded the terms offered as reasonable) and could lease it to the commissioners. Under the lease, compensation for the land would be assessed on a market value basis by arbitration, but the rate of royalty payable for the phosphate would be fixed by the resident commissioner. Moneys paid by way of compensation or royalties were to be paid to the resident commissioner and were to be held by him in trust for the former owners. Similarly, moneys to be paid under agreements reached between the landowners and the commissioners were to be paid to the resident commissioner and held by him in trust for those entitled. In 1931 the resident commissioner (who had earlier written the threatening letter) finally fixed the rate of royalties to be paid under the 1928 Ordinance, stating in

his proclamation that part of the royalty would be held in trust for the Banaban community generally (the 1931 transaction). The words of the lease reiterated the words of trust. The 1928 Ordinance was modified by a 1937 Ordinance which, inter alia, omitted the reference to holding the moneys in trust and required the resident commissioner to pay the moneys received as royalties for the benefit of the natives of the island and to pay the moneys received as compensation to the former owners of the land.

In 1942 Ocean Island was occupied by the Japanese. The resident commissioner left, and thereafter there was no resident commissioner established on the island. During the occupation all land records, all the Banabans' houses and many trees were destroyed. After the war the island was uninhabitable and the Banabans were resettled on Rabi late in 1945; this island, some 1,600 miles from Ocean Island, was part of the Fiji Colony and had providentially been bought as a second home for the Banabans in 1942. A Rabi Island Council was formed with some legislative powers and after a ballot the Banabans decided to make Rabi their permanent home.

In 1947 an agreement was made between the commissioners and the Banaban landowners of Ocean Island. It provided for the commissioners to acquire further parcels of land on Ocean Island and for payments to be made to the landowners. No provision was made to review the scale of the payments and the agreement was generally disadvantageous to the Banabans. Although the agreement was signed in the presence of the administrative officer responsible for Rabi, all negotiations had been conducted by the manager of the commissioners. In 1948 the commissioners negotiated an agreement ('the sand agreement') with the Rabi Island Council whereby they were permitted to remove sand from the beach at Ocean Island. In 1957 the commissioners agreed to raise the royalty payable under the 1947 agreement and subsequently they improved the financial lot of the Banabans by various ex gratia payments. In 1971 the office of resident commissioner was abolished and replaced by that of Governor. The function of prescribing the trees and shrubs under the replanting obligations in the A and C deeds accordingly devolved on the Governor.

The Council of Leaders and some (but not all) of the Banaban landowners owning individual plots of land scattered about Ocean Island brought proceedings against the commissioners and the Attorney-General on behalf of the Crown. In the first action *('Ocean Island No 2'*) they claimed that the Crown was in a fiduciary relationship to the Banabans and that in respect of the 1931 transaction and the 1947 transaction the Crown had acted in breach of that relationship through a conflict of duty and interest. In the second action *('Ocean Island No 1* ') it was claimed that the commissioners had wrongfully removed sand from a particular plot. It was also claimed that they had failed to comply with the obligations affecting some 250 acres to replant worked-out lands and that they should be required to demolish the pinnacles, to import soil, to plant coconuts in baskets of soil six feet deep and ten feet in radius and to provide access to the replanted plots. That aspect of the claim would involve constructing some 80 miles of roadways in the 250 acres and the imporation of soil from Australia over several years; it would take at least five years before planting could begin and a further 12 to 14 years before the trees began to fruit. The plaintiffs claimed specific performance and alternatively damages. In respect of certain plots where not all who might be interested were before the court, the claim for specific performance was expressed to be 'should all the owners of such land wish it'.

Held -- (i) The fiduciary claims in Ocean Island No 2 failed, since any obligation which the Crown had towards the Banabans was a governmental obligation (or 'trust in the higher sense') and as such was not justiciable in the courts; it was not a 'true trust' in the conventional sense (see p 238 b, post); in particular --

(a) the naming of the holder of an office rather than an individual as trustee suggested an intention to create a governmental obligation rather than a true trust (see p 221 c, post);

(b) the problems inherent in relation to the law of perpetuities, the ascertainment of the beneficiaries and in the assessment of their interests made it difficult to infer that a true trust had been created in respect of the Banaban Fund (see p 226 b and c, post);

© the circumstances surrounding the 1913 arrangements, particularly the fact that the Crown was not a party to the agreement between the Banabans and the company and that there were no statements made on behalf of the government before, during, or after the 1913 agreement to show an unequivocal intention to hold the fund on a true trust, substantially supported the existence of a governmental obligation rather than a true trust (see p 226 e to g, post);

(d) the trust referred to in the 1928 Ordinance imposed a statutory duty on the resident commissioner to use the moneys received in a particular way, but in the absence of any intention (or implication) to create a fiduciary obligation, the Ordinance did not create a true trust or any other fiduciary obligation (see p 230 j to p 231 a, post); Re Bulmer, Greaves v Inland Revenue Comrs [1937] 1 All ER 323 distinguished;

(e) there were no express words in the 1937 Ordinance creating a true trust; the language of the Ordinance was more consonant with that of a governmental obligation than a true trust; and the words of trust in the 1931 transactions (which themselves created no true trust) could not convert the obligation under the Ordinance into a true trust (see p 235 f to h, post); Kinloch v Secretary for State for India in Council (1882) 7 App Cas 619 applied.

(ii) In the absence of a true trust there was no other fiduciary obligation of the Crown in relation to the Banaban community which would have given rise to a conflict of duty and interest in Ocean Island No 2 because --

(a) nothing in the 1913 arrangements could be said to constitute the Crown an agent of the Banaban community so as to give rise to a fiduciary relationship (see p 227 h, post);

(b) a governmental obligation did not give rise to the application of the rules of equity relating to self-dealing and fair-dealing; to hold otherwise would be to render a non-justiciable obligation justiciable (see p 228 f, post);

© the imposition of a statutory duty by the 1928 Ordinance to fix the rate of royalty and to perform other functions was too wide and indefinite to impose fiduciary obligations; and coupling the performance of a non-fiduciary obligation with self-dealing did not subject the self-dealer to any fiduciary duty (see p 232 d and g, post); Re Reading's Petition of Right [1948] 2 All ER 68 distinguished.

Per Megarry V-C. (1) Breaches of the self-dealing and fair-dealing rules are not subject to the six year period of limitation laid down by the Limitation Act 1939, s 19(2) (see p 248 d and e, post).

(2) Where a claim to an account is ancillary to a claim for equitable compensation, the Limitation Act 1939 and the doctrine of laches apply to the ancillary claim as they apply to the substantive claim, notwithstanding s 2 of the 1939 Act (see p 249 j to p 250 a, post).

(3) In determining whether proceedings may properly be brought against the Crown under the Crown Proceedings Act 1947, it is sufficient (in an appropriate case) if the plaintiff can show that the requirements of s 40(2)(b) have been met; he does not need also to show that, the claim being formerly enforceable by petition of right under s 1, the money was properly payable out of the United Kingdom Treasury (see p 251 h, post).

(4) Declarations should not be made against the Crown in the English courts under what was formerly the Exchequer equity jurisdiction unless the obligation is an obligation of the United Kingdom government (see p 256 f, post).

(iii) The statutory provisions which required royalties to be paid or applied to or for the benefit of the Banabans did not apply to moneys payable under various statutes and agreements to the government of the Gilbert and Ellice Islands Colony in lieu of taxation, even if they were described as royalties; the Banabans were accordingly not entitled to such moneys (see p 215 f to p 216 a, post).

(iv) The sand claim in Ocean Island No 1 failed because --

(a) the term 'beach' meant the area from low-water mark upwards to high-water mark and beyond to all that lay to the landward of high-water mark and was in apparent continuity with the beach at high-water mark (see p 263 a and b, post); Government of State of Penang v Beng Hong Oon [1971] 3 All ER 1163 applied; Fisherrow Harbour Comrs v Musselburgh Real Estate Co Ltd (1903) 5 F 387 and Musselburgh Magistrates v Musselburgh Real Estate Co Ltd (1904) 7 F 308 considered;

(b) applying that test, it was clear that the land from which the commissioners had removed the sand was an area of beach in respect of which they were entitled to remove sand under the sand agreement (see p 265 c and d, post).

Per Megarry V-C. Although the court has no jurisdiction to determine title to foreign land or the right to possession of it or to award damages for trespass to it, ownership of foreign land would be merely incidental to a claim for the conversion of sand removed from it and hence the court would have jurisdiction to hear such a claim (see p 266 g and p 267 b, post).

(v) The replanting claim in Ocean Island No 1 succeeded in part on one of the two grounds put forward; for --

(a) as the replanting obligations had not been entered into by the present commissioners with the present owners of the land, the present commissioners were not liable on them unless liability could be established either by novation or by the doctrine of benefit and burden (see p 279 d and j to p 280 a, post).

(b) although it would be unfair to allow the present commissioners to escape liability by reason of their unincorporated state and the failure of the governments to ensure that each generation of commissioners succeeded in law to the burdens as well as benefits of the company's undertaking, it was impossible to find or infer the massive series of novations required to make the present commissioners liable; for there was a complete lack of the requisite animus contrahendi, especially in view of the absence of any explanation to the landowners in 1920 of the significance of the change from an incorporated company to unincorporated commissioners (see p 280 b d and e, post).

© nevertheless the present commissioners were liable under the doctrine of benefit and burden; for contemporary documents and circumstances showed that the original commissioners took over the rights and liabilities of the company and on subsequent changes of individual commissioners it was clearly intended that each should enjoy the benefits and be responsible for the liabilities; furthermore, there was sufficient connection between the present commissioners and the A and C deeds creating the benefits and burdens to enable the principle that he who takes the benefit of a transaction must bear the burden of it to be applied (see p 293 f to j and p 296 a, post); dictum of Upjohn J in Halsall v Brizell [1957] 1 All ER at 377, Parkinson v Reid [1966] SCR 162 and E R Ives Investment Ltd v High [1967] 1 All ER 504 applied; Bagot Pneumatic Tyre Co v Clipper-Pneumatic Tyre Co [1902] 1 Ch 146 not followed;

(d) although the benefits taken by the present commissioners under the 1913 agreement were, at highest, minimal, the mining rights which they enjoyed under the A and C deeds were substantial; moreover, the commissioners and their predecessors had treated the mining areas globally and not on a plot-by-plot basis and hence they could not escape the burdens by maintaining in respect of individual plots that they had not derived any benefit therefrom (see p 294 j and p 295 f, post); accordingly, the commissioners were liable on the replanting obligations of the A and C deeds (into which, in respect of parcels covered by A and C deeds, the replanting obligations of the 1913 agreement had merged) and were subject to the normal remedies, including damages, for breach of that obligation; if specific performance of the obligation could be decreed, they would be liable for damages under Lord Cairns's Act (see p 277 c and f and p 297 g, post);

(e) the present owners of the land were competent to bring proceedings to enforce the replanting obligations which ran with the land both at law and in equity (see p 297 h, post);

(f) the replanting obligation would not be defeated by the failure of the resident commissioner or the Governor to prescribe trees and shrubs when the benefits under the A and C deeds had been enjoyed by the commissioners and the court could, if necesary, make an appropriate order (see p 303 a b and e to g, post); however, the function of prescribing trees and shrubs was purely governmental in nature and the court therefore had no jurisdiction to make a declaration relating to its performance (see p 305 a to d, post);

(g) the word 'replant' was to be construed in its context and in the circumstances existing when the 1913 agreement and the A and C deeds were executed; so construed, it did not require the execution of extensive and disproportionately expensive works such as levelling pinnacles, constructing roadways and baskets of soil, importing soil, and so on; instead, it merely required planting in a few feet of loose phosphate in the land in its worked-out state; and this construction was supported by the words relating to possibility in the 1913 agreement and the A and C deeds (see p 273 a to c and h, p 275 b to d and p 276 a and b, post).

(vi) The court would not order specific performance of the replanting claim in Ocean Island No 1, because --

(a) in relation to the plots in respect of which some co-owners were not parties to the action, the plaintiffs could only obtain specific performance if all other parties entitled to join in enforcing the obligations were before the court; and this defect could not be cured by seeking a form of order leaving the views of the other parties to be ascertained after the action (see p 310 b f and g, post); Hasham v Zenab [1960] AC 316 considered;

(b) in relation to the other plots (which were scattered about the island), damages would be a more appropriate remedy than specific performance since the latter would result in a small number of isolated plots being replanted with trees in hollows beside the pinnacles; the coconuts were unlikely to fruit and the plots would be surrounded by other plots not so replanted, thus making access for the owner, at best, difficult; accordingly, as a matter of discretion, specific performance would be refused (see p 312 a and b, post).

(vii) Any plaintiff in Ocean Island No 1 who had sufficiently established his title to land that was the subject of an A or C deed was entitled to damages if the land had ceased to be used by the commissioners; those damages would be based on the diminution in value of the land resulting from the breach of the replanting obligations; they would not be the cost of replanting the land in accordance with them unless the plaintiff showed that this cost represented the loss to him; no plaintiff had established this; there was not enough evidence of the diminution in value of the land caused by the failure to replant to enable damages to be assessed; and accordingly, failing agreement, there must be further submissions to establish the extent of each plaintiff's loss (see p 313 e and f, p 319 f, p 320 a to d and p 321 a and b, post).

NOTES:

For the meaning of trust, see 38 Halsbury's Laws (3rd Edn) 809, 810, para 1346, and for cases on the subject, see 47 Digest (Repl) 14, 15, 1-21.

For the doctrine of privity of contract, see 9 Halsbury's Laws (4th Edn) 329-334, and for cases on the subject, see 12 Digest (Ressiue) 48-55, 237-289.

CASES-REF-TO:

Cases referred to in judgment in Ocean Island No 2
Ackbar v C F Green & Co Ltd [1975] 2 All ER 65, [1975] QB 582, [1975] 2 WLR 773, [1975] 1 Lloyd's Rep 673, Digest (Cont Vol D) 613, 212a.
Attorney-General v Nissan [1969] 1 All ER 629, [1970] AC 179, [1969] 2 WLR 926, HL, 11 Digest (Reissue) 723, 446.
Attorney-General v Wilts United Dairies (1922) 91 LJKB 897, 127 LT 822, HL, 25 Digest (Repl) 153, 638.
Attorney-General of Ontario v Mercer (1883) 8 App Cas 767, 52 LJPC 84, 49 LT 312, PC, 38 Digest (Repl) 792, 89.
Ayerst v C & K (Construction) Ltd [1975] 2 All ER 537, [1976] AC 167, [1975] 3 WLR 16, [1975] STC 345, [1975] TR 117, 54 ATC 141, HL, Digest (Cont Vol D) 492, 1664a.
Banda and Kirwee Botty (1866) LR 1 A & E 109, 35 LJ Adm 17, 14 LT 293, 12 Jur NS 819, 2 Mar LC 323, 37 Digest (Repl) 455, 14.
Banda and Kirwee Booty, Re (1875) LR 4 A & E 436, 44 LJ Adm 41, 33 LT 332, 3 Asp MLC 66, 39 Digest (Repl) 432, 415. *%bank voor Handel en Scheepvaart NV v Slatford [1952] 1 All ER 314, [1953] 1 QB 248, 2 Digest (Repl) 269, 614.
Barclays Bank Ltd v Quistclose Investments Ltd [1968] 3 All ER 651, [1970] AC 567, [1968] 3 WLR 1097, HL, Digest (Cont Vol C) 35, 401a.
Barraclough v Brown [1897] AC 615, [1895-9] All ER Rep 239, 66 LJQB 672, 76 LT 797, 62 JP 275, 8 Asp MLC 290, 2 Com Cas 249, HL, 44 Digest (Repl) 345, 1802.
Bombay and Persia Steam Navigation Co v Maclay [1920] 3 KB 402, 90 LJKB 152, 15 Asp MLC 283, 30 Digest (Reissue) 190, 207.
British South Africa Co v Companhia de Mocambique [1893] AC 602, [1891-4] All ER Rep 640, 63 LJQB 70, 69 LT 604, 6 R 1, HL, 11 Digest (Reissue) 398, 388.
Bulmer, Re, Greaves v Inland Revenue Comrs, [1937] 1 All ER 323, sub nom Re Bulmer, ex parte Greaves [1937] Ch 499, 106 LJCh 268, 156 LT 178, [1936-1937] B & C R 196, CA, 4 Digest (Reissue) 274, 2442.

Burghes v Attorney-General [1912] 1 Ch 173, CA; affg [1911] 2 Ch 139, 80 LJCh 506, 105 LT 193, 30 Digest (Reissue) 191, 218.
Calgary and Edmonton Land Co Ltd, Re [1975] 1 All ER 1046, [1975] 1 WLR 355, 10 Digest (Reissue) 1167, 7260.
Cannon St (No 20) Ltd v Singer and Friedlander Ltd [1974] 2 All ER 577, [1974] Ch 229, [1974] 2 WLR 646, 27 P & CR 486, [1974] RVR 162, Digest (Cont Vol D) 857, 158b.
Chapman v Michaelson [1909] 1 Ch 238, 78 LJCh 272, 100 LT 109, CA, 30 Digest (Reissue) 196, 247.
Chippewa Indians of Minnesota v United States (No 1) (1937) 301 US 358.
Chippewa Indians of Minnesota v United States (No 2) (1939) 307 US 1.
Civilian War Claimants Association Ltd v R [1932] AC 14, [1931] All ER Rep 432, 101 LJKB 105, 146 LT 169, HL; affg (1930) 47 TLR 102, CA; affg (1930) 46 TLR 581, 11 Digest (Reissue) 725, 468.
Corm of Stamp Duties v Livingston [1964] 3 All ER 692, [1965] AC 694, [1964] 3 WLR 963, [1965] ALR 803, PC, Digest (Cont Vol B) 247, * 258a.
Deschamps v Miller [1908] 1 Ch 856, 77 LJCh 416, 98 LT 564, 11 Digest (Reissue) 400, 395.
Dyson v Attorney-General (No 1) [1911] 1 KB 410, 80 LJKB 531, 103 LT 707, CA, 30 Digest (Reissue) 189, 203.
Dyson v Attorney-General (No 2) [1912] 1 Ch 158, 81 LJKB 217, 105 LT 753, CA, 30 Digest (Reissue) 189, 204.
Edgeter v Kemper (1955) 136 NE 2d 630.
Edwards (Inspector of Taxes) v Bairstow [1955] 3 All ER 48, [1956] AC 14, [1955] 3 WLR 410, 36 Tax Cas 207, [1955] TR 209, 34 ATC 198, 48 R & IT 534, HL, 28(1) Digest (Ressiue) 566, 2089.
Esquimalt and Nanaimo Railway Co v Wilson [1920] AC 358, [1918-19] App ER Rep 836, 89 LJPC 27, 122 LT 563, 50 DLR 371, [1919] 2 WWR 961, PC, 11 Digest (Reissue) 705, 336.
Fort Berthold Reservation Tribes v United States (1968) 390 F 2d 686.
Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536, [1914-15] All ER Rep 24, 84 LJKB 1465, 113 LT 98, 21 Com Cas 67, CA, 30 Digest (Reissue) 198, 256.
Hardoon v Belilios [1901] AC 118, 70 LJPC 9, 83 LT 573, PC, 9 Digest (Reissue) 208, 1242.
Hodge v Attorney-General (1839) 3 Y & C Ex 342, 8 LJ Ex Eq 28, 160 ER 734, 35 Digest (Repl) 623, 2923.
Holmes, Re (1861) 2 John & H 527, 31 LJCh 58, 5 LT 548, 8 Jur NS 76, 70 ER 1167, 11 Digest (Reissue) 396, 372.
Ibralebbe v R [1964] 1 All ER 251, [1964] AC 900, [1964] 2 WLR 76, PC, 8(2) Digest (Reissue) 852, 981.
Imperial Mercantile Credit Association (Liquidators) v Coleman (1873) LR 6 HL 189, 42 LJCh 644, 29 LT 1, HL, 9 Digest (Reissue) 525, 3140.
Johnson, Re, Roberts v Attorney-General [1903] 1 Ch 821, 72 LJCh 682, 88 LT 161, 11 Digest (Reissue) 387, 298.
Kayford Ltd, Re [1975] 1 All ER 604, [1975] 1 WLR 279, Digest (Cont Vol D) 1005, 167a.
King v Victor Parsons & Co [1973] 1 All ER 206, [1973] 1 WLR 29, [1973] 1 Lloyd's Rep 189, CA, Digest (Cont Vol D) 617, 1900c.
Kinloch v Secretary of State for India in Council (1882) 7 App Cas 619, 51 LJCh 885, 47 LT 133, HL; affg sub nom Kinlock v Secretary of State for India in Council (1879) 15 Ch D 1, CA, 11 Digest (Reissue) 725, 467.
Kitchen v Royal Air Forces Association [1958] 2 All ER 241, [1958] 1 WLR 563, CA, 32 Digest (Repl) 607, 1900.
Knox v Gye (1872) LR 5 HL 656, 42 LJCh 234, HL, 32 Digest (Repl) 590, 1773.
Lorentzen v Lydden & Co Ltd [1942] 2 KB 202, 111 LJKB 327, 167 LT 363, 11 Digest (Reissue) 729, 490.
Low v Bouverie [1891] 3 Ch 82, [1891-4] All ER Rep 348, 60 LJCh 594, 65 LT 533, CA, 8(2) Digest (Reissue) 546, 396.
Massey v Davies (1794) 2 Ves 317, 30 ER 651, 47 Digest (Repl) 487, 4386.
Mitford v Reynolds (1842) 1 Ph 185, [1835-42] All ER Rep 331, 12 LJCh 40, 7 Jur 3, 41 ER 602, LC, 8(1) Digest (Reissue) 282, 291.
Moggridge v Thackwell (1803) 7 Ves 36, 32 ER 15, LC; affd (1807) 13 Ves 416, HL; affg (1792) 1 Ves 464, 3 Bro CC 517, [1775-1802] All ER Rep 218, 30 ER 440, LC, 8(1) Digest (Reissue) 441, 1431.
Moody v Poole Corpn [1945] 1 All ER 536, [1945] KB 350, 114 LJKB 305, 172 LT 355, 109 JP 133, 32 Digest (Repl) 590, 1765.
Nanwa Gold Mines Ltd, Re, Ballantyne v Nanwa Gold Mines Ltd [1955] 3 All ER 219, [1955] 1 WLR 1080, 9 Digest (Reissue) 145, 811.

Nocton v Lord Ashburton [1914] AC 932, [1914-15] All ER Rep 45, 83 LJCh 784, 111 LT 641, HL, 32 Digest (Repl) 620, 1983.
Oriental Inland Steam Co, Re, ex parte Scinde Railway Co (1874) 9 Ch App 557, 43 LJCh 699, 31 LT 5, 10 Digest (Reissue) 978, 5894.
Paterson v Chadwick, Paterson v Northampton and District Hospital Management Committee [1974] 2 All ER 772, [1974] 1 WLR 890, 18 Digest (Reissue) 26, 170.
Peterson, Re [1909] 2 Ch 398, 7 LJCh 53, 101 LT 480, CA, 36(1) Digest (Reissue) 566, 283.
Poole v Attorney-General (1708) Park 272, 145 ER 777, 23 Digest (Repl) 521, 2854.
Prideaux v Webber (1661) 1 Lev 31, 1 Keb 204, 83 ER 282, 32 Digest (Repl) 410, 340.
Pyx Granite Co Ltd v Ministry of Housing and Local Government [1959] 3 All ER 1, [1960] AC 260, [1959] 3 WLR 346, 123 JP 429, 58 LGR 1, 10 P & CR 319, HL, 30 Digest (Reissue) 202, 277.
Randall v Errington (1805) 10 Ves 423, 32 ER 909, 47 Digest (Repl) 259, 2271.
R v Secretary of State for Home Department, ex parte Bhurosah [1967] 3 All ER 831, [1968] 1 QB 266, [1967] 3 WLR 1259, CA, 11 Digest (Reissue) 744, 607.
Reading's Petition of Right, Re [1949] 2 All ER 68, sub nom Reading v R [1949] 2 KB 232, CA; affd sub nom Reading v Attorney-General [1951] 1 All ER 617, [1951] AC 507, HL, 1 Digest (Repl) 549, 1720.
Rustomjee v R (1876) 1 QBD 487, 45 LJQB 249, 34 LT 278; affd 2 QBD 69, CA, 15 Digest (Repl) 273, 409.
St Pierre v South American Stores (Gath and Chaves) Ltd [1936] 1 KB 382, [1935] All ER Rep 408, 105 LJKB 436, 154 LT 546, CA, 11 Digest (Reissue) 399, 392.
Telescriptor Syndicate Ltd, Re [1903] 2 Ch 174, 72 LJCh 480, 88 LT 389, 10 Mans 213, 10 Digest (Reissue) 1096, 6735.
Te Teira Te Paea v Te Roera Tareha [1902] AC 56, 71 LJPC 11, 85 LT 558, PC, 47 Digest (Repl) 34, 180.
Theodore v Duncan [1919] AC 696; rvsg (1917) 23 CLR 510, PC, 38 Digest (Repl) 72, * 337.
Thorne Rural District Council v Bunting [1972] 1 All ER 439, [1972] Ch 470, [1972] 2 WLR 517, 23 P & CR 23, 71 LGR 51.
Thorpe v Owen (1842) 5 Beav 224, 11 LJCh 129, 49 ER 563, 47 Digest (Repl) 29, 143.
Tito v Waddell [1975] 3 All ER 997, [1975] 1 WLR 1303, Digest (Cont Vol D) 325, 1680a.
Tolputt (H) & Co Ltd v Mole [1911] 1 KB 836, 80 LJKB 686, 104 LT 148, CA; affg [1911] 1 KB 87, DC.
United Africa Co Ltd v M V Tolten (owners), The Tolten [1946] 2 All ER 372, [1946] P 135, [1947] LJR 201, 175 LT 469, CA, 11 Digest (Reissue) 398, 387.
Wilbur v United States (1930) 281 US 206.
Williams v Howarth [1905] AC 551, 74 LJPC 115, 93 LT 115, PC, 8(2) Digest (Reissue) 684, 131.
Cases referred to in judgment in Ocean Island No 1
Ash v Dickie [1936] 2 All ER 71, [1936] Ch 655, 105 LJCh 337, 154 LT 641, CA, 13 Digest (Reissue) 146, 1204.
Aspeden v Seddon (1875) 10 Ch App 394, 44 LJCh 359, 32 LT 415, 39 JP 597; subsequent proceedings sub nom Aspden v Seddon, Preston v Seddon (1876) 1 Ex D 496, CA, 19 Digest (Repl) 49, 273.
Attorney-General v Great Southern and Western Railway Co of Ireland [1925] AC 754, 94 LJKB 772, 133 LT 568, HL; rvsg sub nom Great Southern and Western Railway Co of Ireland v R [1924] 2 KB 450, CA, 16 Digest (Repl) 264, 335.
Austerberry v Oldham Corpn (1885) 29 Ch D 750, 55 LJCh 633, 53 LT 543, 49 JP 532, CA, 26 Digest (Repl) 278, 75.
Axelsen v O'Brien (1949) 80 CLR 219.
Babbage v Coulburn (1882) 52 LJQB 50, 46 LT 794, CA; affg sub nom Babbage v Coulburn (1882) 9 QBD 235, 51 LJQB 638, 13 Digest (Reissue) 441, 3653.
Bagot Pneumatic Tyre Co v Clipper Pneumatic Tyre Co [1902] 1 Ch 146, 71 LJCh 158, 85 LT 652, 9 Mans 56, 19 RPC 69, CA; affg [1901] 1 Ch 196, 9 Digest (Reissue) 669, 3997.
Barker v Stickney [1919] 1 KB 121, [1918-19] All ER Rep Ext 1363, 88 LJKB 315, 120 LT 172, CA, 13 Digest (Reissue) 99, 843.
Bilborough v Holmes (1876) 5 Ch D 255, 46 LJCh 446, 35 LT 759, 3 Digest (Repl) 208, 447.
Bracewell v Appleby [1975] 1 All ER 993, [1975] Ch 408, [1975] 2 WLR 282, 29 P & CR 204, Digest (Cont Vol D) 279, 39a.
Brett v Cumberland (1619) Cro Jac 521, 3 Bulst 164, 1 Roll Rep 359, 79 ER 446, 11 Digest (Reissue) 775, 880.

British South Africa Co v Companhia de Mocambique [1893] AC 602, [1891-94] All ER Rep 640, 63 LJQB 70, 69 LT 604, 6 R 1, HL, 11 Digest (Reissue) 398, 388.
Brown v Gould [1971] 2 All ER 1505, [1972] Ch 53, [1971] 3 WLR 334, 22 P & CR 871, 31(1) Digest (Reissue) 285, 2351.
Buck v Attorney-General [1965] 1 All ER 882, [1965] Ch 745, [1965] 2 WLR 1033, CA; affg [1964] 2 All ER 663, [1964] 3 WLR 850, 8(2) Digest (Reissue) 661, 32.
Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256, [1891-4] All ER Rep 127, 62 LJQB 257, 67 LT 837, 57 JP 325, 4 R 176, CA, 12 Digest (Reissue) 66, 342.
Chamber Colliery Co Ltd v Twyerould (1893) [1915] 1 Ch 268 n. HL, 23 Digest (Repl) 843, 995.
Chaney v Murphy [1948] LJR 1301, CA, 50 Digest (Repl) 357, 801.
Chatsworth Investments Ltd v Cussins (Constractors) Ltd [1969] 1 All ER 143, [1969] 1 WLR 1, CA, Digest (Cont Vol C) 643, 1988a.
Clarke v Earl of Dunraven, The Satanita [1897] AC 59, 66 LJPC 1, 57 LT 337, 8 Asp MLC 190, HL; affg sub nom The Satanita [1895] P 248, 12 Digest (Reissue) 85, 436.
Conquest v Ebbetts [1896] AC 490, [1895-9] All ER Rep 622, 65 LJCh 808, 75 LT 36, HL; affg [1895] 2 Ch 377, 82 LT 560, CA, 31(1) Digest (Reissue) 196, 1643.
Cox v Bishop (1857) 8 De G M & G 815, 26 LJCh 389, 29 LTOS 44, 3 Jur NS 499, 44 ER 604, 33 Digest (Repl) 818, 816.
Dansk Rekylriffel Syndikat Akt v Snell [1908] 2 Ch 127, 77 LJCh 352, 98 LT 830, 12 Digest (Reissue) 431, 3110.
Darbey v Whitaker (1857) 4 Drew 134, 29 LTOS 351, 62 ER 52, 40 Digest (Repl) 79, 603.
Dinham v Bradford (1869) 5 Ch App 519, LC, 2 Digest (Repl) 505, 515.
Elliston v Reacher [1908] 2 Ch 665, [1908-10] All ER Rep 612, 78 LJCh 87, 99 LT 701, CA, 40 Digest (Repl) 337, 2749.
Fisherrow Harbour Comrs v Musselburgh Real Estate Co Ltd (1903) 5 F 387; affd sub nom Musselburgh Real Estate Co Ltd v Musselburgh Provost [1905] AC 491, HL, 47 Digest (Repl) 718, * 587.
Giles (CH) & Co Ltd v Morris [1972] 1 All ER 960, [1972] 1 WLR 307, Digest (Cont Vol D) 852, 75a.
Gourlay v Duke of Somerset (1815) 19 Ves 429, 31(2) Digest (Reissue) 684, 5615.
Halsall v Brizell [1957] 1 All ER 371, [1957] Ch 169, [1957] 2 WLR 123, Digest (Cont Vol B) 641, 2179a.
Hart v Alexander (1837) 2 M & W 484, Murp & H 63, 6 LJEx 129, 150 ER 848; affg (1837) 7 C & P 746, 32 Digest (Repl) 415, 392.
Hart v Hart (1881) 18 Ch D 670, 50 LJCh 697, 45 LT 13, 2 Digest (Repl) 468, 312.
Hasham v Zenab [1960] AC 316, [1960] 2 WLR 374, PC.
Hepenstall v Wicklow County Council [1921] 2 IR 165, 31(2) Digest (Reissue) 634, * 1806.
Hopgood v Brown [1955] 1 All ER 550, [1955] 1 WLR 213, CA, 31(1) Digest (Reissue) 220, 1800.
Hordern v Hordern [1910] AC 465, 80 LJPC 15, 102 LT 867, PC, 45 Digest (Repl) 526, 1114.
Ives (ER) Investments (or Investment) Ltd v High [1967] 1 All ER 504, [1967] 2 QB 379, [1967] 2 WLR 789, CA, Digest (Cont Vol C) 828, 925c.
Jackson v Jackson (1853) 1 Sim & G 184, 22 LJCh 873, 21 LTOS 98, 65 ER 80, 40 Digest (Repl) 79, 602.
Jeune v Queens Cross Properties Ltd [1973] 3 All ER 97, [1974] Ch 97, [1973] 3 WLR 378, 26 P & CR 98, Digest (Cont Vol D) 584, 5140a.
Jones v Herxheimer [1950] 1 All ER 323, [1950] 2 KB 106, CA, 31(2) Digest (Reissue) 637, 5197.
Joyner v Weeks [1891] 2 QB 31, 60 LJQB 510, 65 LT 16, 55 JP 725, CA, 31(2) Digest (Reissue) 635, 5186.
Knight Sugar Co Ltd v Alberta Railway and Irrigation Co [1938] 1 All ER 266, 82 Sol Jo 132, PC, 38 Digest (Repl) 897, 938.
Lawrence's Will Trusts, Re, Public Trustee v Lawrence [1971] 3 All ER 433, [1972] Ch 418, [1971] 3 WLR 188, Digest (Cont Vol D) 726, 455a.
Leeds Industrial Co-operative Society Ltd v Slack [1924] AC 851, [1924] All ER Rep 259, 93 LJCh 436, 131 LT 710, HL, 19 Digest (Repl) 206, 1468.
Lytton v Great Northern Railway Co (1856) 2 K & J 394, 27 LTOS 42, 2 Jur NS 436, 69 ER 836, 7 Digest (Repl) 349, 53.
May v Belleville [1905] 2 Ch 605, 74 LJCh 678, 93 LT 241, 40 Digest (Repl) 317, 2613.
Mellor v Walmesley [1905] 2 Ch 164, 74 LJCh 475, 93 LT 574, CA, 47 Digest (Repl) 703, 488.
Milines v Gery (1807) 14 Ves 400, [1803-13] All ER Rep 369, 33 ER 574, 2 Digest (Repl) 505, 513.
Morland v Cook (1868) LR 6 Eq 252, 37 LJCh 825, 18 LT 496, 40 Digest (Repl) 330, 2711.

Moss v Smith (1850) 9 CB 94, 19 LJCP 225, 14 LTOS 376, 14 Jur 1003, 137 ER 827, 29 Digest (Repl) 303, 2288.
Murphy v Wexford County Council [1921] 2 IR 230, 46 Digest (Repl) 382, * 335.
Musselburgh Magistrates v Musselburgh Real Estate Co Ltd (1904) 7 F 308.
New Brunswick and Canada Railway and Land Co Ltd v Muggeridge (1859) 4 Drew 686, 62 ER 263, 9 Digest (Reissue) 254, 1511.
New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd [1974] 1 All ER 1015, [1975] AC 154, [1974] 2 WLR 865, [1974] 1 Lloyd's Rep 534, [1974] 1 NZLR 505, PC, Digest (Cont Vol D) 114, * 99a.
Palmer v Johnson (1884) 13 QBD 351, [1881-5] All ER Rep 719, 53 LJQB 348, 51 LT 211, CA, 40 Digest (Repl) 111, 856.
Parkinson v Reid (1966) 56 DLR (2d) 315, Digest (Cont Vol C) 305, * 352a.
Pembroke v Thorpe (1740) 3 Swan 437n, 36 ER 939, 40 Digest (Repl) 44, 262.
Penang (Government of State of) v Beng Hong Oon [1971] 3 All ER 1163, [1972] AC 425, [1972] 2 WLR 1, PC, Digest (Cont Vol D) 1021, 482a.
Practice Note [1942] WN 89, PC, 30 Digest (Reissue) 255, 615.
Price v Penzance Corpn (1844) 4 Hare 506, 9 JP 775, 67 ER 748, 7 Digest (Repl) 415, 299.
Radstock Co-operative and Indsutrial Society Ltd v Norton-Radstock Urban District Council [1968] 2 All ER 59, [1968] Ch 605, [1968] 2 WLR 1214, 132 JP 238, 66 LGR 457, CA; affg [1967] 2 All ER 812, [1967] Ch 1094, [1967] 3 WLR 588, Digest (Cont Vol C) 1052, 224a.
Reid v Bickerstaff [1909] 2 Ch 305, [1908-10] All ER Rep 298, 78 LJCh 753, 100 LT 952, CA, 40 Digest (Repl) 341, 2770.
Richardson v Smith (1870) 5 Ch App 648, 39 LJCh 877, 40 Digest (Repl) 79, 604.
Roberts v Holland [1893] 1 QB 665, 62 LJQB 621, 5 R 370, DC, 12 Digest (Reissue) 41, 164.
Ryan v Mutual Tontine Westminister Chambers Association [1893] 1 Ch 116, 62 LJCh 252, 67 LT 820, 2 R 156, CA, 44 Digest (Repl) 23, 141.
St Pierre v South American Stores (Gath and Chaves) Ltd [1936] 1 KB 382, [1935] All ER Rep 408, 105 LJKB 436, 154 LT 546, CA, 11 Digest (Reissue) 399, 392.
Salter v Kidgly (1689) Carth 76, Holt KB 210, 90 ER 648, 17 Digest (Reissue) 274, 414.
Sanderson v Cockermouth and Workington Railway Co (1850) 7 Ry & Can Cas 613, 2 H & Tw/ 327, 19 LJCh 503, 74 ER 1708, LC, 38 Digest (Repl) 324, 225.
Scarf v Jardine (1882) 7 App Cas 345, [1881-5] All ER Rep 651, 51 LJQB 612, 47 LT 258, HL, 12 Digest (Reissue) 734, 5298.
Scratton v Brown (1825) 4 B & C 485, [1824-34] All ER Rep 59, 6 Dow & Ry KB 536, 107 ER 1140, 47 Digest (Repl) 706, 522.
Sheehan v Great Eastern Railway Co (1880) 16 Ch D 59, 50 LJCh 68, 43 LT 432, 50 Digest (Repl) 463, 1581.
Shiloh Spinners Ltd v Harding [1973] 1 All ER 90, [1973] AC 691, [1973] 2 WLR 28, 25 P & CR 48, HL, Digest (Cont Vol D) 755, 725ec.
Smiley v Townshend [1950] 1 All ER 530, [1950] 2 KB 311, CA, 31(2) Digest (Reissue) 638, 5199.
Storer v Great Western Railway Co (1842) 2 Y & C Ch Cas 48, 3 Ry & Can Cas 106, 12 LJCh 65, 6 Jur 1009, 63 ER 21, 38 Digest (Repl) 324, 224.
Trepca Mines Ltd, Re [1960] 3 All ER 304, [1960] 1 WLR 1273, CA, 10 Digest (Reissue) 1124, 6962.
United Dairies Ltd v Public Trustee [1923] 1 KB 469, [1922] All ER Rep 444, 92 LJKB 326, 128 LT 768, 31(2) Digest (Reissue) 627, 5131.
Vickers v Vickers (1867) LR 4 Eq 529, 36 LJCh 946, 2 Digest (Repl) 429, 66.
Wederman v Societe Generale d' Electricite (1881) 19 Ch D 246, 45 LT 514, CA, 9 Digest (Reissue) 711, 4207.
Westhoughton Urban District Council v Wigan Coal and Iron Co Ltd [1919] 1 Ch 159, 88 LJCh 60, 120 LT 242, CA, 33 Digest (Repl) 825, 876.
Westminister (Duke) v Swinton [1948] 1 All ER 248, [1948] 1 KB 524, 31(2) Digest (Reissue) 828, 6867.
Wigsell v School for Indigent Blind (1882) 8 QBD 357, 51 LJQB 330, 46 LT 422, DC, 7 Digest (Repl) 299, 206.
Wilson v Furners Railway Co (1869) LR 9 Eq 28, 39 LJCh 19, 21 LT 416, 553, 38 Digest (Repl) 324, 227.
Wilson v Northampton and Banbury Junction Railway Co (1874) 9 Ch App 279, 43 LJCh 503, 30 LT 147, 38 JP 500, 44 Digest (Repl) 23, 140.

Wolverhampton Corpn v Emmons [1901] 1 QB 515, 70 LJKB 429, 84 LT 407, CA, 7 Digest (Repl) 416, 306.
Wroth v Tyler [1973] 1 All ER 897, [1974] Ch 30, [1973] 2 WLR 405, 25 P & CR 138, Digest (Cont Vol D) 855, 837a.
Wrotham Park Estate Co v Parskide Homes Ltd [1974] 2 All ER 321, [1974] 1 WLR 798, 27 P & CR 296, Digest (Cont Vol D) 808, 2770a.

CASES-CITED:

Cases also cited in Ocean Island No 2
Attorney-General v De Keyser's Royal Hotel Ltd [1920] AC 508, [1920] All ER Rep 80, HL.
Attorney-General v Great Southern and Western Railway Co of Ireland [1925] AC 754, HL.
Attorney-General v Jonathan Cape Ltd [1975] 3 All ER 484, [1976] QB 752.
Attorney-General v Magdalen College, Oxford (1854) 18 Beav 223.
Attorney-General for Ontario v McLean Gold Mines Ltd [1927] AC 185, PC.
Barber v Manchester Regional Hospital Board [1958] 1 All ER 322, [1958] 1 WLR 181.
Brain, Re (1874) LR 18 Eq 389.
Brooks-Bidlake and Whittal Ltd v Attorney-General for British Colombia [1923] AC 450, PC.
Burdick v Garrick (1870) 5 Ch App 233.
Conway v Rimmer [1968] 1 All ER 874, [1968] AC 910, HL.
Cooper v Stuart (1889) 14 App Cas 286, PC.
Crompton (Alfred) Amusement Machines Ltd v Customs and Excise Comrs (No 2) [1973] 2 All ER 1169, [1974] AC 405, HL.
Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] 2 All ER 633, [1971] Ch 949, CA.
Cunnack v Edwards [1896] 2 Ch 679, CA.
Dougan v Macpherson [1902] AC 197, HL.
Farrar v Farrars Ltd (1888) 40 Ch D 395, CA.
Favorke v Steinkopff [1922] 1 Ch 174.
Fox v Mackreth (1788) 2 Bro CC 400.
Franklin v Attorney-General [1973] 1 All ER 879, [1974] QB 185.
Geaves, ex parte (1856) 8 De GM & G 291.
Gosman, Re (1881) 17 Ch D 771, CA.
Hall v Hallett (1784) 1 Cox Eq Cas 134.
Hardwicke (Lord) v Vernon (No 2) (1798-9) 4 Ves 411.
Hauxwell v Barton-upon-Humber Urban District Council [1973] 2 All ER 1022, [1974] Ch 432.
Hennessy v Wright (1888) 21 QBD 509, DC.
Hickley v Hickley (1876) 2 Ch D 190.
Hobourn Aero Components Ltd's Air Raid Distress Fund, Re, Ryan v Forrest [1946] 1 All ER 501, [1946] Ch 194, CA.
Inland Revenue Comrs v Clay, Inland Revenue Comrs Buchanan [1914] 3 KB 466, [1914-15] All ER Rep 882, CA.
Jarvis v Moy, Davies, Smith, Vandervell & Co [1936] 1 KB 399, CA.
Kabaka's Government v Kitonto [1965] EA 278.
Kennedy v De Trafford [1897] AC 180, [1895-9] All ER Rep 408, HL.
Knight v Marjoribanks (1848) 11 Beav 322, (1849) 2 Mac & G 10.
Land Realisation Co Ltd v Postmaster-General [1950] 1 All ER 1062, [1950] Ch 435.
Mackenzie-Kennedy v Air Council [1927] 2 KB 517, CA.
Massingberd's Settlement, Re, Clark v Trelawney (1890) 63 LT 296, CA.
Naylor Benzon Mining Co Ltd, Re [1950] 1 All ER 518, [1950] Ch 567.
Nixon v Attorney-General [1930] 1 Ch 566, CA.
Nugent v Nugent [1908] 1 Ch 546, CA.
R v Skinner [1968] 3 All ER 124, [1968] 2 QB 700, CA.
Saunders v Vautier (1841) 4 Beav 115.
Seminole Nation v United States (1942) 316 US 286.
Silkstone and Haigh Moor Coal Co v Edey [1900] 1 Ch 167.
Smyth, Re, Leach v Leach [1898] 1 Ch 89.

Strahan, Re, ex parte Geaves (1856) 8 De G M & G 291.
Thompson v Comr of Stamp Duties [1968] 2 All ER 896, [1969] 1 AC 320, PC.
Tone (River) Conservators v Ash (1829) 10 B & C 349.
Cases also cited in Ocean Island No 1
Ackbar v C F Green & Co Ltd [1975] 2 All ER 65, [1975] QB 582.
Applegate v Moss [1971] 1 All ER 747, [1971] 1 QB 406, CA.
Barker v Damer (1689) 3 Mod 337.
Beaman v ARTS Ltd [1949] 1 All ER 465, [1949] 1 KB 550, CA.
Blundell v Brettargh (1810) 17 Ves 232, [1803-13] All ER Rep 496.
Boyer v Warbey [1952] 2 All ER 976, [1953] 1 QB 234, CA.
Buckingham v Daily News Ltd [1956] 2 All ER 904, [1956] 2 QB 534, CA.
Bulli Coal Mining Co v Osborne [1899] AC 351, [1895-9] All ER Rep 506, PC.
Cannon St (No 20) Ltd v Singer and Friedlander Ltd [1974] 2 All ER 577, [1974] Ch 229.
Carpenters Estates Ltd v Davies [1940] 1 All ER 13, [1940] Ch 160.
Chesworth v Farrar [1966] 2 All ER 107, [1967] 1 QB 407.
Cooth v Jackson (1801) 6 Ves 12, [1775-1802] All ER Rep 460.
Cubitt v Smith (1864) 11 LT 298.
Czarnikov (C) Ltd v Koufos [1967] 3 All ER 686, [1969] 1 AC 350, HL.
Danish Bacon Co Ltd staff pension fund, Re, Christensen v Arnett [1971] 1 All ER 486, [1971] 1 WLR 248.
Dawson v Lord Fitzgerald (1876) 1 Ex D 257, CA; rvsg (1873) LR 9 Exch 7.
Deschamps v Miller [1908] 1 Ch 856.
Dyson v Attorney-General [1911] 1 KB 410, CA; subsequent proceedings [1912] 1 Ch 158, CA.
Firth v Midland Railway Co (1875) LR 20 Eq 100.
Franklin v Attorney-General [1973] 1 All ER 879, [1974] QB 185.
Greater London Council v Connolly [1970] 1 All ER 870, [1970] 2 QB 100, CA.
Greene v West Cheshire Railway Co (1871) LR 13 Eq 44,
Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536, [1914-15] All ER Rep 24, CA.
Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd [1970] 1 All ER 225, [1970] 1 QB 447, CA.
Holmes, Re (1861) 2 John & H 527.
Ibralebbe v R [1964] 1 All ER 251, [1964] AC 900, PC.
James v Emery (1818) 8 Taunt 245.
Jarvis v Swans Tours Ltd [1973] 1 All ER 71, [1973] QB 233, CA.
Jegon v Vivian (1871) 6 Ch App 742, LC.
King & Victor Parsons & Co [1973] 1 All ER 206, [1973] 1 WLR 29, CA.
Kitchen v Royal Air Forces Association [1958] 2 All ER 241, [1958] 1 WLR 563, CA.
Lauri v Renad [1892] 3 Ch 402, CA.
Lawrance v Lord Norreys (1890) 15 App Cas 210, [1886-90] All ER Rep 858, HL.
Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, HL.
Lucy v W T Henleys Telegraph Works Co Ltd [1969] 3 All ER 456, [1970] 1 QB 393, CA.
Manby v Bewicke (1857) 3 K & J 342.
Martin v Porter (1839) 5 M & W 351.
Molyneux v Richard [1906] 1 Ch 34.
Paterson v Chadwick [1974] 2 All ER 772, [1974] 1 WLR 890.
R v Secretary of State for the Home Department, ex parte Bhurosah [1967] 3 All ER 831, [1968] 1 QB 266, CA.
Satanita, The [1895] P 248, CA.
Schuler (L) A G v Wickman Machine Tool SalesLtd [1973] 2 All ER 39, [1974] AC 235, HL.
Smith v Morgan [1971] 2 All ER 1500, [1971] 1 WLR 803.
Smith v Peters (1875) LR 20 Eq 511.
Soames v Edge (1860) John 669.
Sydney Municipal Council v Bull [1909] 1 KB 7, [1908-10] All ER Rep 616.
Tameshwar v R [1957] 2 All ER 683, [1957] AC 476, PC.
Theodore v Duncan [1919] AC 696, PC.
Tito v Waddell [1975] 3 All ER 997, [1975] 1 WLR 1303.
United Africa Co Ltd v M V Tolten (owners), The Tolten [1946] 2 All ER 372, [1946] P 135, CA.

United Merthyr Collieries Co, Re (1872) LR 15 Eq 46.
Vincent v Godson (1854) 4 De G M & G 546.
Waring and Gillow Ltd v Thompson (1912) 29 TLR 154, CA.
Way v Yally (1704) 2 Salk 651.
West (Richard) & Partners (Inverness) Ltd v Dick [1969] 1 All ER 943, [1969] 2 Ch 424, CA.
Whitaker v Forbes (1875) 1 CPD 51, CA.
Wilkinson v Clements (1872) 8 Ch App 96.
Wilks v Davis (1817) 3 Mer 507, LC.
Williams v Howarth [1905] AC 551, PC.
Willis v Earl Howe [1893] 2 Ch 545, CA.

INTRODUCTION:

Action. Two actions ('Ocean Island No 1' and 'Ocean Island No 2') were brought by the owners of certain lands in Ocean Island and by Rotan Tito, a prominent landowner, and the Council of Leaders (a statutory body) against three individuals who were, at the date of the writ, the British Prosphate Commissioners (an unincorporated body) and Her Majesty's Attorney-General. The nature of the litigation and the claims and the facts are set out in the judgment.

COUNSEL:

J. R Macdonald and C L Purle for the plaintiffs in Ocean Island No. 1. R A MacCrindle QC, N C Browne-Wilkinson QC and D K Rattee for the three defendant British Phosphate Commissioners in Ocean Island No 1. J G Le Quesne QC, J E Vinelott QC, P L Gibson and D C Unwin for the Attorney-General in Ocean Island No 1. The fifth to 18th defendants in Ocean Island No 1 did not appear and were not represented. W J Mowbray QC, J R Macdonald QC, L A Tucker and C L Purle for the plaintiffs in Ocean Island No 2. J E Vinelott QC, P L Gibson and D C Unwin for the Attorney-General in Ocean Island No 2.

JUDGMENT-READ:

Cur adv vult. 29th, 30th November.

JUDGMENTBY-1: MEGARRY V-C

JUDGMENT-1:

MEGARRY V-C read the following judgment: I GENERAL I. Introduction
This is litigation on a grand scale. From 8th April 1975 until 18th June 1976 I was engaged in hearing two cases relating to Ocean Island. Each was commenced by the same writ, issued on 10th November 1971. However, as one substantial section of the plaintiffs' claim did not directly concern one group of defendants, the three BritishPhosphate Commissioners, a sensible arrangement was made with a view to saving part of what were bound to be massive costs. A second writ was accordingly issued on 18th June 1973 with the British Phosphate Commissioners among the defendants; and then on 20th September 1973 the commissioners were struck out of the first action, which was left to proceed against Her Majesty's Attorney-General as the sole remaining defendant to a substantially reduced set of claims.

It was agreed on all hands that the action as constituted by the second writ should be heard first, and that the original action, in its reduced form, should follow immediately afterwards. As a result, the action heard first became known as Ocean Island No 1, even though it was the subject of the second writ; the action heard second, based on the reduced form of the original writ, thus became Ocean Island No 2. I shall continue to use these names, or the abbreviations No 1 or No 2. Put explicitly, Rotan Tito and others v Waddell and others, 1973 R 2013 is No 1, and Rotan Tito and another v Her Majesty's Attorney-General, 1971 R 3670 is No 2.

There was no agreement that the evidence in one case should constitute evidence in the other; but inevitably there was some degree of cross-reference between the two cases, and in Ocean Island No 2 it was agreed that I should use in that case the background knowledge that I had acquired in Ocean Island No

1. This interrelation of the two cases was accentuated by various common elements. One was the sharing of counsel. For the plaintiffs there was accretion, and for the Attorney-General subtraction. Mr Macdonald led for the plaintiffs in No 1, and in No 2 he was himself led for the plaintiffs by Mr Mowbray. For the Attorney-General in No 1, Mr Le Quesne, until he left the Bar for other duties, led Mr Vinelott, and thereafter Mr Vinelott led for the rest of No 1 and for all of No 2. For the British Phosphate Commissioners, I may say, Mr MacCrindle led Mr Browne-Wilkinson in No 1.

Another common factor was much of the documentation. Fifty bundles of agreed letters, reports, minutes, and other documents did duty in both actions, together with a rich miscellany of other documents; and five more bundles served in No 1. In all, well over 10,000 pages must have been put before me. The documents and transcripts of the evidence, when stacked, stand well over six feet high, or perhaps I should say a little over two metres. This included the pleadings, which in No 1 are over 120 pages long, ending with an amended surrejoinder to amended rejoinder; in No 2 they are rather less in bulk and considerably shorter in substance, since over 35 pages consist of a detailed enumeration of documents relied on by the plaintiffs. In both cases there were many arguments on the pleadings, and much amendment during the hearings. In this, No 2 perhaps surpassed No 1; certainly its pleadings became more prismatic. On the other hand, No 1 amply demonstrated for all concerned the physical difficulties in conducting litigation in an orthodox courtroom when in addition to the voluminous documents and a wealth of authorities, there are manifold maps and plans, some of them five feet or more long or wide and some with an area of 20 square feet or more.

In duration, Ocean Island No 1 took 106 court days as against the 100 days of Ocean Island No 2, and it also required the additional 15 days (between Day 74 and Day 75 of the hearing) that were needed for holding a view of the locus in quo in the circumstances that I have related in **Tito v Waddell** n1. I heard much evidence, though in No 1 there were many more witnesses than in No 2: there were over 30 in No 1 as against nine in No 2. This difference was reflected in the speeches; in No 1 they took a little more than 60 days out of 106, whereas in No 2 they lasted for about three-quarters of the 100 days. It took counsel for the plaintiffs about a month to open No 1 and another month to reply. Much law was involved in each case. Over 130 reported cases were cited in No 1 and over 90 in No 2, with many passages from textbooks and other sources as well.

n1 [1975] 3 All ER 997, [1975] 1 WLR 1303

I have recited these statistical details at the outset as they help to explain a number of matters. First, all concerned have encountered the obvious difficulties of volume and complexity. Second, the press of materials inevitably left some loose ends, with some points doubtless thought to be not worth the pursuit. Third, the judgment in such cases is bound to be massive, and to deal with every point that has been raised would make it of intolerable length. Fourth, I propose to set out in one judgment much material that is common to both actions, and then to treat as being incorporated by reference such of the material as is relevant to each action, without repeating it. Fifth, I propose to deliver judgment first in Ocean Island No 2, which is what remains of the original action, and then to deliver judgment in Ocean Island No 1. I may add that I fully concur with counsel in thinking that the appropriate course to pursue was to hear both cases before delivering judgment in either.

There is one other matter that I must mention at this stage. I was told that a third Ocean Island action was waiting to come on after No 1 and No 2 had been decided. Subject to one reservation by the British Phosphate Commissioners, I was accordingly pressed on all hands in Ocean Island No 1 to express my views on all the issues that arose, even if by reason of some finding of fact or some ruling on a point of law that issue did not necessarily arise for decision in No 1; for these views, it was said, might be of assistance in reaching a settlement in No 3. No 3, I was told, has not far short of 300 plaintiffs, instead of the dozen or so in No 1 whose cases were intended to represent the various combinations of fact that might arise in No 3. In due course I shall have to consider how far I can properly give effect to this request, and to the reservation that went with it; this related to what was known as the purple land. For the present I merely record it, and also the fact that I know little more about Ocean Island No 3 than is indicated by this statement.

I should add that in this judgment I have inserted a number of headings; and I shall preface the transcript with a list of these headings in order to provide something of a table of contents. I do this merely for ease of reference; the headings are not intended in any way to affect the meaning of the text.

2. Ocean Island

I must first say something about Ocean Island. It lies just south of the equator in the Western Pacific, about 170 degree west of Greenwich, and roughly halfway between the Hawaiian Islands and the coast of Australia. Its nearest neighbour is Nauru, lying some 160 miles to the west; and Nauru plays an important though subsidiary part in the story. Both islands are known as phosphate islands, in that nature has given them deep deposits of high-grade phosphates. Whether these are of avian or marine origin seems to be uncertain. Ocean Island has a surface area of not much over 1,500 acres, or some 2 1/2 square miles. It is roughly circular in shape, except for a bite taken out of the southern side, which is called Home Bay. Viewed in profile, the island is the shape of a shallow dome, with the centre of the island rising to some 250 feet. The structure of the island consists of a coral limestone base overlaid by phosphate; and there is a surrounding coral reef which dries out at low tide. On the island the coral is mainly in the form of a large collection of what are usually called 'pinnacles'. These are not easy to describe, and although the photographs are helpful, they do not really convey the picture that meets the eye. In its natural state, the surface of the island consisted of grass, trees and vegetation, growing more or less directly out of alluvial phosphate, with very little of what could be called 'topsoil' in any real sense of the word; but there are outcroppings of coral pinnacles, of a greyish colour. The process of extracting the phosphate consisted of open-cast working which removed the relatively small quantity of alluvial phosphate, consisting of small fragments down to a dust, and the relatively large quantity of phosphate in rock form, some rocks weighing many tons. The phosphate deposits were deepest in the centre of the island, and there the process of extraction has left a terrain consisting of scores of pinnacles to the acre, many standing 60 or 80 feet high, or more, with pits beside each of them narrowing down to a small area. The pinnacles themselves are of widely varying shapes and sizes, with abundant pitting and erosion; admirers of modern sculpture might find much to please them in the pinnacles.

The depth of the phosphate deposits decreases as one approaches the coast, and there is a substantial 'pinnacle belt' of exposed pinnacles, mainly on the east and north, where the land drops away on the seaward side. On the surrounding rim of the island there is not enough phosphate to be worth mining. The main residential quarter for the staff and workmen who extract the phosphate is near the south-west and west of the coast; and the plant for treating the phosphate and providing services is on the south. I shall say more about the physical features of the island in due course; for the present that suffices.

3. The litigation

The general shape of the litigation is that various claims are made by the Banabans against the British Phosphate Commissioners and the Attorney-General, as representing the Government of the United Kingdom. Before I outline these claims, I must say something about the background. When phosphate was discovered on Ocean Island in 1900 the island was accupied by a population of some 500 indigenous inhabitants who called the island 'Banaba' and were themselves known as 'Banabans': in each name the first 'a' is long, being pronounced as if an 'r' were inserted between it and the following 'n'. For 20 years the phosphate was extracted by a British company, first by the Pacific Islands Co Ltd, and soon, from 1902, by its subsidiary, the Pacific Phosphate Co Ltd. Then in 1920 the British Phosphate Commissioners were constituted by the governments of the United Kingdom, Australia and New Zealand. This was when the governments had jointly acquired the mining undertakings which the company had built up on Ocean Island and on the neighbouring Nauru as well.

Since 1920 the mining has been conducted by the British Phosphate Commissioners, with on commissioner appointed by each of the three countries. The commissioners, who were never incorporated, held the undertaking in trust for the three governments in the proportion of 42 per cent for the United Kingdom, 42 per cent for Australia, and 16 per cent for New Zealand. The mining of phosphate on Ocean Island was carried on with the Banabans remaining in residence; but the outbreak of World War 2 in 1939, and the subsequent occupation of the island by the Japanese in 1942, first curtailed production and then brought it to an end. The Japanese transferred most of the Banabans to other islands, and when in 1945 Ocean Island was recovered from the Japanese, it had been devastated and was uninhabitable. Though the Banabans' right to return to Ocean Island has been carefully preserved, it was plainly impossible for them to go back immediately after the war. Another island, Rabi (pronounced as if an 'm' separated the 'a' and the

'b') had been bought for them in 1942 out of a fund which had been built up for them out of phosphate royalties; and it was to Rabi that they went, and where, after a plebiscite in May 1947, they finally decided to remain as their 'headquarters and home'.

One complication was that whereas Ocean Island was part of the Gilbert and Ellice Islands Colony, Rabi was in the Fiji Colony: it lies some 1,600 miles south-east of Ocean Island, and is some 17,000 acres in extent, compared with Ocean Island's 1,500 acres. Parties of Banabans have from time to time visited Ocean Island and remained there for some while; indeed, a party was in residence when I visited it. But from any practical point of view there has long been no question of the Banaban community as a whole ever returning to live on Ocean Island. About three--quarters of the island has now had phosphate extracted from it, and when the last of the workable phosphate has gone in another two or three years, little will be left save a desolation of uninhabitable pinnacles surrounded by a rim of land bearing such buildings and plant on it as the British Phosphate Commissioners abandon there.

I think that I should at this stage give an outline of the litigation so that when I come to the detailed facts they may be seen in relation to the broad issues between the parties. I shall, of course, be guilty of some degree of duplication in doing this, since I shall have to consider the claims in detail at a later stage: but the size and complexity of the case seems to me to make repetition on a modest and selective scale a virtue rather than a fault, The litigation has two main aspects, one physical and the other financial: Ocean Island No 1 is principally concerned with the former and Ocean Island No 2 with the latter. In No 1; claims are made by a selection of Banaban landowners against the first three defendants, who were the British Phosphate Commissioners when the writ was issued. The first, Sir Alexander Waddell, was appointed by the United Kingdom Government on 1st January 1965; the second, Mr Gainey, was appointed by the New Zealand Government on 1st February 1973. Unhappily, he died during the hearing of No 1; but all concerned expressed themselves as being satisfied that any consequent procedural complications could be overcome. The third defendant, Sir Allen Brown, was appointed by the Australian Government on 1st July 1970; but after I had reserved judgment I was informed that as from 1st July 1976 he had been replaced by Mr Maurice Carmel Timbs.

In very broad terms, the claims in Ocean Island No 1 that were made against the first three defendants fall under three main heads. First, there is a claim for specific performance of contractual obligations to replant certain land with trees and shrubs, or alternatively for damages; and this is the main issue in the case. Second, there is a claim for over-mining. This seeks damages for the wrongful removal of phosphate from what was called the purple land, consisting of long thin strips just outside the boundaries of the mining areas on the east and north of the island. Third, there is the sand claim. This alleges that there has been an unauthorised removal of sand from what was called the red land, on the south-east coast of the island. The fourth defendant, the Attorney-General, is concerned with only the first of these claims, and then only in minor degree. The contention is that the United Kingdom Government, acting by the Governor of the Gilbert and Ellice Island Colony, is bound to prescribe the trees and shrubs that are to be planted.

That is No 1. Ocean Island No 2 is very different. The claim is made by Mr Rotan Tito, who claims to be the owner of much land on Ocean Island, and by the Council of Leaders, an incorporated body which is, in effect, the governing body of the Banabans. The sole defendant is the Attorney-General. Again there are three main heads of claim. The first two relate to the Crown standing in a fiduciary position towards the Banabans in connection with two transactions, one in 1931 and the other in 1947. These were quite different. The 1931 transaction was in essence the compulsory acquisition of 150 acres, whereas the 1947 transaction was a voluntary disposition of two areas of 291 and 380 acres. For the 1931 transaction, the core of the plaintiffs' claim is that the royalty payable to the Banabans under the mining lease granted to the British Phosphate Commissioners by the resident commissioner of the Gilbert and Ellice Islands Colony as part of the compulsory process was fixed under the relevant statute by an officer of the Crown (the resident commissioner) in a transaction in which the mining rights were being conferred by the Crown on the Crown itself, in the shape of the British Phosphate Commissioners, so that there was a conflict of duty and interest. The royalty was fixed at less than a proper figure, say the plaintiffs, and so the Crown must pay compensation to make up the amount in fact paid by way of royalties to the amount that ought to have been paid. An alternative basis for the claim is that the mining lease was a lease by a fiduciary to itself, and that this produces the same consequences.

That it the 1931 transaction. The 1947 transaction consisted of an agreement made by the Banaban landowners with the British Phosphate Commissioners for the mining of the 291 and 380 acres, in return for certain lump sums and a royalty. No direct element of compulsion entered into this, though the compulsory powers still existed and had not been forgotten; but the claim is that the Crown stood in a fiduciary position towards the Banabans, and so the agreement was an agreement between a fiduciary acting by its creatures, the British Phosphate Commissioners, and the beneficiaries of that fiduciary. The Crown as such fiduciary was therefore, it is claimed (and I put it very broadly), under a duty to make full disclosure to the Banaban landowners, and to ensure either that they received a full commercial price, or that they had competent independent advice. The Crown failed to discharge this duty, it is said, by failing to reveal that the phosphate was being sold at less than its true value to Australian and New Zealand concerns for manufacture into superphosphates. Substantial benefits were thus being conferred on Australian and New Zealand farmers instead of larger royalties being paid to the Banabans. Furthermore, there had been no disclosure of what sums were being paid by the British Phosphate Commissioners to the Gilbert and Ellice Islands Colony, in respect of phosphate exports, in lieu of taxation or otherwise; and nothing was done to ensure that the Banabans had proper advice. The royalty payable under the 1947 agreement was far below the proper royalty, and so the Banabans were entitled to compensation against the Crown.

Those are the first two claims, based primarily on the alleged fiduciary position of the Crown; and together they constitute the major part of Ocean Island No 2. The third claim is completely different. It relates to certain of the sums in respect of phosphate exports that I have just mentioned. These sums were made payable by the British Phosphate Commissioners to the Gilbert and Ellice Islands Colony in lieu of taxation, or in relation to taxation, by a series of agreements between the British Phosphate Commissioners and the Gilbert and Ellice Islands Colony Government, and by a series of Gilbert and Ellice Islands Colony Ordinances. What the plaintiffs contend under what for brevity may be called 'the Crown royalties claim' is that certain other Ordinances of the Gilbert and Ellice Islands Colony and of Fiji catch these payments, and make them payable to the Banabans instead. Here the question is essentially on of construing the relvant documents. The relief under all three heads is primarily claimed in the form of a series of declarations that the Crown is liable or bound to pay or transfer the sums in question (and not in the form of judgments for the money, or orders to pay it), with supporting accounts, enquiries and directions.

4. The constitutional position of Ocean Island

Before I consider any of these claims, there are other matters that I should outline. First, there is the constitutional position of Ocean Island. I do not propose to discuss this in any great detail. The broad position is that under the Pacific Islanders Protection Act 1875, the British Settlements Act 1887, the Foreign Jurisdiction Act 1890 and the Pacific Order in Council 1893 a High Commissioner for the Western Pacific was established, together with a system of courts and other institutions, and provisions as to the law applicable. Article 108 of the Order in Council empowered the High Commissioner to make, alter and revoke 'Queen's Regulations' for various purposes. In 1892 the islands in the Gilbert and Ellice groups (not then including Ocean Island) were proclaimed as British Protectorates. On 2nd October 1900, after some correspondence between the Pacific Islands Co Ltd and the Colonial Office in Downing Street, a licence in the name of Queen Victoria and executed by the Secretary of State for the Colonies was granted to the company: the company had applied for such a licence on 4th January 1900. The licence granted the company the exclusive right to occupy Ocean Island for 21 years from 1st January 1901 for the purpose of removing guano and other fertilising substances, and to display the British flag in token of the occupation.

The company had in fact already hoisted the British flag. This had been done on 5th May 1900 by Albert Ellis, an employee of the company, who had discovered the presence of rich phosphate deposits on the island. On 3rd May, two days before the flag was hoisted, Ellis had entered into a short written agreement on behalf of the company with the 'King and Natives of Ocean Island', expressed to be made 'for and on behalf of the entire population of Ocean Island'. The agreement purported to give the company the sole right to raise and ship all rock and alluvial phosphate on the island; it provided for the company to pay the natives £ 50 a year, or trade to that value; and the company agreed not to remove any alluvial phosphate from land where coconut or other trees or plants cultivated by the Banabans were growing. I do not think that I need comment on this piece of commercial enterprise. Nor shall I mention the other provisions of the agreement, apart from observing that it was to be in force for 999 years. This concept can have meant little to the Banabans, if, indeed, it was ever put to them; the interpreter stated that he was never told to interpret it to the Banabans, and his competence as an interpreter of written English seems at least doubtful. The 'King' was

not in fact a king; he was, it seems, a ceremonial functionary of a much lower stature. Within a year it had been agreed that the annual £ 50 was to be divided among the landowners whose land had been worked. Active operations had begun in August 1900 when representatives of the company landed and started to erect houses and work the phosphate. But I need not pursue the point, for nothing that I have to decide turns on this initial agreement. It is the licence from the Crown that was the significant document. In addition to making the provisions that I have mentioned, it prohibited any assignment or underletting without the written consent of the Secretary of State for the Colonies, and it provided for the company to pay £ 50 a year to him for the use of the Crown; and there were various other provisions that I need not recite.

On 28th November 1900, the High Commissioner issued a proclamation applying the Pacific Order in Council 1893, and such of the Queen's Regulations made thereunder as applied to the islands of the Gilbert and Ellice Islands Protectorate, to all persons within Ocean Island, which was thereupon included within the jurisdiction of the resident commissioner and deputy commissioner of the protectorate. Two days later, on 30th November 1900, the High Commissioner made a Queen's Regulation. In this regulation, the term 'Gilbert and Ellice Islands Protectorate' was to include Ocean Island; and the removal of guano and other fertilising substances from waste or unoccupied lands in the protectorate without the prior permission of the High Commissioner or resident commissioner was prohibited. On 28th September 1901, the captain of HMS Pylades, on Admiralty instructions, hoisted the British flag on Ocean Island, and took possession of Ocean Island in the name of Edward VII. In doing this, the Captain read a proclamation stating that the hoisting of the flag showed that the jurisdiction of the resident commissioner and deputy commissioner of the protectorate, as notified by the proclamation of 28th November 1900, extended to Ocean Island.

In the meantime, a revised licence dated 13th August 1901 had been issued to the company in place of the first licence dated 2nd October 1900. This was for a term of 99 years from 1st January 1901. On 15th August 1902, the Secretary of State gave approval for the assignment of the licence for Ocean Island by the Pacific Islands Co Ltd to its newly-formed subsidiary, the Pacific Phosphate Co Ltd (which I shall call 'the company'). This assignment was soon made. Shortly afterwards, by a deed dated 31st December 1902, the third and final licence was granted. This was in the form of a grant by Edward VII to the company in substitution for the second licence. It conferred an exclusive right to occupy Ocean Island for the purpose of working phosphate deposits for the term of 99 years from 1st January 1902. By cl 2 of the licence the company covenanted to pay to the Secretary of State, for the use of His Majesty, £ 50 a year for the first four years, and then, in lieu thereof, on or before 31st March 1907 and every subsequent 31st March until and including the year 2000, 'aroyalty of sixpence a ton' on all guano and other fertilising substances exported by the company from the island during the preceding year. There were a number of other terms and provisions, and of these I think I need mention only cl 5. By this the company covenanted that it would properly feed, support and treat all its employees, and 'duly respect the persons and rights of othe inhabitants of the said Island'. This third licence, I may say, is the licence that has remained in force throughout.

I can now come forward to 10th November 1915, when the Gilbert and Ellice Islands Order in Council 1915, was made. By that order, the Gilbert and Ellice Islands within the protectorate were annexed to His Majesty's Dominions, and became known as the Gilbert and Ellice Islands Colony. The order made a number of provisions relating to powers, jurisdiction, offices, and so on, which I need not mention at this stage. The order took effect on 12th January 1916. Shortly afterwards, by an Order in Council made on 27th January 1916 and taking effect on 19th May 1916, the boundaries of the Gilbert and Ellice Islands Colony were extended so as to include, inter alia, Ocean Island.

I can now summarise the position as follows. Jurisdiction over Ocean Island was obtained peacefully and without any overt act of conquest or cessation. It became part of the Crown's dominions by virtue of the occupation of the island by the company and the hoisting of the flag on May 5th 1900, coupled with the Crown's licence to the company; and it thereupon became Abritish settlement under the British Settlements Act 1887. The law officers (Sir Robert Finlay and Sir Edward Carson) so advised on 16th May 1904, and I think they were right. Although on 29th February 1912 the then law officers (Sir Rufus Isaacs and Sir John Simon) disagreed with part of their predecessors' opinion, that was on another point. On any footing Ocean Island was part of the Gilbert and Ellice Islands Colony from 1916 onwards. In 1975, I was told, the Gilbert Islands and the Ellice Islands were divided into two separate colonies, with Ocean Island remaining part of the Gilberts. But that, of course, was long after these proceedings had been commenced; and at all material times from 1916 onwards Ocean Island was part of the undivided Gilbert and Ellice Islands Colony. Before

that, Ocean Island seems to have been a British possession administered as part of a protectorate. I do not think that any serious issue remains between the parties arising from this constitutional situation.

As a colony by settlement, Ocean Island received English law, apart from any relevant native customary law; and this was not affected when in 1916 Ocean Island became a part of the Gilbert and Ellice Islands Colony, a colony by cession. Article 20 of the Pacific Islands Order in Council 1893 provides that subject to the other provisions of the Order, civil and criminal jurisdiction exercisable under the Order are, 'so far as circumstances admit' to be exercised 'upon the principles of and in conformity with the substance of the law for the time being in force in and for England...' That language, it is contended, is wide enough to let in any recognied Banaban law; and this is not seriously disputed. What has been disputed is the extent to which the owner of the surface of land on Ocean Island is also the owner of the subjacent minerals, or has any right to dispose of them; and the Attorney-General contends that no such ownership or right has been established. Subject to this, I do not think that it is questioned that in essence English law has at all material times applied to Ocean Island, subject to local statute law.

5. The land transactions

The land transactions between the British Phosphate Commissioners and their predecessors, the two companies, on the one hand, and the Banabans on the other hand, may be ranged under seven heads. In setting out the facts, I may say, I shall refer to many dates not because the exact date has any special significance, but in order to facilitate reference to the particular document, and so on.

(i) 1900-1913: before the 1913 agreement

First, there was the period from 1900 to 1913, before the 1913 agreement had been made. During this period the company (by which I mean the relevant company at the time) at first entered into many somewhat haphazard transactions with individual Banabans. The island was divided into a large number of small separate plots of land, identifiable by landmarks, in a wide variety of irregular shapes; and most plots were substantially less than an acre in area. Many landowners owned more plots than one; and the Banaban custom of landholding kept the land within the family, so that on the death of a landowner his land would pass to one or more of his children. However, others could readily be adopted so as to take by descent, and so inheritance was not confined to issue of the landowner. At various times this sytem was described by Europeans as being one of the land being entailed, though this is obviously a very rough analogy.

It has long been a matter of dispute how far a landowner could dispose of his land inter vivos; but despite that dispute, in early days a number of leases and purchases were made from individual landowners. The company in effect made such bargains as could be made with those landowners who were willing to deal with the company, the general pattern being that of freehold sales at about £ 15 or £ 16 an acre. At an early stage, however, the Colonial Office drew the company's attention to the Queen's Regulations and other legislation which, in brief, prohibited outright purchases of native lands, with minor exceptions, and severely restricted leases of such lands. Under the amended and consolidated King's Regulations 1908, regs 22 and 23, purchases required the approval of the resident commissioner or High Commissioner; they were restricted to plots not exceeding i acre; nobody could buy more than one plot in any one island; and land in cultivation with permanent food-producing crops was excluded. Any conveyance required the endorsement of the resident commissioner as to the vendor's title, as to the land not being required for his support, and as to the fairness of the contract; and even when the conveyance had been thus endorsed, it might be disallowed by the High Commissioner. These provisions replaced the absolute prohibition on sales which reg 17 of King's Regulations 1903 had imposed.

Leases were dealt with by reg 24. They were restricted to 99 years and to land in any island not exceeding five acres. Furthermore, the lessee, if a non-native, was required to submit the lease to the resident commissioner, who was to make suitable enquires of the lessor and native authorities. He was to refuse to confirm the lease --

'if it shall appear that the land sought to be leased is not the property of the proposed lessor, or that the lease had been unfairly obtained, or that the terms are manifestly to the disadvantage of the native lessor, or that there will not be left sufficient land to support the family of the lessor, or that the lease is otherwise contrary to sound public policy.'

This was virtually the same as reg 18 of the King's Regulations 1903, save that this had contained no five-acre limit, and the maximum term had been 21 years. If the resident commissioner confirmed the lease, he was to register it by having a copy entered in a book, indorse it, and charge £ 1. These and many other

provisions of the King's Regulations were plainly designed to protect the native inhabitants against exploitation.

The difficulties for the company resulting from these provisions of the King's Regulations and other legislation were met in part by a King's Regulation made on 18th February 1903. This validated 19 specified outright sales to the company that had been made in 1901. For the most part, however, the company sought to avoid the impact of the King's Regulations for the future by evolving what became known as the 'P and T' deeds, the initials standing for 'phosphate and trees'. These were documents expressed to be made in consideration of the payment by the company of a lump sum which varied from £ 6 to £ 30 per acre. The usual practice was to make an additional payment for any coconut trees on the land, though this was done outside the formal agreement, which remained silent on the matter. The landowner was expressed to sell to the company all the coconut, pandanus and other trees growing or to be grown on his land, and all the rock and alluvial phosphate that might be found on it, with the right to remove and ship the same within a period which was sometimes five years and sometimes ten.

Though expressed to be deeds, the documents were executed under hand only, with the landowner usually affixing his mark in lieu of a signature. The deeds were very short, and often the detailed description of the land was longer than the rest of the deed. I may take one such deed at random. It is dated 27th November 1903 and relates to Nei Benia's land. The description gives the area, and then continues: 'Commencing at Peg i, and proceeding on a bearing of 311 degree 42 inch for 72 links to Peg 2, thence on a bearing of 323 degree 20 inch for 43 links to Peg 3...', and so on, for 12 typewritten lines. A plan on the back shows the 12-sided plot. The word 'Nei', I may say, is a prefix used to denote that Benia was a female; this prefix is used for married and unmarried women alike. Among the Banabans there is not, and never has been, so far as I am aware, any difference between men and women in relation to the ownership of land or any other legal rights; and on marriage a woman has always retained her own name and has not assumed that of her husband. In such matters Ocean Island has never required the statutory reforms which England found necessary in the last century and this.

The P and T deeds were thus, it was thought, a solution of the company's difficulties under the King's Regulations. Without purchasing the land or taking a lease of it, the company nevertheless acquired the rights that it needed for the extraction of the phosphates. The deeds were registered, at first with the High Commissioner and soon with the resident commissioner. The first of these deeds was registered in April 1904. But acquisitions remained haphazard; the company was still acquiring small individual plots of land, as and when it could, by individual bargains with those landowners who were willing. The result was in some degree unsatisfactory to all concerned. The small island was becoming dotted about with small plots here and there that were being mined. This presented obvious mining difficulties for the company, and could hardly have been welcome to those neighbouring landowners who were not willing to have their land mined. Further, the company had no assurance how much more land would become available for mining. By the end of 1908 the company had worked some 65 acres and had another 135 acres available under P and T deeds; and the annual rate of export of raw phosphate had begun to exceed 200,000 tons. The Colonial Office decided that instead of the resident commissioner merely visiting Ocean Island from time to time (for he was then based on Tarawa) Ocean Island should become the headquarters of the Gilbert and Ellice Islands Protectorate. Thus at the end of 1907 it became a seat of government, and remained so until the resident commissioner left in World War 2. The Colonial Office also decided that as from ist April 1909 the revenue under the Crown licence of 1902 should be paid to the government of the Gilbert and Ellice Islands Protectorate. Early in 1909, if not before, there was an acting resident commissioner in residence on the island.

By this time the Banabans were understandably getting alarmed at the extent of the company's operations in relation to the size of their island. The Banabans lived in four villages. Tabwewa was near the west coast. Tabiang was near the south-west coast, and at the western end of Home Bay. Ooma was not far from the coast near the centre of the curve of Home Bay, and rather further from Ooma Point (or Sydney Point) which is the southern tip of the island and forms the eastern extremity of Home Bay. Buakonikai was near to the summit of the island, a little to the east of centre. All stood on phosphate land, though Buakonikai, in contrast with the others, was in the heart of the land with the greatest depth of phosphate.

The Banabans were not surprisingly concerned with their future in relation to the mining. Before 1900, they had been supporting themselves with some difficulty. The average rainfall was desperately small, and

in times of droughout they had had to collect what water they could from underground caves in the subjacent coral limestone, known as 'bangabangas'. They had in the main subsisted on the fruit of coconut, pandanus and almond trees, together with what fish they could catch. In years of drought hundreds had died of starvation when the fruit trees died. The coming of the company had meant that water could be obtained (the company produced it by condensing sea-water), and the money received under P and T deeds and for working for the company enabled them to buy food from the company's store. In that sense their lot had been improved; certainly their mode of life had greatly changed. But the land on their small island was being replaced at an alarming speed by the barren workings from which phosphate had been extracted: a scattered pattern of 65 acres of worked-out land out of a total of some 1,500 acres must have been striking, and so must the acceleration in the process that had occurred between 1900 and 1908.

In April 1909 the acting resident commissioner reported to the High Commissioner that, after allowing for the area occupied by the villages and also the area of the barren coral pinnacles, over one-third of the island was then useless to the Banabans. The future plainly held the grave question whether the company was to stop mining at some point, or whether the Banabans should be persuaded to go and live on some other island; and there was a suggestion that the company should purchase another island, Kuria, to be exchanged for Ocean Island. Questions such as these were being discussed at the time, not least in the Colonial Office minutes; and those minutes began to raise the question whether the P and T deeds were not an attempt to evade reg 24 of the King's Regulations 1908. Even as early as this, Ocean Island had been the subject of debate in the House of Commons and discussion in the newspapers. The company was finding increasing difficulty in persuading landowners to part with land near the existing workings; and while some owners contented themselves with asking £ 100 or £ 150 for their plots, others flatly refused to make any dispositions.

Matters came to a head with a letter dated 12th November 1909 from the resident commissioner to the company. In this, the resident commissioner said that he was unable to see that certain agreements which had been sent to him for registration were in accordance with any of the existing regulations, and so he could not register them until the High Commissioner had decided the matter. The agreements were evidently P and T deeds. A month later, after discussion with representatives of the company, the resident commissioner proposed that certain areas should be marked off for mining, with enough in them to last the company for another 20 years, and that no mining should take place except in a mining area. Land outside the areas which the company had already acquired, he suggested, should either be sold back to the former owner, or exchanged for land inside a mining area. He proposed that 170 acres should be marked off in addition to the areas already acquired by the company. He also suggested that the company should pay an annual sum to be held in trust for the general benefit of the Banabans, 'always having in view the purchase of another Island in the Gilbert Group and the ultimate transfer of the natives to that Island'.

The company viewed the general tenor of these proposals with favour, though it wished to make some variations in the terms. Thus for the resident commissioner's 170 acres the company wished to substitute 300, a figure which was later increased to 500. There was a long period of discussion of the proposals. There were discussions between the company and the Colonial Office, and discussions within the company and within the Colonial Office. The resident commissioner, the High Commissioner and various officials all played their part in the proposals and counter-proposals, understandings and misunderstandings, and agreements and disagreements; and there was at least one official rebuke within the Colonial Service. Steps were taken, and steps were retraced; and from time to time there were massive recapitulations of the march of events. The Colonial Office was emphatic that there could be no question of removing the Banabans from Ocean Island unless the transfer was most clearly for their benefit and also voluntary in the full sense of the word.

I shall not attempt to summarise the ebb and flow of negotiations. The company, as it was entitled to, throughout bargained hard and astutely for its own benefit; but the Colonial Office was showing great concern for the protection of the Banabans, and so was the resident commissioner and, to a somewhat lesser extent, the High Commissioner. Innumerable arguments and contentions emerged from the company, whereas the Colonial Office, the resident commissioner and the High Commissioner, with whom rested the ultimate legislative and administrative power, argued less with the company and more among themselves. On the official side there was an evident concern that no terms should be put before the Banabans for

acceptance unless they were considered to be proper and in the best interests of the Banabans. On all sides it was accepted that nothing could be done unless the Banabans agreed.

During this period there had been discussions on Ocean Island between the resident commissioner and representatives of the company as to the proposed mining areas. As far back as June 1910 a large meeting of Banabans had unanimously approved the principle of mining areas, and had left the details to the resident commissioner. After many discussions, by the end of 1911 three areas had been agreed, with a total of some 477 acres. There was a northern area of 171 acres, a central area which, with its extension, was 171.8 acres, and an eastern area of 134 acres. The company was not to be allowed to acquire all the land in these areas: they were to be areas within which future acquisitions could be made by the company up to a total of whatever acreage was finally agreed. In other words, the mining areas were to constitute an 'envelope', as it has been called, within which the company was to be permitted to acquire further land for mining up to the total of the agreed 'ration', so that if (as was the case) the 'ration' was less than the land available within the 'envelope', some of the 'envelope' would have to be left unmined. In the event, the acquisitions already made by the company in the northern area meant that the new acquisitions would all have to be in the central and eastern areas.

By the spring of 1913 the company and the Colonial Office had finally reached agreement. By then nearly 215 acres in all had been the subject of P and T deeds; and of this area, nearly 130 acres remained unworked. On 14th March 1913 the Colonial Office wrote to the company, setting out in 11 numbered paragraphs a recapitulation of the terms that had been agreed. The company had suggested that a draft agreement embodying the terms should be submitted to the company for approval; but the Colonial Office replied that a formal and definite agreement could not conveniently be drawn up until the consent of the native owners had been obtained. In fact, no formal agreement was ever drawn up. By a further letter dated 11th April 1913 the Colonial Office agreed an amendment to the terms set out in its earlier letter, and then on 23rd April 1913 the company replied. This reply was not a simple acceptance of the 11 numbered paragraphs in the Colonial Office letter of 14th March, but set out nine of these 11 paragraphs in extenso. The two omitted paragraphs related to the prices for goods sold by the company, and the sale of water to the Banabans. In one sense nothing turns on these omissions; but they do go some way towards supporting a contention that was put forward in Ocean Island No 2. Looked at in terms of offer and acceptance in the law of contract, the exchange of letters has its problems; looked at in terms of an agreement relating to the exercise of governmental powers the difficulties disappear. In fact, the two omitted terms duly appear in the 1913 agreement made between the company and the Banabans.

I do not propose to set out in full the 11 numbered paragraphs of the recapitulation in the Colonial Office letter of 14th March 1913; but I must make some reference to them. By para 1, the future mining operations of the company were to be confined to the three mining areas that I have mentioned, with a 'ration' of 50 acres in the northern area, 100 acres in the central area, and 100 acres in the eastern area. By para 2, the mining rights in 103 acres of land within the mining areas which had already been acquired by the company under P and T deeds were to be recognised; and the mining rights on unworked land outside the mining areas were, with the consent of the landowners, to be exchangeable for mining rights in equivalent land within the mining areas. There was a time limit on this, which, however, was omitted from para 2 in the company's letter. Instead, the company's letter included a paragraph protesting about this time limit. Paragraph 3 of the Colonial Office letter prescribed that, apart from land exchanged, a price of not more than £ 60 an acre and not less than £ 40 an acre should be paid for 'the total of 147 acres (more or less) to be purchased', with a provision for paying any deficiency between the total paid and £ 6,000 'to the fund for the general benefit of the natives'. The 147 acres, I may say, when added to the 103 acres that the company already had in the mining areas, made up the total of 250 acres that the company was to be allowed. Paragraph 4 then provided that when the lands had been worked out they should revert to the native owners as soon as this could take place without inconvenience to the company's operations.

Paragraph 5 I should set out in full:

'That an additional royalty of sixpence per ton be paid by the Company on all phosphate shipped from Ocean Island as from the 1st July 1912, the royalty to be calculated on the same basis as the existing royalty, viz, on the total tonnage of phosphate exported by the Company from the island, the proceeds of this additional royalty to be devoted to the general benefit of the natives.'

This is a provision on which considerable argument developed in Ocean Island No 2. At this stage I propose to say no more than that the original 6d royalty payable to the Crown had, by this stage, as I have already mentioned, become payable by the company to the government of the Gilbert and Ellice Islands Protectorate; and although para 5 does not in terms specify the payee, it seems plain that the additional royalty, like the original royalty, was to be paid to the same government.

Paragraphs 6 and 7 dealt with mining rights in the 250 acres, allowing the company to make up the 250 acres gradually if there was difficulty in getting native owners to sell simultaneously, and permitting mining for the remaining period of the company's licence, subject for the provision for reverter. Paragraphs 8 and 9 dealt with trees and shrubs. They were not to be cut down on any of the 250 acres on which mining operations were not being conducted. Paragraph 9 read:

'That the Company shall replant with suitable trees and shrbrubs any land on which mining operations have been completed, before handing back the land to the owners.'
By a letter dated 11th April 1913 the Colonial Office agreed to meet the company's wishes by inserting between 'completed' and 'before' the words 'at least to the extent to which the land was previously planted'. Paragraphs 10 and 11 of the main letter I have already mentioned.

That was the agreement that was ultimately achieved between the company and the Colonial Office. Not until it had been made was the company in a position to proceed with the acquisition of any land from the Banabans. But, in addition, there had to be in existence forms for the individual transactions with the landowners, to take the place of the P and T deeds for the future. By May 1913 the Chief Judicial Commissioner of the High Commission had made a start in drafting these instruments. The Colonial Office then took a hand in the drafting, and on 13th August sent the company three draft deeds. These became known as the A, B and C deeds respectively. The B deeds, intended for exchanges of land, were of no importance. They ran into difficulties, and I think in the end only one was ever executed. At all events, it was agreed during the hearing of Ocean Island No 1 that there was no need to consider the B deeds. But the A and C deeds, when finally settled, were used extensively. The A deed was drafted for the case where the company had a P and T deed for the land and was surrendering its rights and interests under that deed for the rights granted by the A deed. The C deed was drafted for cases where there was no existing P and T deed. On 15th August the company made detailed comments on the draft deeds, and on 23rd August the Colonial Office sent to the company drafts revised so as meet the company's points.

A day or two earlier Mr Eliot, the new president commissioner, had left London for Fiji and Ocean Island, taking the revised drafts with him. It was he who drew up the form of agreement between the company and the Banabans which was to become the 1913 agreement. The agreement, he said, 'embodied the conditions arrived at between the Colonial Office and the Company's Board'. The agreement also contained an important group of provisions agreed on Ocean Island between the resident commissioner and representatives of the company who had gone to Ocean Island. These provisions were set out in a letter from the resident commissioner dated 10th November 1913 and the company's reply dated 11th November; and on 12th November the resident commissioner reported the substance of these proposals to the High Commissioner, and sent a copy to the Colonial Office.

On 19th December 1913, after the 1913 agreement containing these terms had been signed, the High Commissioner wrote to the Colonial Office, concurring in the resident commissioner's proposals and recommending approval by the Colonial Office. I think that I should read most of the resident commissioner's letter to the High Commissioner. After some introductory matters, the resident commissioner wrote:

'3. As Your Excellency is aware, the [company] have undertaken to pay the extra 6d. a ton to the proposed Banaban Fund as from the 1st of July, 1912, and I think it probable that I shall require the whole of the first year's payment, viz., from 1st July, 1912, to 30th June, 1913, for immediate expenditure, provided that the further leases are first signed. I propose that this money which, according to Mr. Ellis's calculation, represents a sum of £ 4,743, should be paid direct to me in the presence of the Banabans, and that it should be drawn out, whenever required, by the Banaban community with the approval of the Native Magistrate and Kaubure of the island, subject to my being satisfied that it was not used for any wasteful purposes. Mr. Ellis agrees to this proposal on behalf of his Directors; the Company would, of course, benefit by the expenditure of most of this money in the island, though I have no doubt that a portion of it would be used by the Banabans in travelling around the Gilbert Islands, and to this I see no objection.

'4. Should I find that the purposes of the proposed trust fund are understood, and deemed satisfactory, I should not bring forward the above proposal, but it should be borne in mind that the greatest opposition to future leases within the permitted areas will be from the oldest members of the community, and I deem it essential that I should be able to demonstrate to them, by the immediate transfer of this sum for their use, that they will personally benefit, as well as the younger generation, by the early settlement of this business.

'5. It will be made clear that no part of this trust money can be touched as from 1st July, 1913, without the permission of Your Excellency and the Secretary of State, but that I have no doubt that permission might be obtained to utilize the accruing interest for the payment of an annuity to those who have parted with their lands.

'6. I trust Your Excellency may be able to support my action to the Secretary of State if I find it advisable to expedite the final settlement by going beyond the powers given to me, and without further delaying matters by obtaining sanction for this proposal. I am aware that I shall bind the Government by so doing, and that I must incur the full responsibility for such action.'

The discussions on Ocean Island began on 7th November 1913, the day that representatives of the company reached the island. From 7th to 17th November there were daily meetings between the resident commissioner and the representatives of the company; and out of these arose the exchange of letters that I have mentioned. On 18th November long public meetings with the Banabans began, as well as separate meetings by the Banabans among themselves. Detailed accounts of the meetings between the resident commissioner and the company on the one hand and the Banabans on the other hand have survived. The proposed agreement was explained and discussed in considerable detail, and many questions and complaints were answered as well. Though the representatives of the company took part, the resident commissioner carried the main burden of the discussions with the Banabans. I think that it is reasonably clear that the resident commissioner did explain to the Banabans the provisions of the agreement relating to the Banaban Fund on the general lines set out in his letter of 12th November to the High Commissioner, though he went further in relation to the interest on the fund. Instead of the tentative reference to 'permission might be obtained to utilising the accruing interest for the payment of an annuity to those who have parted with their lands', there was the firm provision that the interest would be utilised thus. One record of the meeting on 19th November records the resident commissioner as telling this to the Banabans, and saying that future generations of Banabans would be the richest natives in the Pacific. He also said that he did not know what would be done with all the money, but the British Government would find a way to expend it in their interests, and would listen to suggestions from them in the matter.

At the public meetings a division between the Banabans began to emerge, with Buakonikai and Tabwewa tending to be in favour of the agreement and Tabiang and Ooma against it. On 28th November the resident commissioner allowed Banabans to begin signing the agreement, and 72 landowners signed; and within a few days 74 more had signed. On 10th December deputations from Tabiang and Ooma came to the resident commissioner to say they now wanted to accept the terms. At a meeting that day 86 more signed the agreement, and by then 250 landowners were in favour of the agreement and 63 against. Soon a number of others signed the agreement, and in the end it was signed by a total of 258 Banabans.

(2) 1913-1920: the 1913 agreement

With the signing of the 1913 agreement comes the second main period. The agreement was the first comprehensive bargain with the Banabans, and it was to govern dealings in phosphate land on Ocean Island until the 1931 transaction. I propose to read the entire agreement, pausing from time to time to make brief comments on its provisions, but leaving any longer discussions until the end. The agreement, with the consequent A and C deeds, is in the forefront of Ocean Island No 1; in Ocean Island No 2 it is an important part of the background to the claims based on the 1931 and 1947 transactions.

The agreement begins as follows:

'Agreement entered into on the under-mentioned days of November and December, in the year 1913, A.D., by us the undersigned landowners and natives of the Island of Banaba, and by Albert F. Ellis, Local Director of the [company], in the presence of E. C. Eliot, His Britannic Majesty's Resident Commissioner of this Protectorate.'

It will be observed that neither the resident commissioner nor any other organ of government is expressed to be a party. It is merely that all concerned signed in the presence of the resident commissioner.

The agreement continues:

'2. This Agreement shall be subject to the fulfilment of the conditions enumerated below, and shall entail on us the obligations herein stated.

'3. That land to the extent of 145 acres within the delimited areas shall be acquired by the [company] on the terms laid down by His Majesty's Government, and which are embodied in the deeds which shall hereafter be signed.'

The 'delimited areas' are, of course, what has been called the 'envelope', and the deeds in question are the A, B and C deeds.

'4. That as soon as each plot of land has been surveyed the owner of such land shall sign the prepared deeds before the Resident Commissioner on payment being made to him of the purchase price as arranged, namely, at a sum of not more than £ 60, and not less than £ 40, per acre, according to the position and quality of the land, or by exchange by mutual consent, also compensation for food-producing trees as has been done in the past under the "Phosphate and Tree Purchase" agreements.'

The Banabans had had it explained to them that the company was offering to pay £ 60 an acre for land in the central mining area and £ 40 in the eastern mining area; the deposits of phosphate were deeper in the central area than in the eastern.

'5. That as soon as the deeds have been signed to the extent of eight acres in the central mining area, and eight acres in the eastern mining area, the Company will at once comply with the terms agreed upon and which are embodied below, but it is hereby undertaken that as each lot is surveyed, up to the limit of 145 acres aforesaid, we, the landowners concerned, will be prepared to receive our purchase money and sign the deeds.

'6. We understand that should we, the Banaban landowners, fail to comply with these conditions, the Company would be at liberty to cancel the obligations imposed upon them.'

I do not think that I need cmment on these two clauses; it is the next five clauses which form the central core of difficulty in the agreement. I shall read them without a break.

'7. On the above conditions the Company hereby undertakes to hand over to the Resident Commissioner the whole of the first year's contributions to the Banaban Fund, namely, from the 1st July, 1912, to 30th June, 1913, which amounts to a sum of £ 4,734, and that this money shall be devoted to the following uses: --

'8. After deducting a sum of £ 300 to start the annuity fund (at the rate of £ 150 for the two years 1913 and 1914), the whole of this amount shall be expended for the benefit of the existing Banaban community in any way which may be recommended by them, and agreed to by their Native Magistrate and Kaubure, and subject to the decision of the Resident Commissioner that such expenditure is equitable and not wasteful.

'9. That this sum of £ 300 reserved out of the total payment of £ 4,734 shall be used to start the annuity scheme, which scheme is as follows: --

'10. For the three years, 1913, 1914, and 1915, a sum of £ 150 will be available each year, and in the following years this amount will be increased by £ 150 each year; this represents the simple interest on the yearly sum of £ 5,000, payable by the Company to the Banabans (through the Government) in royalty. That this money shall be used each year for distribution among all Banabans who lease land to the Company from this date, in the proportion recommended by the Banabans themselves, and subject to the decision of the Resident Commissioner that such division is equitable.

'11. That this sum of £ 5,000 is approximate only, and would be subject to increase or decrease, according to the yearly tonnage shipped by the Company.'

I shall leave these clauses for discussion later. At this stage I merely say that the origin of this group of clauses was not in the correspondence between the Colonial Office and the company, but in the local discussions between the resident commissioner and the representatives of the company in November 1913. The reference in cl 7 to 'the first year's contributions to the Banaban Fund' is a reference not to any existing fund, but to a new fund which by implication was to be established and fed by the new 6d royalty. I may add that at the meeting with the Banabans on 28th November 1913, when Mr Ellis signed the agreement on

behalf of the company, he handed to the resident commissioner a cheque for £ 4,743 with a covering letter. This was to the effect that the cheque should be held until the Banabans had signed the agreement and also had sold to the company eight acres in both the central and eastern areas, and should only be applied on the agreed terms after this had been done.

I continue with the agreement:

'12. That so soon as the 16 acres of land referred to in paragraph 5 hereof have been leased to the Company, the Company shall comply with the following conditions from that date, namely: -- (a) That they shall return all worked out lands to the original owners, and that they shall replant such lands -- whenever possible -- with coconuts and other food-bearing trees, both in the lands already worked out and in those to be worked out. (b) That the royalty of 6d a ton on all phosphate shipped shall be paid to the Government by the Company for the Banaban Fund as from the 1st of July, 1912, which includes the first year's payment of L4,734 referred to in paragraph 7 hereof. © That the Banabans shall enjoy the right to cultivate all lands leased by them to the Company until the Company actually require to work such land, or to put up covered-in areas, or to make railways, etc., over such lands. (d) That the Company will adopt a system of uniform prices for all goods sold by them, either to their own employees, or to any natives or other inhabitants of Ocean Island, and pending the arrangement of this matter an immediate reduction in price will be made on many articles as specified on the attached list. (e) That the Company shall provide each adult Banaban native with one gallon of fresh water per diem whenever necessary, at the price of three farthings per gallon.'

The agreement then ends as follows:

'In witness whereof we, the undersigned, have hereby placed our signatures and duly witnessed marks, on the under-mentioned days and months in the Year of Our Lord One thousand nine hundred and thirteen, in the presence of the Resident Commissioner, at Ocean Island.'
There is then the date 28th November 1913. The agreement is signed by Mr Ellis 'per pro' the company, and by 258 Banabans, many signing by a mark, on a range of dates running from 28th November to 16th December 1913. At the end of the signatures there are the words, 'All the above signatures were affixed in my presence', and the signature of the resident commissioner.

I return to the group of clauses which have given rise to difficulty and argument, cll 7 to 11. Before I consider these, I must mention cl 12(b) which, despite its position, really forms a prelude to this group of clauses. It introduces an altogether new feature into the relationship between the Banabans and the company, a royalty of 6d a ton on all phosphate shipped as from 1st July 1912. This, of course, was quite distinct from the 6d royalty already payable under the Crown licence of 1902, a royalty which since 1st April 1909, as I have mentioned, had been payable to the government of the Gilbert and Ellice Islands Protectorate. It was the new royalty which was often referred to as the 'additional royalty', as from the point of view of the company it plainly was. The 1913 agreement was, to some extent, backdated in its operation. The phosphate year from 1st July 1912 to 30th June 1913 had ended over four months before the agreement was signed, so that the tonnage for that year was already known, and the amount of the royalty for the year had already been ascertained to be the sum of £ 4,734 mentioned. The amount of the royalties for future years was, of course, unknown, but for the purpose of the agreement, and to facilitate explanation to the Banabans, the amount was taken to be £ 5,000, with the provision for increase and decrease made by cl 11.

By the terms of cl 12(b) all royalties, including the initial £ 4,734, were to be 'paid to the Government by the Company for the Banaban Fund'. No explanation of 'the Banaban Fund' in the documents seems to have been thought necessary, beyond what could be gathered from cll 7 to 12. The royalty was payable on all phosphate shipped since 1st July 1912, irrespective of the plots of land it came from; it was not confined to land newly provided under the 1913 agreement, but extended to phosphate taken from land which the company had already obtained.

I can now turn to the effect of cll 7 to 11. I found these somewhat elusive, and by no means easy to comprehend; and more than once during the hearing I had to return to a careful study of them to avoid misunderstandings. I think that their main import is as follows. First, what is established is a single fund, the Banaban Fund. The reference to 'the annuity fund' in cl 8 seems to have been a slip for 'the annuity scheme'; for under the agreement there never was any separate annuity fund. Second, the Banaban Fund had two quite different functions. One related to the initial payment of £ 4,734. Of this, £ 300 was to be used

for the annuity scheme. The remaining £ 4,434 was to be expended 'for the benefit of the existing Banaban community' in accordance with cl 8. This, it will be observed, was a 'once for all' provision for the first payment alone, with nothing to match it for later years.

The other function of the Banaban Fund was to provide money for the annuity scheme. The £ 300 taken from the first payment of £ 4,734 provided for the years 1913 and and 1914, at the fixed rate of £ 150 a year. For 1915 and subsequent years, however, two new elements came in. First, the payments were variable with the royalty paid. Thus if in 1915 the royalty were to be £ 5,000 exactly, £ 150 would be distributable under the annuity scheme; whereas if the royalty was more than £ 5,000, or less than £ 5,000, the annuity payment would be correspondingly more or less. £ 150 is 3 per cent of £ 5,000, and so in effect the annuity payments would be 3 per cent of the actual royalty paid. Second, from 1915 onwards the annuity payments were to be cumulative. If one assumes royalty payments to be constant at £ 5,000 each year, the annuity payments would be £ 150 for 1915, £ 300 for 1916, £ 450 for 1917, and so on.

The second main feature of these clauses of the 1913 agreement relates to the recipients of the payments. The £ 4,434 was to be expended 'for the benefit of the existing Banaban community', in accordance with cl 8; and no particular point arises on this. The annuity scheme, on the other hand, was that 'this money' (which must mean the money available for annuities) was to be distributed 'among all Banabans who lease land to the company from this date' in accordance with cl 10. No difficulty has arisen before me relating to the mode of distributing this money; but it is noteworthy that the recipients of the annuities were by no means the same as those whose land had given rise to the royalty that produced the annuities. As I have mentioned, the royalty was payable on all phosphate shipped after 1st July 1912. Thus if phosphate had been shipped from A's land in 1912 or 1913, and A was not one of those who leased land to the company 'from this date' (probably 28th November 1913) within cl 10, A would get no annuity, even though his land had helped to produce the royalty; whereas B, who leased land to the company under the 1913 agreement, was entitled to share in the annuity scheme. However, so far as A was concerned, he had struck his bargain with the company before the 1913 agreement was made, and the 6d a ton royalty was no part of that bargain. The agreement was drafted so as to provide an inducement to Banaban landowners to lease land to the company; and, in a sense, the payment by the company of a royalty in respect of land which they already had was mere bounty. Similar considerations apply to the devotion of the initial £ 4,434 to the benefit of the existing Banaban community.

The third main feature of these clauses of the 1913 agreement is the absence of any provision for the capital of the Banaban Fund. The fund would be increased each year by the royalties of £ 5,000 a year, more or less, and the notional interest at 3 per cent on the accumulated royalties would be distributed each year as annuities. Not a word is said about how long this process was to continue, or whether and for what purposes any of the capital of the fund could be expended, apart, of course, from the initial £ 4,734; this was to go as to £ 300 for annuities and as to the rest for the benefit of the existing Banaban community. This express provision for the disposition of the first year's royalty throws into relief the absence of any provision for all subsequent royalties. So far as the 1913 agreement itself was concerned, the accumulated annual royalties were to be held in perpetuity, yielding each year the appropriate annuities for those who leased land to the company 'from this date' within cl 10.

That leads me to the fourth main feature. 'The Government' had important functions under the agreement. One was the receipt of the 6d royalty payable under the agreement. In cl 10 of the agreement this was expressed in the form of the yearly sum 'payable by the Company to the Banabans (through the Government) in royalty'. Clause 12(b) states that the 6d royalty is to be 'paid to the Government by the Company for the Banaban Fund'. The latter form of expression seems to me to be the dominant form so far as the forms conflict. Clause 12(b) is an operative provision, obliging the company to make the payment, whereas in cl 10 the words are merely exegetical, explaining what the annuity payments of £ 150 represent. Furthermore, the words 'the Banabans' in cl 10 are somewhat indefinite in meaning, whereas 'the Banaban Fund', though unexplained, represents a more intelligible concept for money which is intended to yield annual payments of annuities. I should also mention the reference in cl 2 to 'His Majesty's Government' in relation to the A and C deeds.

In addition to these direct functions, there are a number of other functions which are consigned to a government official, the resident commissioner. He is to witness the A and C deeds (cl 4), he is to receive the initial £ 4,734 (cl 7), he is to consider whether the expenditure of the £ 4,434 is 'equitable and not

wasteful' (cl 8), and he is to consider whether the Banabans' proposals for dividing the annuities are 'equitable' (cl 9). Nevertheless, despite these governmental functions, neither the government nor the resident commissioner was made a party to the 1913 agreement; that was an agreement between the company and the Banabans who signed it, and them alone.

There was also what might be called the fifth main feature of these clauses, save that it does not appear in them at all. This was the practice that grew up and was acquiesced in by the 1913 landowners of making payments out of the interest on the fund for the provision and maintenance of various services to the Banabans, such as education, medical services, and so on, with certain other payments, for example, to Banaban elders and for drought relief. Such payments, of course, reduced the sums available for the landowners, but were accepted by them without demur. Despite these payments, by 1930 the balance available for the 1913 landowners provided an income of about £ 6 a head.

I shall have to return to the 1913 agreement both for Ocean Island No 1 and Ocean Island No 2; but for the present I need say no more than that in No 1 the agreement (and in particular cl 12(a)) is relied on by the plaintiffs for the obligation imposed on the company to replant the worked-out land with coconut and other food-bearing trees, while in No 2 it is relied on by the plaintiffs as helping to establish that prior to the 1931 transaction the Crown was in a fiduciary position in relation to the Banabans. With that, I can, I think, turn to the A and C deeds, which are mainly of importance in No 1.

The A and C deeds were printed forms, normally completed mainly in typewriting.
An original deed was put in evidence as exhibit D7, and I take this as being typical of the physical condition of the deeds. I think that I ought to set out a specimen of each type of deed. An example of an A deed is the deed made between Naribaua and the company dated 13th March 1916. It is headed with the number allotted to the land concerned, in this case A233, and the words, 'Deed for use where there is a licence already existing in respect of the land concerned'. The deed then proceeds:

"This deed is made the 13th day of March, 1916, between Naribaua his heirs executors or assigns of the first part the Pacific Phosphate Company Limited of London and Melbourne (hereinafter called the Company) of the second part and Edward Carlyon Eliot His Majesty's Resident Commissioner in Ocean Island (hereinafter called the Resident Commissioner) of the third part. Whereas by a deed dated the first day of September 1912 the said Nairbaua [sic] sold to the Company all the cocoanut pandanus and all other trees then growing or that should be grown and all the rock and alluvial phosphate that might be found (with the right to remove the same within the next [blank] years) on that piece of land situated at Ooma, Ocean Island as described in the plan on the back of the said deed. And whereas the Company has requested the said Naribaua his heirs executors or assigns to extend the said term of [blank] years referred to in the said deed which the said Naribaua his heirs executors or assigns has consented to do in the manner and upon the terms and conditions hereinafter appearing and subject to the concurrence of the Resident Commissioner being obtained to the transaction. And whereas the Resident Commissioner has agreed to join in this deed for the purpose of signifying his concurrence as aforesaid. Now it is hereby declared as follows: (1) The Company hereby surrenders to the said Naribaua his heirs executors or assigns all the rights and interests conferred on it by the said deed of 1st September 1912 to the intent that the said rights and interests may from the date of this deed absolutely cease and determine. (2) (i) The said Naribaua his heirs executors or assigns, hereby grants to the Company the right to remove from that piece of land situated at Ooma, Ocean Island the dimensions of which are described in the plan on the back of this deed all rock and alluvial phosphate that may be found therein during the term beginning at the date hereof and ending on the 31st day of December 1999 and the right during the said term to cut down and remove all trees, shrubs, &c, on the said land the cutting down and removing whereof may be necessary (a) for the exercise of any operations actually commenced or immediately contemplated by the Company for the purpose of or with a view to extracting any such rock or alluvial phosphate, or (b) to enable the Company to construct any railway which may be required for the carrying on of its operations as aforesaid on the said land or any land adjoining the same from which the Company has the right to take rock and alluvial phosphate. (ii) Unitil any such operations are commenced and being carried on the said Naribaua his heirs executors or assigns, his servants and agents shall have free access at all times to the said land for the purpose of cultivating the same and collecting and removing the vegetable produce thereof. (iii) Whenever the said land shall whether before or at the end of the said term cease to be used by the Company for the exercise of the rights hereby granted the Company shall replant the said land as nearly as possible to the extent to which it was planted at

the date of the commencement of the Company's operations under Clause I (i) hereof with such indigenous trees and shrubs or either of them as shall be prescribed by the Resident Commissioner for the time being in Ocean Island and the said lands shall when and as soon as in the opinion of the said Resident Commissioner this may be without prejudice to the Company's operations as aforesaid revert to and become revested in the said Naribaua his heirs executors or assigns, freed and discharged from all rights of the Company under this deed. In witness whereof the parties hereto have hereunto affixed their signatures this 13th day of March, one thousand nine hundred and sixteen.'
The signatures are then witnessed, and there is a notation by rubber stamp showing that the transaction was registered in the resident commissioner's office on, in this case, 15th March 1916. There is also a plan with a statement of the area and a description of the boundaries, in the style used for the P and T deeds.

I pause there to mention three points. First, in addition to misspelling the grantor's name in the first recital, this particular deed is obviously imperfect in its failure in the second and third recitals to mention the term of years of the P and T deed which is to be extended. Second, the reference in cl (2)(iii) to the date of commencement of the company's operations 'under clause I(i) hereof' is an obvious slip; the reference should be to 'clause (2)(i) hereof'. Probably the slip came about through taking a C deed, where the reference is correct, and then producing an A deed by the insertion of a new cl 1 to effect the surrender, renumbering the former cl 1 so as to make it cl 2, and then forgetting to alter the reference in what had become cl 2(iii). Nothing, fortunately, turns on it. Nor has anything turned on the third point, that of the A and C deeds being called 'deeds' and yet providing for execution (and in fact being executed) under hand only. Perhaps they merely carried on an Ocean Island tradition established by the P and T deeds.

I turn to the C deed. The specimen that I have taken is headed 'C.101', with the title 'Deed for new plots within the mining areas'. The deed then reads as follows:

'This deed is made the 17th day of April between Nei Mimi of the first part the Pacific Islands Phosphate Company Limited of London and Melbourne (hereinafter called the Company) of the second part and Edward Carlyon Eliot His Majesty's Resident Commissioner in Ocean Island (hereinafter called the Resident Commissioner) of the third part to record the following transaction: -- (1) -- (i) In consideration of the sum of £ 97.11.11 paid to the said Nei Mimi by the Company (the receipt whereof the said Nei Mimi hereby acknowledges) the said Nei Mimi hereby grants to the Company the right to remove from that piece of land situated at Paukonikai Ocean Island the dimensions of which are described in the plan on the back of this deed, all rock and alluvial phosphate that may be found therein during the term beginning at the date hereof and ending on the 31st day of December 1999 and the right during the said term to cut down and remove all trees shrubs &c. on the said land the cutting down and removing whereof may be necessary (a) for the exercise of any operations actually commenced or immediately contemplated by the Company for the purpose of or with a view to extracting any such rock or alluvial phosphate or (b) to enable the Company to construct any railway which may be required for the carrying on of its operations as aforesaid on the said land or any land adjoining the same from which the Company has the right to take rock and alluvial phosphate. (ii) Until any such operations are commenced and being carried on the said Nei Mimi his servants and agents shall have free access at all times to the said land for the purpose or [sic] cultivating the same and collecting and removing the vegetable produce thereof. (iii) Whenever the said land shall whether before or at the end of the said term cease to be used by the Company for the exercise of the rights hereby granted the Company shall replant the said land as nearly as possible to the extent to which it was planted at the date of the commencement of the Company's operations under Clause I(i) hereof withe such indigenous trees and shrubs or either of them as shall be prescribed by the Resident Commissioner for the time being in Ocean Island and the said lands shall when and as soon as in the opinion of the said Resident Commissioner this may be without prejudice to the Company's operations as aforesaid revert to and become revested in the said Nei Mimi freed and discharged from all rights of the Company under this deed. In witness whereof the parties hereto have hereunto affixed their signatures this 17th day of April one thousand nine hundred and fourteen.'
The rest of the document is on much the same lines as the A deed that I have set out.

It will be observed that in each deed the last sub-clause (cl (2)(iii) in the A deed and cl (1)(iii) in the C deed) is in identical form, and contains a replanting obligation and a provision for reverter. Both play a prominent part in Ocean Island No 1. I shall have to return to them later. It will also be observed that the resident commissioner is a party to each deed, though on this the deeds differ somewhat in their terms. In

the C deed, the resident commissioner is a party simpliciter, whereas in the A deed it is recited that the landowner has agreed to extend the period stated in his P and T deed subject to the concurrence of the resident commissioner being obtained to the transaction; and it is then recited that the resident commissioner has agreed to join in the deed 'for the purpose of signifying his concurrence as aforesaid'. There is also the difference that in the A deed there is no express statement of any consideration, though there is a surrender by the company of its rights under the P and T deed and a grant by the landowner of the right of removal. In the C deed there is an expression of consideration in the payment of the stated sum for the grant of the right of removal.

It will also be observed that the last sub-clause provides for 'the Resident Commissioner for the time being in Ocean Island' to prescribe the indigenous trees and shrubs to be planted, and that the third party to the agreement is the resident commissioner, Mr Eliot, who was in office at the time. There is nothing to constitute the resident commissioner a corporation, and so, on the face of it, this cannot be more than an agreement by an individual who has long ceased to hold the office of resident commissioner (and is, I think, dead) that whoever is resident commissioner at the relevant time will do the necessary prescribing. There is also a minor difficulty about the words 'for the time being in Ocean Island'. At some time during World War 2 the resident commissioner left Ocean Island, and Ocean Island ceased to be the headquarters of the resident commissioner for the Gilbert and Ellice Islands Colony, which were established elsewhere in the colony. Thereafter there could thus be said to be no resident commissioner 'in' Ocean Island, though there was a resident commissioner 'for' Ocean Island, as for the rest of the colony. These are matters that I shall have to consider later.

Having described the 1913 agreement and the A and C deeds, I can pass quickly over the next six years. The necessary eight acres in each of the central and eastern mining areas were quickly provided by the Banabans, and large numbers of A and C deeds were duly executed. In the period 1913 to 1922 inclusive I think there were just under 300 in all. All were executed before the British Phosphate Commissioners came on the scene at the end of 1920, save for three C deeds, two of which were executed in June 1921, and the other in January 1922; but these are not directly concerned in the present proceedings. I can now come forward to 1920, when the British Phosphate Commissioners were constituted and took over; and that is the third period.

(3) 1920-1931: the British Phosphate Commissioners and the compulsory acquisition

As I have indicated, Ocean Island and Nauru have to a considerable degree been interlinked in relation to phosphate deposits. Before World War 1 Nauru was a German possession; but the Pacific Phosphate Co had by contract acquired considerable rights for the working of phosphates there, and during the war British forces occupied the island. After the armistice in 1918, there was much negotiation, and in the end three instruments were executed which have a considerable bearing on the issues before me. These instruments were as follows. First, there was a tripartite agreement dated 2nd July 1919 made between 'His Majesty's Government in London, His Majesty's Government of the Commonwealth of Australia and His Majesty's Government of the Dominion of New Zealand'. I shall call this 'the 1919 agreement'. Second, there was a five-part agreement dated 25th June 1920, which I shall call 'the 1920 agreement'. Third, there was a six-part indenture dated 31st December 1920, which I shall call 'the 1920 indenture'.

On the face of it, the 1919 agreement applied only to Nauru; but, as will be seen, the 1920 indenture made arts 9 to 14, inclusive, of the 1919 agreement apply to Ocean Island as well. The 1919 agreement recited that a mandate for the administration of Nauru had been conferred on the British Empire, and that it was necessary to provide for exercising the mandate and mining the phosphate. It was then stated that the three governments agreed as set out in the following provisions. The administration of the island was to be vested in an administrator; and the Australian Government was to appoint the first administrator, for a term of five years. The powers of the administrator were defined. Then by arts 3 and 4 it was provided that there should be a board of commissioners with three members, one to be appointed by each government, and each was to hold office at the pleasure of the government appointing him. Their remuneration was to be fixed by the three governments, or by a majority of them, and the title to the phosphate deposits on Nauru and all the land, buildings, plant and equipment used for working them was to vest in the commissioners. The rights of the company were coverted into a claim for compensation at a fair valuation, to be contributed by the three governments in the proportions they agreed, or in default in the proportions set out in art 14 of the agreement.

That brings me to arts 9 to 14, the articles which became applicable to Ocean Island as well as Nauru. I think I should set them out in full:

'Article 9. The deposits shall be worked and sold under the direction management and control of the Commissioners subject to the terms of this Agreement. It shall be the duty of the Commissioners to dispose of the phosphates for the purpose of the agricultural requirements of the United Kingdom Australia and New Zealand so far as those requirements extend. Article 10. The Commissioners shall not except with the unanimous consent of the three Commissioners sell or supply any phosphates to or for shipment to any country or place other than the United Kingdom Australia or New Zealand.'

In the event, very little of the phosphate from either island went to the United Kingdom, largely owing to the distances involved and the discovery of large deposits of phosphate in Morocco. Virtually the whole output went to Australia and, to a lesser extent, New Zealand, though from time to time there were surpluses which were exported to Japan and elsewhere.

I continue with the agreement:

'Article 11. Phosphates shall be supplied to the United Kingdom Australia and New Zealand at the same f.o.b. price to be fixed by the Commissioners on a basis which will cover working expenses cost of management contribution to administrative expenses interest on capital a sinking fund for the redemption of capital and for other purposes unanimously agreed on by the Commissioners and other charges. Any phosphates not required by the three Governments may be sold by the Commissioners at the best price obtainable. Article 12. All expenses costs and charges shall be debited against receipts and if by reason of sales to countries other than the United Kingdom Australia or New Zealand or by other means or circumstances any surplus funds are accumulated they shall be credited by the Commissioners to the three Governments in the proportions in which the three Governments have contributed under Article 8 of this agreement and held by the Commissioners in trust for the three Governments to such uses as those Governments may direct or if so directed by the Government for which they are held shall be paid over to that Government.'

Article 11 established the system whereby phosphate was sold to purchasers in the three countries at cost price, after allowing for interest on capital (which was charged at 6 per cent) and a sinking fund. Outside sales, on the other hand, were to be at the best price obtainable. In practice, the Commissioners established an 'f.o.b. equalisation fund', with a normal level of £ 100,000, and this provided a cushion whereby profits made in one year could be used to offset losses made in another year. The 'phosphate year' ran from 1st July to 30th June, and the price to be charged for phosphate was normally fixed in advance for the whole of a phosphate year. The expenses of the year might, of course, be more or less than the estimate; and another important variable was the quantity of phosphate sold during the year. If the sales were less than the estimate, the overheads would be larger in relation to each ton of phosphate sold, and so the prospects of a loss were increased; and conversely, if more phosphate was sold than was estimated. Furthermore, the operations of the British Phosphate Commissioners on the two islands were for many purposes treated by them as one, so that problems arose in this litigation in segregating the Ocean Island element from the Nauru element, particularly in relation to operating and other costs.

Next there is art 13:

'There shall be no interference by any of the three Governments with the direction management or control of the business of working shipping or selling the phosphates and each of the three Governments binds itself not to do or to permit any act or thing contrary to or inconsistent with the terms and purposes of this Agreement.'

This article established the independence of the British Phosphate Commissioners as against any one or two of the three governments, though not, of course, against all three acting in concert. Finally, there is art 14.

'Until the readjustment hereinafter mentioned each of the three Governments shall be entitled to an allotment of the following proportions of the phosphates produced or estimated to be produced in each year, namely -- United Kingdom 42 per cent. Australia 42 per cent. New Zealand 16 per cent. Provided that such allotment shall be for home consumption for agricultural purposes in the country of allotment and not for export. At the expiration of the period of five years from the coming into force of this Agreement and every five years thereafter the basis of allotment shall be readjusted in accordance with the actual requirements of each country. If in any year any of the three Governments does not require any portion of its allotment the

other Governments shall be entitled so far as their requirements for home consumption extend to have that portion allotted among themselves in the proportions of the percentages to which they are entitled as above. Where any proportion of the allotment of one of the Governments is not taken up by that Government that Government shall when the phosphates are sold be credited with the amount of the cost price as fixed by the Commissioners under the first paragraph of Article 11 but if such phosphates are sold to a purchaser other than one of the Governments any profit above the said cost price shall be carried to the surplus fund mentioned in Article 12.'

I need only say that there never was the readjustment that was contemplated by this article; the percentages remained unchanged throughout.

That concludes the articles which were to be applied to both islands. The only other article provided for the agreement to come into force on ratification by the Parliaments of the three countries. The Australian and New Zealand Parliaments ratified the agreement in October 1919, and the United Kingdom Parliament did so on 4th August 1920 by the Nauru Island Agreement Act 1920.

In the meantime, on 25th June 1920, the 1920 agreement had been made. The five parties were His Majesty King George V, the High Commissioners for Australia and New Zealand, Viscount Milner (who was then Secretary of State for the Colonies) and the company. After nearly five pages with over a dozen unnumbered recitals, the agreement provided, in effect, for the three governments (the reference to 'Government' in the singular in cl 1 is an obvious slip) to purchase from the company for £ 3.5 million the whole of the company's Ocean Island and Nauru undertakings, rights and assets as from 1st July 1920, together with the company's offices in Australia. As might be expected, the agreement included elaborate provisions for the three governments to indemnify the company against a wide range of matters, including claims to royalties, and so on: see cl 5. There were also many other provisions. I need not mention these, apart from cl 17, which provided for the company, as from 1st July 1920, pending completion, to be deemed to be carrying on the undertaking on behalf of the governments.

After that agreement had been executed, each of the three governments proceeded to appoint a commissioner, a process which was completed by September 1920: on 21st September the three commissioners held a meeting in London. In that state of affairs, the 1920 indenture came to be executed on 31st December 1920. The six parties were (1) the company; (2) His Majesty King George V; (3) His Majesty the King represented by the High Commissioner for Australia; (4) His Majesty the King represented by the High Commissioner for New Zealand; (5) Viscount Milner, the Secretary of State for the Colonies; and (6) the three first British Phosphate Commissioners, Mr Dickinson for the United Kingdom, Mr Collins for Austealia and Mr Ellis for New Zealand. The indenture was expressed to be supplemental to the 1919 agreement. After various recitals (including one which described the 1919 agreement as 'the Phosphates Deposits Agreement' and another which called the 1920 agreement 'the Purchase Agreement') the indenture proceeded to provide that the company, by direction of the three governments, conveyed to the three British Phosphate Commissioners all the company's assets in respect of Ocean Island and Nauru. By cl 1© these included --

'The full benefit of all leases tenancies and other rights to or over lands in the said Islands under the land deeds or leases made between native landowners of the said Islands and the Company and belonging to the Company and registered in the office of the Resident Commissioner for the Gilbert and Ellice Islands Colony at Ocean Island aforesaid and in the office of the Civil Administrator at Nauru for all the respective unexpired residues of the terms of years thereby created and for all the estate and interest of the company in the same premises subject to the payments and royalties thereby assured and reserved and the covenants and conditions therein contained.'

Then the habendum of the indenture ran as follows:

'TO HOLD all the said premises (SUBJECT respectively as aforesaid) Unto and TO THE USE of the present Commissioners their heirs executors administrators and assigns according to the nature thereof as joint tenants UPON TRUST and to the intent that the said premises shall at all times hereafter be held by the present Commissioners (as such Commissioners) and the Board of Commissioners from time to time hereafter to be duly appointed under the Phosphate Deposits Agreement (hereinafter included in the expression "the Board of Commissioners") for the purposes and upon the terms and with and subject to the powers and in accordance with the provisions contained in the Phosphate Deposits Agreement AND TO THE INTENT that the phosphate deposits on the said Ocean Island and the said Island of Nauru shall at all

times hereafter be worked sold disposed of and dealt with by the Board of Commissioners in accordance with the provisions of Articles 9 to 14 (both inclusive) of the Phosphate Deposits Agreement AND SUBJECT ALSO to the Agreements and obligations on the part of the Board of Commissioners and the Governments respectively hereinafter contained.'
Next there were a number of provisions for indemnity and release:

'2. THE Board of Commissioners shall henceforth duly perform and observe all the Agreements on the part of the Governments and provisions set forth in Clauses 3 and 4 of the Purchase Agreement. 3. THE Governments and each of them shall at all times hereafter duly observe and perform the Agreements by the Governments for the indemnity of the Company as set forth in Clause 5 of the Purchase Agreement. 4. THE Governments and each of them hereby release the Company from all liability on and after the First day of July One thousand nine hundred and twenty to make any further payments of royalty under the provisions of the Ocean Island Concession and a letter dated the Fifteenth day of October One thousand nine hundred and twelve addressed by the Company to the Under-Secretary of State for the Colonies agreeing to pay a new royalty and from all liability in respect of any breach after the First day of July One thousand nine hundred and twenty of any covenant or condition therein contained.'
The reference to the letter of 15th October 1912, I should explain, is to a letter in which the company agreed to pay the further royalty of 6d a ton which in due course became the subject of cl 12(b) of the 1913 agreement.

'5. THE Board of Commissioners and the Governments and each of them shall as from and after the First day of July One thousand nine hundred and twenty undertake to make all payments and observe and perform all covenants and conditions reserved by and contained in the land-deeds and leases referred to in Sub-sections (C) and (D) of Clause 1 hereof and shall at all times hereafter keep the Company indemnified against all claims demands actions and proceedings by any person firm company or authority in respect thereof or in respect of any breach thereof after the said First day of July One thousand nine hundred and twenty.'
I can pass over several more clauses, and then there was cl 10. This runs as follows:

'AND IT IS HEREBY DECLARED that on any and every appointment from time to time by any of the said three Governments of a new Commissioner under the Phosphate Deposits Agreement in the place of any dead retiring or outgoing Commissioner it shall be lawful for such Government by a deed to be executed by any Minister of such Government to appoint such new Commissioner to be a trustee of these presents in the place of such dead retiring or outgoing Commissioner (as the case may be) and to make a vesting declaration and do all such acts and things (if any) as may be necessary for vesting the said premises in the Board of Commissioners under the Phosphate Deposits Agreement for the time being.'

At this point I should mention one of the problems that has run through the two cases before me, and especially Ocean Island No 1. That is the status of the present British Phosphate Commissioners. None of them, of course, was a party to the 1920 transactions: each is a successor to successors to the original commissioners. Though the commissioners were from time to time referred to as a 'Board', there never was anything to incorporate them. Indeed, cl 10 of the indenture, with its machinery for the appointment of new commissioners as trustees, and the making of vesting declarations, points against any intention to incorporate them. Yet the provisions for vesting contained in cl 10 seem to have been ignored from the outset. From time to time new commissioners have been appointed, yet all concerned seem to have acted as if the commissioners for the time being automatically succeeded to all the property and all the contractual rights and liabilities of the predecessor commissioners, without any need for assignments, or vesting provisions, or novations, or indemnities, or anything else.

The change of ownership from the company to the British Phosphate Commissioners seems to have been effected smoothly enough; but there was a very proper concern on all hands that some explanation should be given to the Banabans. On 25th September 1920, the Colonial Office sent a telegram to the High Commissioner saying that the acting resident commissioner should --

'make clear to natives that agreement under which Board of Commissioners will work phosphates on behalf of Governments of this country Australia and New Zealand has not conferred any political authority on Board or brought about any change in the natives' relations to the local Administration.'

A little earlier, on 11th September 1920, the company's local manager had written to the acting resident commissioner to say that all the company's labourers had been informed that the governments had purchased the company's business on Ocean Island and Nauru, and that the change of ownership made --

'no difference in the agreements or conditions of employment as the company continued to carry on the management of the Island for the present, and at no time will any change be made detrimental to their interests.'

On 18th October 1920, the acting resident commissioner reported to the High Commissioner, referring to this action by the company, and enclosing a copy of the letter of 11th September. The acting resident commissioner continued as follows:

'5. With reference to your telegram of the 25th ultimo, conveying instructions to me from the Secretary of State to inform the Banabans that the change in the ownership of the Company would not affect the natives' relations to the local Administration and to my telegram of even date, I have the honour to inform you that on the afternoon of the 16th instant I gathered all the Banabans together and informed them as instructed by the Secretary of State in the telegram first abovementioned. 6. They all seemed perfectly satisfied, merely remarking that they had been aware of the change for a long time past and were quite satisfied about it.'

I pause there. The relationship of the company and the commissioners to the employees is one thing; the relationship of the commissioners and the administration to the Banabans generally is another. Both seem to have been dealt with. But the relationship of the individual Banaban landowners to the company, a body capable of perpetual existence, and the replacement of that potentially perpetual body by the individual unincorporated commissioners, is very much another matter; and this seems to have remained unconsidered and unexplained. The three original commissioners, I may say, held office for varying periods. The first New Zealand commissioner, Sir Albert Ellis, continued for over 30 years; the first United Kingdom commissioner, Sir Alwin Dickinson, continued for 10 years; while the first Australian commissioner was replaced within the year of his appointment, in 1920. In all, there have been five New Zealand commissioners, seven United Kingdom commissioners, and eight (which very recently became nine) Australian commissioners; but whatever the changes among the commissioners, the undertaking of the commissioners has been carried on without a break, though, of course, subject to the disruption of war. The company, I should add, was ultimately put into liquidation, and on 6th November 1925 was dissolved.

The change made, the British Phosphate Commissioners continued with the extraction of phosphate, exercising all the rights that had been conferred on the company, and observing all the obligations of the company, apart from those in dispute in this litigation, on which I say nothing at this stage. But the land provided under the 1913 agreement would not last for ever, and gradually the need for further land became more and more pressing. As early as 28th September 1923 the British Phosphate Commissioners were writing to the Colonial Office seeking approval for the acquisition of another 150 acres. From the outset the Banabans were firmly opposed to parting with any more land for phosphate working. Their understanding (or more probably misunderstanding) of what had been said to them prior to the 1913 agreement was that no further land would be taken.

I shall not attempt any summary of the ebb and flow of argument, contention, suggestion, proposal, hope and despondency that there was over these years among the Colonial Office, the High Commissioner and the resident commissioner, the British Phosphate Commissioners and the Banabans. Gradually it settled down into a state of affairs where it became reasonably plain that if mining continued, a time would come when it would be virtually impossible for the Banabans (who then numbered some 550) to continue to live on Ocean Island, to which they were fiercely and understandably attached. At the same time, the Colonial Office, though making prolonged enquiries about other possible islands for the Banabans, were firmly refusing to contemplate any removal of the Banabans to another island without their full consent. The Banabans were also adamant in their refusal to part with any more land. In the end, their refusal was often expressed in a demand for a payment of 'L5 a car'. This in effect was a royalty of £ 5 a ton; and in 1924 phosphate was being sold for £ 1 5s a ton f o b.

Many suggestions for meeting the difficulty were considered, including, of course, the offer of better terms to the Banabans. One suggestion was that an undertaking should be proffered that no further land would ever be taken for mining. This was strongly opposed by the British Phosphate Commissioners. An alternative was an undertaking that no more land would be taken for a fixed period such as 20 years, a

proposal which the British Phosphate Commissioners, though unwilling to give any undertaking to that effect, found less objectionable. It would, of course, solve nothing; but it would leave the problem for future generations to solve, and something might always turn up.

By the end of July 1927, agreement had been reached between the British Phosphate Commissioners, the Colonial Office, and the High Commissioner and resident commissioner as to the terms to be put before the Banabans for the acquisition of 150 acres in the central mining area. The main features of these terms were as follows. £ 150 was to be paid for each acre, inclusive of all trees on the land; and in addition to the existing Crown royalty of 6d per ton, the British Phosphate Commissioners were to pay a royalty of 10 1/2d per ton in place of the existing 'additional royalty' of 6d per ton for the Banaban Fund. Of this 10 1/2d, 2d was to go to a new fund, the Banaban Provident Fund; and with £ 20,000 from the existing Banaban Fund, this was to accumulate at compound interest until it reached £ 175,000. 4d out of the 10 1/2d was to go to the landowners of the new 150 acres and also of the land already alienated, with a maximum of £ 5,000 per annum. (At a later stage it was suggested that this 4d should be increased by an addition of 1/4d per ton for every 1s by which the f o b price of phosphate exceeded the price for the year beginning 1st July 1927; but this suggestion was never acted on.) Out of the 10 1/2d, the final 4 1/2d (with a maximum of £ 5,750 per annum) was to be divided so that about £ 2,000 would go to the government for services to the Banabans in the form of a hospital, education, and so on, and the rest would be divided equally among the entire Banaban population. This 4 1/2d could be increased by a further 1/2d to make 5d, in which case the maximum of £ 5,750 per annum would become £ 6,250 per annum; but this possible increase was to be held in reserve and not mentioned to the Banabans initially. In the event the British Phosphate Commissioners' local representative, Mr Gaze, preferred the alternative 1/4d that I have mentioned. There were a number of other details, but as the offer was not accepted, I do not propose to set them out.

On 25th July 1927, the resident commissioner, who had delayed going on leave for the purpose, opened discussions with the Banabans on these terms. The resident commissioner, Mr Grimble, entered in his diary details of these discussions, which continued throughout August and September; but the pages covering 16th August to 20th September have not survived. There were meetings with individuals, with committees, and with various groups of Banabans. By the end of the first week in August one group had decided that they would sell their land only if they received £ 5 for every car of phosphate removed, a proposal which was said to have been carried by a large majority. As I have mentioned, this was the equivalent of a royalty of £ 5 a ton for phosphate which was being sold at an f o b price of barely a quarter of that sum. As before, the demand for such a royalty was more a way of refusing to dispose of any land than a serious proposal for payment.

At one stage a proposal for a royalty of 1s (instead of 10 1/2d) and £ 175 per acre (instead of £ 150) looked as if it might gain acceptance; and later some of the younger Banabans spoke up for 1s and £ 150. But then many women reverted to the demand for £ 5 a car; and when a body stood firm on a proposal of 1s 8d the resident commissioner said that this was an absolutely impossible royalty. In the end some of the landowners agreed that they would accept is.

By early October 1927, out of the 153 Banabans who owned land within the proposed 150 acres, 62 continued to demand £ 5 a ton, 12 abstained from discussion, and 79 were willing to sell at varying prices. Of these, only five were willing to accept the terms offered. The others sought sums varying from 1s plus £ 500 an acre, or 1s 8d plus £ 150 an acre, down to 1s plus £ 150 an acre. After this, there were more discussions; and the British Phosphate Commissioners then brought the Governors-General of Australia and New Zealand into the fray with long telegrams to the Secretary of State for Dominion Affairs. Sir Alwin Dickinson, the United Kingdom commissioner, who was evidently a formidable and pertinacious negotiator, and a ready critic of all who did not agree with his views, maintained a steady and voluminous pressure on the Colonial Office. His object was to obtain firm instructions from the Colonial Office which would secure the phosphate that the British Phosphate Commissioners required on the terms officer by them.

By November 1927 the previously scattered references to compulsion, mostly in relation to the suggested removal of the Banabans to another island (suggestions which the Colonial Office continued to reject), were becoming focused on the enactment of legislation to allow compulsory acquisition of the land. By 3rd February 1928 the Secretary of State was authorising the preparation of a draft Ordinance, suggesting that compensation should be settled by a single arbitrator appointed by him in default of agreement, but with the royalties to be as already agreed between the resident commissioner and Mr Gaze,

the local representative of the British Phosphate Commissioners. By 14th February the Chief Judicial Commissioner of the High Commission had produced a draft Ordinance. On 5th March the resident commissioner reported that after protracted meetings the Banabans had silenced those disposed towards accepting the existing terms, and had decided to sit down and see what happened about their demand for £ 5 a car. The Colonial Office then decided that the draft Ordinance put forward by the High Commission was unsuitable, and that a new draft should be produced in London. Pressure from Australia and New Zealand continued and there was much discussion of the terms of the draft Ordinance.

Suddenly, on 25th June 1928, the Banabans executed a volte face. They unanimously asked the resident commissioner to tell the Secretary of State of their sincere regrets for having opposed his advice in the land negotiations, and said that they were ready to accept the terms offered by the British Phosphate Commissioners and approved by the Secretary of State; and they asked the resident commissioner to settle the precise boundaries of the land with them. On 8th August the resident commissioner reported that on 25th July the Banabans had ratified their agreement as to the terms, and on 27th July they had agreed the proposed boundary of the mining area. But then, on the evening of 27th July they had suddenly reopened their opposition to the inclusive price of £ 150 offered for land and trees. The resident commissioner asked for a month in which to try to reach agreement with the Banabans; and with the assent of the British Phosphate Commissioners this was agreed.

While these negotiations had been taking place, discussions on the terms of the draft Ordinance had continued; and the British Phosphate Commissioners had been consulted and had commented on the draft. On 7th September the resident commissioner reported that all efforts to persuade the Banabans to honour their pledge had failed, and that there seemed to be no hope of their signing the agreement on the authorised terms. The point of disagreement was that the Banabans wished to be paid for coconut, almond and pandanus trees on the 150 acres in addition to the £ 150 an acre, instead of that being a price inclusive of trees. The resident commissioner said that if this demand had been made initially he would have advised acceptance; but if it was now to be conceded, there would be every reason to expect the Banabans to demand still further concessions. With this, the negotiations came to an end; and on 18th September the draft Ordinance was enacted as the Mining Ordinance 1928. By a proclamation made on 18th December 1928 the Ordinance was brought into force on 20th December 1928.

In the meantime there had occurred an event which had understandably given rise to great concern. On 5th August 1928 Mr Grimble, the resident commissioner, sent a letter in the Banaban language to the inhabitants of Buakonikai, the village in the centre of the island. This, of course, was just over a week after the Banabans had retracted their agreement to the terms offered. The letter was produced in evidence in Ocean Island No 1, and an agreed translation was put in to join the agreed bundle of documents in both cases. The translation of what came to be called the Buakonikai letter reads as follows:

'To the People of Buakonikai, Greetings. You understand that the Resident Commissioner cannot again discuss with you at present as you have shamed his Important Chief, the Chief of the Empire, when he was fully aware of your views and your strong request to him and he had granted your request and restrained his anger and restored the old rate to you -- yet you threw away and trampled upon his kindness. The Chief has given up and so has his servant the Resident Commissioner because you have offended him by rejecting his kindnesses to you. Because of this I am not writing to you in my capacity as Resident Commissioner but I will put my views as from your long-standing friend Mr. Grimble who is truly your father, who has aggrieved you during this frightening day which is pressing upon you when you must choose LIFE or DEATH. I will explain my above statement: --

'POINTS FOR LIFE. If you sign the Agreement here is the life: -- (1) Your offence in shaming the Important Chief will be forgiven and you will not be punished; (2) The area of the land to be taken will be well known, that is only 150 acres, that will be part of the Agreement; (3) The amount of money to be received will be properly understood and the Company will be bound to pay you, that will be part of the Agreement.

'POINTS FOR DEATH. If you do not sign the Agreement: -- (1) Do you think that your lands will not go? Do not be blind. Your land will be compulsorily acquired for the Empire. If there is no Agreement who then will know the area of the lands to be taken? If there is no Agreement where will the mining stop? If there is no Agreement what lands will remain unmined? I tell you the truth -- if there is no Agreement the limits of the compulsorily acquired lands on Ocean Island will not be known. (2) And your land will be compulsorily

acquired at any old price. How many pence per ton? I do not know. It will not be 10 1/2d. Far from it. How many pounds per acre? I do not know. It will not be £ 150. Far from it. What price will be paid for coconut trees cut down outside the area? I know well that it will remain at only £ 1. Mining will be indiscriminate on your lands and the money you receive will be also indiscriminate. And what will happen to your children and your grandchildren if your lands are chopped up by mining and you have no money in the Bank? Therefore because of my great sympathy for you I ask you to consider what I have said now that the day has come when you must choose LIFE or DEATH. There is nothing more to say. If you choose suicide then I am very sorry for you but what more can I do for you as I have done all I can. I am, your loving friend and father, Arthur Grimble.

'P.S. You will be called to the signing of the Agreement by the Resident Commissioner on Tuesday next, the 7th August, and if everyone signs the Agreement, the Banabans will not be punished for shaming the Important Chief and their serious misconduct will be forgiven. If the Agreement is not signed consideration will be given to punishing the Banabans. And the destruction of Buakonikai Village must also be considered to make room for mining if there is no Agreement.'

In considering that letter, one must bear in mind the position of Mr Grimable at the time. He had been put into a position of great difficulty. All concerned had accepted that it was he who should negotiate with the Banabans; and for a long while he had been doing this. He was the resident arm of government, yet it was he, and not any officer of the British Phosphate Commissioners, who had been trying to persuade the Banabans to enter into an agreement with the British Phosphate Commissioners on terms which had been negotiated between the Colonial Office and the British Phosphate Commissioners, with, or course, much assistance from him and the High Commissioner. For the purpose of negotiating the agreement Mr Grimble had postponed the leave to which he was entitled. He was, I understand, to some extent a sick man at the time. The negotiations had dragged on for a long while; they had finally come to nothing, or so it seemed, and then, when they suddenly came to life again, they had as suddenly been halted once more, and, as it turned out, killed. The climate, too, was the climate of Ocean Island, and the year was 1928, when the means of alleviating equatorial climates were not what they are today. One must bear all this in mind, and not least that resident commissioners are human beings. I should also say that the letter seems to me to be wholly out of character for one who was a dedicated colonial servant with a deep affection for the Banabans.

Even so, with every allowance made, it is impossible to read the letter without a sense of outrage. The letter makes grievous threats if the inhabitants of Buakonikai do not sign the agreement to sell their property to the British Phosphate Commissioners. Those threats are of unspecified punishment; of the destruction of their village; of the compulsory acquisition of their land for 'any old price' and for less than the 10 1/2d royalty being offered; and of 'indiscriminate' mining on their lands. These threats were made by the man who, though subject to the High Commissioner and the Colonial Office, was the effective governor of the colony.

Those threats by a high government officer are bad enough; the future was to make it worse. As I have mentioned, some six weeks later, on 18th September 1928, the Mining Ordinance 1928, was enacted; and under this the royalty to be paid for minerals extracted was to be such 'as the Resident Commissioner may prescribe'. The Ordinance was brought into force on 20th December 1928; and under it the Banaban landowners were to get whatever royalty was prescribed by a resident commissioner who had uttered these threats to the people of Buakonikai, and had made these assertions about the low level of royalty payable under a compulsory acquisition.

Now there is nothing to suggest that at any relevant time the High Commissioner or the Colonial Office knew about the Buakonikai letter; nor is it clear when Mr. Grimble first knew that the duty of prescribing a royalty would be his. Indeed, some two and a half years were to go by before on 12th January 1931 (and after an abortive attempt rather over a month earlier), Mr Grimble finally exercised his statutory power to prescribe the royalty. Long before then he knew about his statutory powers and the position in which he had been put, and in which he had put himself. One question is thus that of the position of a person who, in a proposed transaction between vendors and purchasers, has done all the bargaining on behalf of the purchasers, and, being in a position of high authority, has uttered grave threats to the vendors in an unsuccessful attempt to persuade them to accept the purchasers' offer. Can such a person, within three years, properly exercise a statutory power to fix the major part of the consideration on a compulsory acquisition, especially when the threats included a statement that on such an acquisition the royalty will be less than has been offered?

I do not think that one has to be a lawyer to see that in such a case the vendors may at least suspect that the decision might not be made with the impartiality and detachment that there ought to be, and that someone who finds himself in such a position ought at least to lay his predicament before higher authority and seek some alternative arrangement. That was not done. Part of the responsibility must be laid at the door of the Colonial Office and the High Commissioner, who had arranged for the resident commissioner to attempt to get the consent of the Banabans to the terms agreed with the British Phosphate Commissioners and who nevertheless put the resident commissioner, with this background of apparent partiality, into the position of prescribing the royalty. This, of course, is quite apart from the Buakonikai letter. For that letter and its consequences, and not least for what ought to have been done (but was not) during the two and a half years between the exasperation of the moment that seems to have produced the letter and the actual prescribing of the royalty, the whole responsibility must be borne by Mr Grimble. Unfortunately I shall have to come back to this letter in due course.

I must now return to the march of events. I had reached the enactment and bringing into force of the Mining Ordinance 1928. Much turns on this, and I must read most of it. It is entitled 'An Ordinance to regulate the right to mine and work minerals in the Gilbert and Ellice Islands Colony', a title which conveys little idea of the main purport of the statute. Section 1 confers the short title, and s 2 defines 'minerals' in terms which I need not set out; 'phosphates' are expressly included. By s 3,

'No person shall work or raise any minerals on or remove any minerals from any lands in the Gilbert and Ellice Islands Colony unless he is authorised to do so by licence from the Crown and subject to such terms and conditions as may be prescribed in the licence.'

There is then s 4:

'Where the holder of any such licence as in the last preceding section provided does not possess rights over the surface of any piece of land comprised in the licence which are necessary for the purpose of the licence and has been unable to come to an agreement with the owner or owners for the acquisition of the said rights and the Secretary of State for the Colonies deems it expedient in the public interest that the land should be made available to the holder of the licence for the purpose of enabling him to work raise and remove any minerals or for any purpose connected therewith or ancillary thereto and the Resident Commissioner is satisfied having regard to all the circumstances (including any royalties payable by the holder of the licence) that the terms offered for the acquisition of the said rights are reasonable it shall be lawful for the Resident Commissioner to deliver to the owner or owners of the said rights a notice (in such form as may be prescribed by the High Commissioner) of his intention to take possession of the said land and if the terms offered as aforesaid are not accepted by the owner or owners by a date named in the notice the Resident Commissioner may enter into possession of the said land and the said land shall thereupon be deemed to be Crown land.'

This is a section which cries aloud for subdivision, a cry that today is heard more and more often and seems to be heeded less and less. There are in effect four conditions to be satisfied before the section comes into play. These are: (1) that the holder of a mineral licence from the Crown does not have surface rights over a piece of land that are necessary for the purpose of his licence; (2) that he has been unable to come to an agreement with the owner of these rights to acquire them; (3) that the Secretary of State deems it expedient in the public interest that the land should be made available to the licence-holder for working minerals; and (4) that the resident commissioner is satisfied that in all the circumstances (including any royalties payable by the licence-holder) the terms offered for the acquisition of the surface rights are reasonable.

If these four conditions are satisfied, the ordinance confers a twofold power on the resident commissioner. The first power is to deliver a notice to the owner of the surface rights in the prescribed form, stating the resident commissioner's intention to take possession of the land, and stating a date for acceptance of the terms offered by the licence-holder. The second power is a power to enter into possession of the land; but this can be exercised only if the terms offered by the licence-holder have not been accepted by the date stated in the notice. When the resident commissioner enters into possession of the land, it is thereupon deemed to the Crown land.

Section 5 deals with the next stage, the process whereby the deemed Crown land is made available to the licence-holder:

'The Resident Commissioner may issue to the holder of any such licence as hereinbefore provided at an annual rental not exceeding two shillings and sixpence per acre a lease of the said land for such period as may be required for the purposes of the licence subject to payments by the holder of compensation to the original owner or owners assessed by arbitration in such a manner as the Secretary of State for the Colonies may direct and subject to payment of such royalty on any minerals raised removed and exported as the Resident Commissioner may prescribe.'
Before I comment on this, I think I should read s 6(1). This runs:

'In assessing any compensation on any land acquired under this Ordinance there shall be taken into account the market value of the land (exclusive of any increase in the value of such land by reason of the existence thereon of any minerals) and the improvements thereon reasonable allowance being made for any damage that may be caused by severance and if there be a tenant thereon he shall receive a reasonable compensation for disturbance.'

These provision invite a number of comments. First, as a practical matter, ss 4 and 5 must be regarded as two parts of a single process. There cannot be much point in 'issuing' a lease to the licence-holder subject to paying compensation and royalty if the licence-holder is not willing to accept a lease on such terms. If s 4 was operated but the licence-holder refused to accept the proffered lease, land, which had been acquired because the licence-holder needed it would have become Crown land, and yet there would be no effective provision for the payment of any compensation to the landowner; for all the provisions for payment are intended to be contained in the lease. To operate the statutory powers without an assurance that the licence-holder will accept the proposed lease would thus produce a most unsatisfactory result.

Second, there is the striking contrast between compensation and royalty in the provisions for the basis of assessment. Compensation is to be assessed by arbitration; and s 6(1) provides a proper basis for assessment, related to market value, though excluding minerals from the assessment. Royalty, on the other hand, which is to be paid for minerals, is merely to be 'such royalty... as the Resident Commissioner may prescribe'. No standard or basis for prescribing this royalty is laid down; there is no reference to market value or to anything else. Obviously the resident commissioner must do his prescribing with due propriety; but apart from that, the matter is left at large. One approach is to invoke s. 4: since the process of compulsion comes into play only if there has been a rejection of terms which, having regard to all the circumstances, including royalties, the resident commissioner is satisfied are 'reasonable', then the royalty prescribed by the resident commissioner under s 5 must also be 'reasonable'. That is a slender enough guide; but it is better than nothing.

Third, there is the striking contrast between compensation and royalty in the machinery for assessment. The value of surface rights on a tiny and often parched Pacific island, with phosphate being mined nearby, is obviously very much smaller than the value of the many thousands of tons of phosphate beneath the surface. Yet whereas the machinery of arbitration, with its opportunities for making representations and adducing evidence, is provided for the assessment of the lesser sum for surface rights, a bare process of prescription by the resident commissioner, without any of these opportunities and safeguards, is laid down for the assessment of the greater sum for the much more valuable mineral rights. What the sense in this was I have remained unable to discover. The Colonial Office files reveal considerable discussion about the relatively unimportant process of arbitration, with questions about whether there was to be an arbitrator or arbitrators, and whether there should be an umpire, and so on; but the important process of the resident commissioner prescribing a royalty remains in relative oblivion.

I now turn to the last group of provisions that I need to set out verbatim, ss 6(2) and 7:

'6(2) Any moneys payable by way of compensation or royalty shall be paid to the Resident Commissioner to be held by him in trust on behalf of the former owner or owners if a native or natives of the Colony subject to such directions as the Secretary of State for the Colonies may from time to time give. 7. All moneys payable to any native or natives of the Colony in cases where acquisition of rights has been the result of agreement shall be paid to the Resident Commissioner and shall be held by him in trust on behalf of such native or natives to be used in such manner and subject to such directions as the Secretary of State may from time to time give.'

I think at this stage I should say something about these two provisions, which were much discussed in argument. First, they make quite distinct provisions for the fruits of agreement, on the one hand, and the

fruits of compulsion, on the other; and it is the case of agreement that I shall consider first. If the holder of a mineral licence (and on Ocean Island that meant the British Phosphate Commissioners) reached agreement with a landowner for mining rights, then there was no need, and no power, for any process of compulsion to be operated under the Ordinance. The agreement might, of course, provide for payment by means of royalties, lump sums, instalments, or anything else that the parties wished. Whatever it was, if the money was payable to a native or natives of the colony (and I need not consider any other case) it had to be paid to the resident commissioner; and it was to be 'held by him in trust' on behalf of the native or natives to whom it was payable, subject to the provision relating to the Secretary of State. Unlike s 6(2), s 7 does not in terms specify 'former owner or owners'; but 'such native or natives' carries one back to the reference to moneys payable to any native or natives in cases where the acquisition of rights has been the result of agreement, and in any ordinary case that will be the landowners who, by agreement, have parted with the mining rights. The provision relating to the Secretary of State is that the money is 'to be used in such manner and subject to such directions as the Secretary of State may from time to time give'. This, though clear enough, is a little lacking in elegance; for although the Secretary of State may of course 'give' directions, in the ordinary use of English he can hardly 'give' manner.

Second, there are the fruits of compulsion. Section 6(2), with its reference to 'compensation or royalty', is plainly in point. Once again, such money is to be paid to the resident commissioner 'to be held by him in trust'; but this time the trust is 'on behalf of the former owner or owners', if a native or natives of the colony. This is to be subject to such directions as the Secretary of State may from time to time give; but this time the phrase 'to be used in such manner's is omitted.

At that point I pause, as anyone might. The process of compulsion was firmly linked with the attempt to achieve an agreement, and the failure of that attempt: only on that failure was compulsion to come into play. In the present case, the background to compulsion was that ever since the 1913 agreement, a royalty of 6d per ton had been paid to the Banaban Fund, with the landowners in effect getting only the interest on that fund. Broadly speaking (I omit details), the proposed new agreement was that in place of that 6d royalty payable to the Banaban Fund there was to be a royalty of 10 1/2d. Of this, 4d was to go to the landowners not only of the new 150 acres, but also of the land already alienated; 2d was to go to a new Banaban Provident Fund, to be accumulated; and 4 1/2d was to go to the government to be used for the general benefit of the entire Banaban population, in the form either of services or payments.

That being the offer so strongly commended to the Banabans by the government, the government then proceeded to enact s 6(2). This provides nothing for the landowners of land already alienated, nothing for the Banaban Provident Fund, nothing for the general benefit of the entire Banaban population, and everything for the landowners whose land is taken under the Ordinance. If the Banabans had known about the Ordinance and had fully understood it, it would have provided every landowner of the 150 acres wanted by the British Phosphate Commissioners with a strong incentive to reject the commissioners' offer. 'Accept the offer, and you will share with the landowners covered by the 1913 agreement a mere 4d out of the proffered 10 1/2d royalty, with a hope of getting some benefits as a member of the Banaban population. Reject the offer and you will be entitled to share the entire royalty among yourselves, subject to the directions of the Secretary of State.' Why the legislation took this form I do not understand. The remaining three sections of the Ordinance, I may say, merely lay down penalties for working minerals without a licence and for obstructing licence-holders, and provided for the commencement of the Ordinance.

I confess that I leave this Ordinance with feelings of some relief, tempered by the realisation that I shall have to return to it. It would be merciful to resist temptation and merely describe it as inept. Thirteen years later a memorandum by the Secretary to the High Commission was to describe the provision in s 6(2) which carried the money to the landowners instead of to the community as an 'error' and as being contrary to the directions of the Secretary of State. The execution of the Ordinance, too, was attended by no excess of competence, as will be seen. Soon after the final breakdown of the negotiations and the enactment of the Ordinance, Mr. Grimble was at last able to go on his long overdue leave, and an acting resident commissioner was appointed in his place. On 28th December 1928, the acting resident commissioner reported that he had held a meeting of the Banabans the previous day, that the provisions of the Ordinance had been 'thoroughly explained to them', and that copies of the Ordinance had been given to them. To give a thorough explanation would have taxed most men; one can only guess at what the Banabans made of it.

Soon the British Phosphate Commissioners were at work preparing the detailed offer which had to be made to the Banabans as a preliminary to the process of compulsion. It gradually emerged as being in essence the previous offer (without the 1/2d or 1/4d extras), with minor variations. The possible impact of the terms of the Ordinance on the destination of the payments seems to have been ignored on all hands. At a meeting with the Banabans on 14th February 1929 the commissioners offered these slightly varied terms to the Banabans; the Banabans forthwith rejected the offer, and although the commissioners kept it open for 14 days, the Banabans did not accept it. On 13th April the commissioners wrote formally to the Colonial Office, asking the Secretary of State to deem it expedient under s 4 of the Ordinance for the 150 acres to be made available to the commissioners; and on 6th May the Secretary of State did this.

By the end of June the High Commission had sent to the acting resident commissioner a draft notice under s 4 relating to the 150 acres, of which, said the High Commission, 'you are directed by the Secretary of State to enter into possession'; there was, of course, no such direction. The letter concluded with a reminder of 'the importance of adhering strictly to the provisions of the Mining Ordinance'. There was some delay while the British Phosphate Commissioners decided on the areas of certain ancillary non-mining land that they needed, but by October an area of some 27 3/4 acres of such land had been identified; and in December the commissioners were making offers to the landowners for this land. In the middle of the month Mr Grimble left England to return from leave to Ocean Island. At the end of December the Banabans made a written offer in place of their former demand of £ 5 a ton. This is not very clear, but I think it was an offer to accept for the mining land 1s 6d per ton and £ 180 an acre, with additional payments for trees. For the non-mining land they sought 3d per square foot for the land on which the buildings stood, as against the commissioners' offer to pay rent at £ 3 an acre. To this the High Commissioner replied on 14th March 1930, bidding the Banabans to be reasonable.

In January 1930, Mr. Grimble, who by then was back on Ocean Island as resident commissioner, submitted a new draft notice to the High Commission, relating to both the mining and the non-mining land; and on 15th February the resident commissioner expressed himself as considering that the terms proposed for the non-mining land were reasonable. On 11th April the Secretary of State informed the British Phosphate Commissioners that he was satisfied that it was expedient in the public interest that the non-mining land should be made available for them. The commissioners then, on 23rd April, sent to the Colonial Office a formal offer for both the mining and non-mining land.

The offer followed the lines of the previous proposals, the main change being that for the mining land the offer was£ 60 an acre plus £ 2 per fully-grown coconcut tree (and less for partly-grown trees) instead of £ 150 an acre with nothing for the trees; the change was made to meet what were believed to be the wishes of the Banabans. The annual rent of £ 3 per acre for non-mining land, too, was simplified for areas under one acre. The total royalty offered was the same 10 1/2d, but its distribution was amended. The Banaban Provident Fund was to receive 3d a ton instead of 2d a ton; and £ 35,000 instead of £ 20,000 was to be taken from the existing Banaban Fund to start the Banaban Provident Fund. Each of these changes, of course, would accelerate the time when the limit of £ 175,000 would be reached and the British Phosphate Commissioners would cease to pay this royalty. The extra 1d a ton was found by reducing from 4d to 3d the royalty that was to go to the landowners; and the annual maximum payment was correspondingly reduced from £ 5,000 to £ 3,750. Throughout there was a bland disregard of the destination for the payments laid down by the 1928 Ordinance, which was, of course, in force.

The British Phosphate Commissioners then sent details of the offer to the resident commissioner, saying that before they placed the offer before the Banabans they would be glad to know if he considered it 'reasonable'; and on 30th April 1930 the resident commissioner replied, saying that the terms and conditions of the offer were 'advantageous to the Banabans'. The word used in s 4 of the 1928 Ordinance is, of course, 'reasonable', and a month later the resident commissioner was to say that no official consent of the resident commissioner for the purposes of s 4 of the Ordinance had been given. On 6th May the British Phosphate Commissioners put the offer before the Banabans; it was not well received and on 12th May it was rejected, though the commissioners kept it open for the full 14 days. By 15th May the High Commissioner was beginning to question the changes in the terms offered which had appeared in the formal offer of 23rd April, and by 21st May he had sent detailed criticisms to the resident commissioner. Thus the extra £ 15,000 to be taken from the existing Banaban Fund would save the British Phosphate Commissioners that amount, and the annual maxima were open to the grave objection that increased production by the commissioners would

reduce the rate of royalty. The resident commissioner's reply was that he had fully considered the matter, and that his view was that the paramount consideration was the speediest possible accumulation of the provident fund.

Not surprisingly, this explanation did not satisfy the High Commissioner. He could not understand why the resident commissioner should regard favourably terms offered by the commissioners which were considerably less favourable to the Banabans than the terms previously offered, when those previous terms had been considered to be the minimum which could be regarded by the government as reasonable. The resident commissioner's explanations and justification came in an 11-page letter on 14th August. The whole emphasis was on the need to have a large provident fund quickly in order to safeguard the Banabans against the consumption of their island, the exhaustion of the phosphates and the possible failure of the phosphate industry. He admitted that the commissioners would profit from the transfer of the extra £ 15,000 from the Banaban fund to the proposed provident fund; but he submitted that 'the question of relative profits, as between the natives and the Commissioners, should not be allowed to obscure the main issue in this matter'. He regarded the financial plight of the race as 'being at present so precarious, and the political consequences of the financial failure being so mortal', that it was immaterial whether or not the British Phosphate Commissioners would profit by the transaction.

I have found some of the reasoning in this letter baffling; and the criticism of it in a High Commission memorandum of 21st September is cogent. In particular, looked at in a broad sense, the extra £ 15,000 was already Banaban money, and if there was good reason for it, that money could at any time by legislation be transferred from the Banaban Fund to the Banaban Provident Fund. The main effect of transferring it forthwith would be to reduce by £ 15,000 the amount which the commissioners would ultimately pay to the Banabans. (Of course, anything taken from the Banaban Fund would also reduce the amount of capital that was available to produce income for the Banaban landowners under the 1913 agreement.) I find it difficult to resist the sad conclusion that the resident commissioner had not fully appreciated the effect of the revised terms, and having expressed the view that they were advantageous to the Banabans, he felt driven to a process of ex post facto self-justification.

In the meantime the High Commission had sent to the Colonial Office for approval a draft of the lease to be 'issued' by the resident commissioner under the Ordinance to the British Phosphate Commissioners, and the Colonial Office had replied, making a number of amendments. Then on 27th September there was a conference between the High Commissioner, the Judicial Commissioner, the resident commissioner and representatives of the British Phosphate Commissioners. There was considerable discussion of the process of arbitration, and who should be the arbitrator or arbitrators. In the course of this the High Commissioner expressed the view that the surface rights were not worth anything like £ 150 an acre. The British Phosphate Commissioners' representatives stated that the British Phosphate Commissioners would stand by the offer of £ 150 an acre or £ 60 plus payment for the trees; the High Commissioner preferred the £ 150 with no payment for trees.

There was also a discussion on royalties. The British Phosphate Commissioners agreed that there should be no maxima and no minima. The High Commissioner also expressed the view that the former offer of a 4d royalty to the landowners and 2d to the Provident Fund was preferable to the revised offer of 3d to each, but that the 4d to the landowners should not go to them but should in effect be amalgamated with the 4 1/2d which was to be held by the resident commissioner in trust for the Banaban community generally. The effect would be that the total 10 1/2d royalty would be split into 2d for the Provident Fund and 8 1/2d for the Banaban community. The High Commissioner also proposed that the sum to be taken from the Banaban Fund to start the Provident Fund should revert from £ 35,000 to £ 20,000. All these proposals were submitted on the same day by telegram to the Colonial Office for approval, and amplified two days later in a long despatch, on parts of which counsel for the plaintiffs placed great reliance.

On 6th October the Secretary of State sent a telegram expressing general approval of the High Commissioner's proposals, but pointing out that they must be put before the Banabans, and refused, before any notice under s 4 of the Ordinance was delivered. By another telegram of the same date the Secretary of State pointed out the difficulties that arose in relation to arbitration from the High Commissioner's expression of the view that it was impossible to place a higher value than £ 150 an acre on the land. The High Commissioner replied to this latter comment by saying that if the arbitration assessed compensation on

actual values the Banabans would be heavy losers, and that they certainly would not ask for arbitration if they understood the situation.

On 11th October the British Phosphate Commissioners put the revised offer before the Banabans, but this time they gave them only seven days for acceptance in place of the previous 14. On 17th October the British Phosphate Commissioners wrote to the resident commissioner, informing him that the Banabans had that day refused the offer, and asking him if he would inform the British Phosphate Commissioners whether he considered the terms reasonable and whether he would proceed under s 4 of the Ordinance. However, the Colonial Office then told the British Phosphate Commissioners that the offer must remain open for not less than 14 days before the resident commissioner was requested to deliver a s 4 notice.

In the meantime, the resident commissioner had acted on the request of the British Phosphate Commissioners. On 18th October, after a meeting with the Banabans at which he 'very strongly' advised them to accept terms offered, he had issued a s 4 notice naming 25th October as the date of 'resumption' of the land by the Crown if the terms were not accepted; and copies of the notice were served on individual landowners. The resident commissioner suggested to the High Commissioner that a week was reasonable and that the Banabans themselves were impatient. But the High Commissioner refused to authorise any departure from the procedure laid down by the Secretary of State. He stated that the offer must remain open for 14 days, that is, up to October 25th; and on 23rd October the resident commissioner told the Banabans that the notice of 18th October was cancelled. The British Phosphate Commissioners then, on 27th October, informed the Banabans that the offer should have been left open until the 25th October and asked them if they would accept it; and they refused. Thereupon the British Phosphate Commissioners again wrote to the resident commissioner asking if he considered the terms reasonable, and whether he was able to proceed under s 4. The resident commissioner replied the same day: he again abjured the statutory word 'reasonable' and stated that he considered the terms 'advantageous to the Banabans', adding that he was prepared to proceed under s 4. The next day the resident commissioner issued a notice to the Banabans under s 4, dated 27th October 1930. This stated his intention to enter into possession of the two areas of 150 and 27 3/4 acres of land on 4th November unless the Banabans accepted the terms offered to them in an attached notice. These terms set out the revised version of the terms, with 8 1/2d of the 10 1/2d royalty being expressed to be held in trust by the resident commissioner for the benefit of the Banabans. The notice also contained a statement that the resident commissioner was satisfied that the terms offered were 'reasonable'.

By 1st November the High Commissioner and the Colonial Office had agreed that if the terms were not accepted, the resident commissioner should proceed to take possession. They also agreed that he should then hand over the land to the British Phosphate Commissioners forthwith on the understanding that the form of lease, which was still in draft, would be completed as soon as possible. On 5th November the resident commissioner accordingly issued a second notice to the Banabans, stating that he did that day enter into possession of the 150 and 27 3/4 acres, and declaring the lands in question to be Crown lands within the meaning of s 4.

In the meantime a draft lease had been settled by the Chief Judicial Commissioner; and on 13th November the British Phosphate Commissioners wrote to the resident commissioner stating that they were prepared to give a formal written undertaking that the new scale of royalties would be brought into force as soon as the land was handed over to them, and that they would execute a lease as soon as it was agreed with the Colonial Office. On 18th November the resident commissioner sent the High Commissioner a convenient summary of the steps taken up to 5th November; and the next day the British Phosphate Commissioners gave the resident commissioner their formal written undertaking in the terms of their letter of 13th November. On 24th November the resident commissioner wrote to the British Phosphate Commissioners, saying that he had the honour to hand over the 150 acres of mining land to the commissioners as from that day on the footing stated in their undertaking. The 27 3/4 acres of non-mining land was not mentioned, as the resident commissioner considered that the handing over of the mining land alone would suffice to bring into play the new rate of royalty.

The resident commissioner then, on 5th December 1930, issued a proclamation prescribing the royalties that the British Phosphate Commissioners were to pay as from 24th November. This was destined to be replaced by another proclamation on 12th January 1931, and so I shall not refer to it in any detail. It was in terms of the 2d royalty for the Banaban Provident Fund, which was to be accumulated at compound interest

with £ 20,000 from the Banaban Fund until the end of the year in which the principal reached £ 175,000, and the 8 1/2d royalty, which was 'to be held in trust by the Resident Commissioner for the benefit of the Banabans'.

By 12th December further difficulties had appeared. The resident commissioner sent a telegram to the High Commissioner saying that he was convinced that the notices issued by him were defective, in that the names of many landowners were omitted, and other land was set down as being owned by the wrong persons. He therefore proposed to issue new notices. The British Phosphate Commissioners had, he said, done no act of ownership on the land handed over on 24th November. On 17th December the High Commissioner approved this proposal, though warning the resident commissioner that a full period of 14 days' notice should be given. On 22nd December the resident commissioner issued 244 amended notices in respect of both the 150 acres and the 27 3/4 acres, covering 368 parcels of land, and specifying 5th January 1931 as the date of entry by the Crown. It was in fact on 10th January 1931 that the resident commissioner gave the landowners written notice of entry for both the 150 acres and the 27 3/4 acres.

Two days later, on 12th January 1931, the resident commissioner issued a proclamation prescribing the royalties under the 1928 Ordinance, in place of the proclamation of 5th December 1930. After a number of recitals, including a recital about the 1928 Ordinance and a recital that the resident commissioner was satisfied that the terms offered by the British Phosphate Commissioners were reasonable, the proclamation states:

'NOW THEREFORE by virtue of the authority vested in me as aforesaid, I do hereby order and proclaim that from and including the 12th day of January, 1931, the British Phosphate Commissioners shall pay, in respect of all phosphate bearing rock or other phosphate bearing substance raised, removed and exported from Ocean Island the following royalties, that is to say (i) two pence per ton to be credited to a fund to be termed "the Banaban Provident Fund" to continue to be paid until the end of the quarterly period during which the Banaban Provident Fund, accumulating at compound interest, shall have reached a total of£ 175,000 and thereafter to cease; (ii) eight and one half pence per ton to be held in trust on behalf of the Banaban community generally to be held and used or expended in such manner as the Secretary of State for the Colonies may from time to time direct; such royalties to be paid on all phosphate shipped from Ocean Island from the date on which the land hereby demised was made available to the Lessees, that is to say, the twelfth day of January 1931.'

It will be observed that, unlike the previous version, no mention is made of the £ 20,000 to be taken from the Banaban Fund, so that on the face of it the British Phosphate Commissioners would ultimately have to pay £ 20,000 more before their liability to pay the 2d royalty ceased. The point was in fact dealt with on 21st January 1931 by the High Commissioner instructing the resident commissioner to transfer £ 20,000 to the Provident Fund and to inform the British Phosphate Commissioners. At the time the Banaban Fund consisted of securities which had cost £ 32,000, and £ 40,000 in cash. It will also be observed that as regards the 8 1/2d 'the Resident Commissioner' has disappeared, and 'the Secretary of State' has been inserted; instead of the money being 'held in trust by the Resident Commissioner for the benefit of the Banabans', it is to be 'held in trust' (without specifying by whom) 'on behalf of the Banaban community generally to be held and used or expended in such manner as the Secretary of State for the Colonies may from time to time direct.'

On the same date as the proclamation, 12th January 1931, the lease was executed. By then there had been incorporated in it the various amendments that had been made in London and the Pacific. The lease was expressed to be made between 'the Resident Commissioner of the Gilbert and Ellice Islands Colony' and 'the British Phosphate Commissioners'. By it, the resident commissioner demised to the British Phosphate Commissioners both the 150 and 27 3/4 acres for a term of 69 years from 1st January 1931. In accordance with s 5 of the 1928 Ordinance, the lease provided for the annual payment of 2s 6d per acre rent to the resident commissioner (or to someone authorised by him) for the use of the government of the Gilbert and Ellice Islands Colony. It provided for the British Phosphate Commissioners to pay to the resident commissioner (or to someone authorised by him) 'upon trust in accordance with the provisions of the Mining Ordinance 1928, such sums as may be assessed by arbitration' held in such manner as the Secretary of State might direct. It then provided for the payment of the royalties of 2d and 8 1/2d in terms which were identical with the terms of the proclamation of 12th January 1931 that I have set out above.

I pause at that point. The 1928 Ordinance is no lengthy enactment; its ten sections occupy little more than a page and a half of print. It has, indeed, a number of difficulties; but it is manifestly an enactment authorising the compulsory acquisition of land. The general import of the words in s 6(2) which run, 'All moneys payable by way of compensation or royalty shall be paid to the Resident Commissioner to be held by him in trust on behalf of the former owner or owners...' is not very difficult to gather. Furthermore, during the whole of this protracted process of compulsory acquisition, all concerned must have made frequent reference to the Ordinance. The lease, indeed, in terms provided for the compensation under the arbitration to be held in trust in accordance with the provisions of the 1928 Ordinance.

Despite this, the royalty was treated quite differently. Throughout, all concerned seemed to have been content to arrange to dispose of it by agreement and proclamation and lease as if the rights given by the 1928 Ordinance to the former owner or owners could and should be ignored. The transfer of L20,000 from the Banaban Fund to the new Banaban Provident Fund of course reduced the capital which had yielded income for the landowners under the 1913 agreement. Further, the 4d royalty that had originally been intended for the landowners under the earlier proposals for the disposition of the 10 1/2d royalty had disappeared, being swallowed up in the 8 1/2d royalty for the benefit of the Banaban community. I may add that when in May 1933 the High Commissioner enquired when the £ 20,000 had been transferred to the new Provident Fund, the resident commissioner's answer was that this was done in February 1931, apart from £ 1,200 which had not been transferred until April 1931.

I can pass over the arbitration on compensation quite shortly. The offer of £ 150 an acre was obviously greatly in excess of the market value of the land devoid of mineral rights. The High Commissioner had plainly been perfectly right in his view on this, though it was doubtless injudicious of him to speak of it in the way that he did. Considerable negotiations had been going on, and in the end the Secretary of State had appointed an experienced colonial servant in the Pacific (though from outside the Gilbert and Ellice Islands Colony), a Mr J S Neill, to act as arbitrator for the Banabans. Mr H B Maynard, who within three years was to become the British Phosphate Commissioner's manager on Ocean Island, was the arbitrator for the British Phosphate Commissioners. The arbitrators gave notice that they would proceed to assess the compensation on 27th January 1931; and three days earlier Mr Neill met the Banabans. He gave them a detailed explanation of what was involved, and then there was a discussion, consisting of questions by the Banabans and answers by Mr Neill. The Banabans took part in the hearing on 27th January; and then, on 30th January, the arbitrators issued their award. This was in terms of the offer made by the British Phosphate Commissioners, that is, £ 150 per acre for mining land, inclusive of trees, and rent for other land at the rate of £ 3 per year per acre (with smaller sums for smaller units), and a scheme of payment for trees cut down. The next day Mr Neill sent a long report of the arbitration to the High Commissioner, stating, inter alia, that the terms offered and awarded were clearly excessive, and that he had agreed to the award as he was getting for the Banabans a much larger sum than he could have pressed for.

(4) 1931-1937: the Funds

With the process of compulsory acquisition complete, I can come forward to the aftermath. The fourth period covers 1931 to 1937. By way of prelude, I should refer to a proposal that the resident commissioner made to the High Commissioner on 17th December 1930, shortly before the final stages of the compulsory acquisition. The resident commissioner recommended that a Banaban trust officer should be appointed 'for the special purpose of guarding the interests and guiding the development of the Banaban race'; for 'the task of trusteeship for the Banabans has assumed such substantive importance that it can be no longer safely handled as one of the numerous functions annexed to the office of Resident Commissioner'. The resident commissioner thought that the officer selected should be a man of legal training, as many aspects of the Banaban situation put the resident commissioner in the position of needing legal advice which was not then available. There was some discussion of what was involved in relation to substantial sums of money on the one hand and schemes for improving education, medical facilities, housing and so on, on the other hand. On 27th February 1931 the resident commissioner submitted a valuable 15-page memorandum dealing with the administration of 'Banaban royalties and other trust moneys paid to the Resident Commissioner by the British Phosphate Commission under section 6(2) of the Mining Ordinance 1928'.

One feature of this document is the emphasis put on the contractual right of the Banaban landowners under the 1913 agreement to receive the interest on the Banaban Fund. In 1930, about £ 1,550 was distributable, giving each landowner an average annual income of£ 6. The removal of £ 20,000 from the Banaban Fund to start the Banaban Provident Fund would, of course, greatly reduce the interest that was

distributable among these landowners. According to the resident commissioner, only about £ 18,000 would be left in the Banaban Fund, though another memorandum received by the High Commissioner on 27th March 1931, which appears to be the work of Mr Neill, the arbitrator, states that the amount was about £ 26,000. Ultimately it emerged as being a little over £ 24,000. Such a sum would not support an annual payment of £ 1,550, and the resident commissioner recommended that the deficiency should be made up out of the royalties payable under the 1931 transaction, and that the payments to the 1913 landowners should thus be stabilised at L1,550. There were 260 of these, and instead of an exactly proportionate division of the £ 1,550, the resident commissioner recommended an annual payment of £ 6 a head to all of them. He referred to these payments as 'annuities'.

That was not all. The resident commissioner further recommended that the annuities of £ 6 a head should be extended so as to include every other person born a Banaban by descent through either father or mother. The resident commissioner said:

'It would be invidious and unfair to grant annuities to the 1913 landowners, and refuse the same privilege to those whose land was alienated before 1913, or to those who have been expropriated this year; and since all these classes will claim the right to draw annuities when still other owners alienate their land, they cannot exclude such future alienators from a share of the advantages at present obtaining.'
As there were some 530 Banabans, £ 6 a head would mean about £ 3,200 a year; and this was to be paid out of royalties.

I pause at that point; for it illustrates the official approach at that time. It would be charitable to call it flexible. Under the 1913 agreement the Banaban Fund was producing income which went to the 1913 landowners. £ 20,000 was taken out of that fund to start the Provident Fund, and so the 1913 landowners lost the income from that £ 20,000. However, they were to be recompensed out of the royalties payable in respect of the 1931 land, royalties which by statute were to be held in trust for the 1931 landowners, but which by proclamation and by contract were to be held in trust for the Banaban community generally. (I think the resident commissioner's recommendation was directed to the 8 1/2d royalty and not the 2d royalty.) However, those royalties were also to provide annuities for all other Banabans. Those who had alienated their land before 1913, and perhaps for 20 years or more had been getting nothing, were to share equally in the fruits provided by the 1931 lands. Those who still had all their land were to get the same. Large landowners, small landowners, owners of no land, all were to be provided for equally out of the 150 acres taken in 1931. As a process of administering property rights under enforceable trusts, comment is superfluous. As a process of wise government and social justice, there is much to be said for it, though of course in this sphere there is ample scope for argument.

Another feature of the resident commissioner's memorandum was that he pointed out that there was a conflict of principle between the Banaban custom of land-holding and the payment of lump sums to individual landowners for surface rights. Under Banaban custom, a Banaban's land will of necessity normally descend within his family. Within this principle the landowner has considerable liberty of action. He may divide his land among his children in such proportions as he wishes, irrespective of sex or age; and he may be adoption add to those who are considered his children. In certain limited instances the land might pass out of his family. Thus a landowner whose kindred refused to look after him in sickness or old age might give land to someone who did care for him. Another example, which later was to be denied recognition by the Native Lands Commission, was where land was taken from a man to provide compensation for a girl whom he had jilted. But subject to that, the land was to stay in the family.

The resident commissioner said that the Banaban 'holds his land in fee tail to the extent that the succession is reserved generally to his family group'; and if one disregards English eccentricities such as barring the entail, this description will do well enough. The payment of a lump sum to an individual landowner for the surface rights in his land, enabling him to spend any or all of the money and leave none for his family, would thus contravene the Banaban system of land holding; and the resident commissioner said that --

'the money should have been invested in trust for each landowner with remainder to his or her customary heirs or successors. The interest only should have been made available for expenditure by successive holders.'

At this, an English lawyer's thoughts will turn to the principle of capital money under the Settled Land Act 1925. In relation to the £ 150 per acre for 150 acres (a total of £ 22,500) payable as compensation to some 160 owners under the compulsory acquisition, the resident commissioner accordingly recommended that the money should be deposited in trust in the local savings bank, and that only the interest should be paid to successive holders. He also advised that a suitable system of registration and procedure, based on custom, should be authorised by law for the regulation of the scheme.

A third feature of the resident commissioner's memorandum is that it drew attention to something that all concerned seemed to have been ignoring. This was the conflict on the destination of the royalties that there was between the Ordinance on the one hand and the scheme agreed by the resident commissioner and all others concerned except the Banabans, and set out in the proclamation and lease. The resident commissioner observed that a change in the law would presumably be necessary to validate the use of the royalty for general communal purposes; and he recommended the change.

There is much more in the resident commissioner's memorandum which I do not think I need discuss, especially in relation to the non-mining land. There is also the memorandum, apparently by Mr Neill, that I have already mentioned; and in this the residue of the Banaban Fund, after losing the L20,000 to the Provident Fund, is dubbed the 'Common Fund'. I shall not discuss this in detail. It supports the view that every Banaban should receive an annual allowance, and that the residue of the royalty payments should be expended under government control in services for the 'public benefit', to be interpeted in a liberal spirit. On 8th May 1931 the High Commissioner sent a copy of this and the resident commissioner's memorandum to the Colonial Office.

In February 1931 the British Phosphate Commissioners began to survey the land compulsorily acquired; and at once they encountered opposition from the Banabans. It is plain that the whole process had come as a shock to the Banabans; and they were resentful and suspicious of all concerned. Indeed, in a telegram to the High Commissioner the resident commissioner reported that his presence on the island was a hindrance to a peaceful settlement, and that the Banabans would only realise the facts if the case already put to them were to be re-stated by a new resident commissioner appointed from elsewhere. But the High Commissioner did not think that the resident commissioner should be replaced, and said that steps should be taken under s 9 of the Ordinance to ensure that the British Phosphate Commissioners had peaceful possession. Opposition continued through March, April and May; but in the end the actions of the resident commissioner, aided at times by the police, resulted in matters settling down.

In July 1931, Sir Murchison Fletcher, the High Commissioner, visited Ocean Island. He held office as High Commissioner, I may say, from November 1929 until May 1936. He discussed the resident commissioner's memorandum of 27th February 1931 with him, and on 29th July he met the Banabans. They put their grievances before him, and he then addressed them. In the course of this address he is reported as saying that it was the rule generally that the surface of land belonged to the owner, but --

'any minerals under the land belonged to the Government which can do what it pleases with them. The surface owners had not planted the minerals nor were they responsible for them, therefore they belonged to the Crown.'

I mention this merely to dispose of it. Whatever may be said about the logic of the proposition, it is clear that no claim to Crown ownership of the phosphates is now made. Counsel for the Attorney-General was quite explicit on that. Apart from a few sporadic statements in minutes and so on, at long intervals, Sir Murchison was on his own in making this assertion, for which I can see no support at all. Indeed, a letter by Sir Murchison himself dated 2nd June 1933 is hard to reconcile with any theory of Crown ownership. Whatever difficulties there are in determining the nature and quality of the ownership of land by the Banabans on Ocean Island, they do not include any claim by the Crown to ownership of the phosphate. I speak only of phosphate and say nothing of other minerals, and in particular of gold and silver; for happily such matters are not before me.

On 7th March 1932 the newly-appointed Native Lands Commissioner, Mr H E Maude (who later, as Professor Maude, was to give evidence before me in Ocean Island No 2), reported to the resident commissioner on the proceedings of the Native Lands Commission under the Gilbert and Ellice Native Lands Ordinance 1922. This body included four Banabans from each of the four village districts on the island; and it sat in the villages successively from 5th October 1931 until 7th March 1932. A large number of claims

were investigated, and in the end 2,479 parcels of land were registered, and their ownership and boundaries settled. These registers would have been invaluable in this litigation, but unhappily they were destroyed during the Japanese occupation of the island. The report had a number of enclusures dealing with matters such as the conveyances which were and those which were not recognised by the commission, in the sense that the commission recommended that they were not to be recognised for the future. There was also a draft Ordinance to regulate the inheritance and conveyance of lands, to give effect to the recommendations in the report. On 27th May the resident commissioner sent the report to the High Commissioner, with an amplified draft of the Ordinance.

On 21st March, soon after Mr Maude made his report, there was a long High Commission minute discussing the Banaban funds in relation to a despatch that the High Commissioner had sent to the Colonial Office on 29th September 1930, and also the resident commissioner's memorandum of 27th February 1931. The minute took a number of the points of difficulty that I have commented on, particularly in relation to the various departures from what appeared to be the rights of the various landowners. These included the 1913 landowners getting royalty on land acquired by the British Phosphate Commissioners before the 1913 agreement, and on the other hand having the fund with produced the interest that they received, the Banaban Fund, depleted by expenditure for the general benefit of the Banabans.

In August the Banabans presented a petition (which was treated as being a petition to the Secretary of State) complaining of the 1931 transaction; and they repeated this in November. On 8th April 1933 the Secretary of State requested the High Commissioner to give the Banabans a written or oral reply as he thought best. On 19th September the senior administrative officer to the resident commissioner sent the Native Magistrate a written reply, pointing out, inter alia, that the arbitration had been in accordance with the law; and the Native Magistrate was asked to call a meeting of the Banabans, and to inform them of the reply. This was done, and on 26th October five members of what was known as the Banaban Committee saw the senior administrative officer about the reply. Finally, on 19th March 1934 the Banabans told the High Commissioner that, though heartbroken, they would loyally accept the final decision that the Secretary of State had made.

In October 1932, Mr Neill had submitted another long memorandum on the Banaban funds, largely following the resident commissioner's recommendations, but explicitly recommending that the residue of the original Banaban Fund should be transferred to the new Common Fund, that is, the fund to be fed by the 8 1/2d royalty. The Colonial Office had not yet sposken on this subject; and on 18th October 1932 the High Commissioner wrote to the Colonial Office. He enclosed a number of documents, including a copy of Mr Neill's latest memorandum, and a note of the discussion with the Banabans that the High Commissioner had had in July 1931. The High Commissioner suggested that as the resident commissioner, Mr Grimble, was in England, the Colonial Office might wish to discuss Mr Neill's proposals with him. The urgency, said the High Commissioner, was that the Banabans who had disclosed the boundaries of their land within the 150 acres should receive payment of interest on the sums paid for surface rights. The object was to encourage those Banabans who were still refusing to disclose their boundaries to the British Phosphate Commissioners to make this disclosure.

The Colonial Office reply on 17th December 1932 was to approve payment of the interest on the £ 22,500 until 30th June 1932, or, if that would give an excessive sum to any individual, until the end of 1931. On the other matters the Colonial Office asked the High Commissioner for his recommendations; Mr Grimble was ill and not available for consultation. On 15th April 1933, the Banabans signed a complaint, but stated that they had decided to disclose the bounds of their lands because of their love for them, and so that they be not forgotten; and on 2nd May they began to do as they had said.

On 7th March 1933 the acting High Commissioner sent to the Colonial Office his recommendations, made on the assumption that the terms of the 1913 agreement had been superseded, and that the properiety of past payments from the Banaban Fund was not to be opened in the light of the 1913 agreement. Put shortly, his recommendations were, first, to keep the balance of the old Banaban Fund separately as a reserve fund, either adding the interest to capital or crediting it to the new Banaban Common Fund. Second, the new Banaban Common Fund was to provide an annuity of £ 6 for all members of the Banaban community, and was to bear the cost of maintaining recognised Banaban community services, and any additional services agreed by the Banabans and approved by the High Commissioner. But a warning was added that landowners might sooner or later seek a judicial decision on the disposal of the Banaban Fund, in

view of s 6(2) of the 1928 Ordinance; and it was recommended that steps to guard against this should if possible be taken. Third, the acting High Commissioner assumed that the Colonial Office had approved the principle of the compensation paid for surface rights being held in permanent trust for the landowners and their heirs, who would get only the interest. Rents and compensation for trees should be paid to the landowners, as representing the annual produce of the land.

In December 1933 there was a new resident commissioner in place of Mr Grimble, Mr J C Barley. On 9th April 1934 he sent to the High Commissioner a nine-page letter about the still unsettled position of the Banaban funds. He pointed out that no decision had yet been made on Mr Grimble's proposal to keep the residue of the old Banaban Fund (which the letter called 'the Old Royalty Trust Fund') separately as a reserve, or Mr Neill's proposal to amalgamate that fund with the new fund, called the Banaban Common Fund, which was to receive the 8 1/2d royalty. The resident commissioner had ascertained that the Treasurer of the colony had been crediting the new 8 1/2d royalty to 'the old Banaban Royalty Trust account', and not, it seems, to a new account for the new Common Fund. Furthermore, nothing had been done to pay the proposed annuity of £ 6 to every Banaban. The letter also stated that the Banaban Common Fund 'has become merged in the Old Royalty Trust Fund'. On the other hand, the interest on the reduced investments of the old Banaban Fund had continued to be distributed, so that the 1913 landowners had been getting their accustomed halfyearly payments, though reduced in amount. Not surprisingly, the Banabans had been bitterly complaining that the only visible result of the new arrangements was that a 35 per cent reduction had been made in the sums paid to the 1913 landowners. The Banabans asked that three-quarters of the 8 1/2d royalty should bear the cost of services to them, with the balance being distributed to them, and that the remaining quarter should be added to existing funds.

Before this had been replied to, a matter on which a great deal had been written had been brought to a close. The Gilbert and Ellice Islands Colony had no currency of its own, and Australian currency and also sterling had circulated in the colony. In April 1930 Australian currency became worth less than sterling, and one odd result was that the quantity of sterling silver in circulation was reduced because, though worth more, it bought no more than the Australian silver. The whole question of currency in relation to the pay of colonial civil servants and otherwise was much debated between London and the Pacific; and one facet of this was that of the currency in which the arbitrators' award had been made. In the end it was decided to ask the arbitrators; and on 18th October 1934 Mr Neill wrote to say that so far as he was concerned the sums were expressed 'in the currency used in the Colony', and that 'in other words it was not intended that the award should be in sterling'. On 29th November Mr Maynard, the other arbitrator, made it explicit that the award was intended to be expressed in Australian currency.

I can now return to the progress of the discussions about the Banaban funds. In the High Commission office it was being pointed out that in view of the rights of the 1913 landowners, the transfer of the £ 20,000 from the old Banaban Fund to the new Provident Fund 'would appear to have been illegal as well as without justification, but it was part of the arrangement between the Government and the British Phosphate Commissioners'. It was added that if it was desired to retransfer the £ 20,000, the difficulty could easily be overcome by arranging with the British Phosphate Commissioners to reduce the agreed total which the Provident Fund was to attain. In discussing this and other matters in a letter dated 12th February 1936, Mr Barley, the resident commissioner, helpfully summarised the position as it stood on the latest figures then available. There were four funds.

(1) The old Banaban Royalty Trust Fund. This was the fund on which the 1913 landowners drew the interest. It stood at a little over £ 29,000, having been shorn of the £ 20,000 used to start the Provident Fund.

(2) The Banaban Common Fund, or the new Banaban Royalty Trust Fund, as it was sometimes called. This was the fund fed by the 8 1/2d royalty under the 1931 transaction. It had reached a little over £ 33,000, but this had been reduced by over £ 12,000 for public services, and so stood at rather more than £ 20,000. The income from this fund was awaiting the decision of the Secretary of State as to its destination.

(3) The Banaban Provident Fund. This fund, fed by the 2d royalty, was accumulating, and stood at nearly £ 33,000.

(4) The Banaban Landholders Fund. This consisted of £ 22,500, the total of the compensation of £ 150 an acre for the 150 acres of mining land under the 1931 transaction. The interest on this fund was being paid to the owners of the mining land which had been taken in 1931.

What the resident commissioner proposed was that the first two funds should be merged; that the £ 20,000 used to start the Provident Fund should be restored with interest to the old Banaban Royalty Trust Fund; that the interest from the combined Trust Fund and Common Fund should be used to meet the cost of direct public services provided by the government for the Banabans; and that an annuity of £ 10 a head should be paid to all true-born Banabans out of the 8 1/2d royalties coming in each year. A long letter from the High Commission to the Colonial Office on 5th August 1936 took the view that £ 10 a head was unnecessarily high. By this time there was considerable Banaban discontent; and on 6th August the resident commissioner sent to the High Commissioner and the Colonial Office a copy of a petition by the Banabans. Discussions continued, mainly in the Colonial Office. By the end of 1936 the Colonial Office had approved a settlement on the general lines proposed by the resident commissioner, and had informed the High Commissioner that the consent of the individual landowners to it should be obtained before legislation to amend the 1928 Ordinance could be enacted.

By 21st February 1937 meetings with the Banabans had been going on for three weeks. The officer then in charge of the colony reported general approval by the Banabans, provided that the landowners had some slightly preferential treatment over the non-landowners. He made appropriate recommendations on these lines, with annuities of £ 8 for adults and £ 4 for children for all Banabans, and with all landowners whose land went under the 1913 or 1931 transactions receiving annuities ranging from £ 2 for less than one acre to £ 10 for landowners with ten acres or more. Although a number of variants were mooted, it was to a settlement along these lines that official sanction was given on 9th March 1937. At a meeting with the Banabans on 24th July 1937, a spokesman for the Banabans told the High Commissioner and the resident commissioner that the Banabans were agreeable, and the 1913 and 1931 landowners were ready to waive their rights to royalties. Mr Rotan, however, demurred; he wanted the royalties on his own lands kept separately for him. He was a large landowner, if not the largest.

On 28th September 1937 the resident commissioner reported that every Banaban landowner except Mr Rotan had accepted the proposed terms; and on 12th October the resident commissioner reported that he held a separate document signed by every individual landowner concerned (except Mr Rotan and his two daughters), accepting the proposed terms of settlement unconditionally. The document was in the Banaban language, and a translation shows that the Banaban Provident Fund and the Banaban Landholders Fund were in terms expressed not to be affected by the agreement. The landowners agreed that phosphate royalties which had accrued or were to accrue should be paid into the Common Fund. Out of this fund an annuity of £ 8 for adults and £ 4 for children under 15 years was to be paid to all true-blooded Banabans, and also to half-Banabans so long as they resided at Ocean Island. The resident commissioner soon framed elaborate rules defining who were to be accounted true-blooded Banabans, and who were to be regarded as half-Banabans; and these rules were accepted by the Banabans. Landowners were to receive an annuity of £ 2 if the total land holding in the 1913 and 1931 areas was less than one acre, *l4 if between one and two acres, £ 6 if between two and five acres, £ 8 if between five and ten acres, and £ 10 if over ten acres. The payments were to come from the Common Fund, which was also to bear the cost of services performed by the government for the Banabans. Payments of annuities to the Banaban elders or for drought relief were to cease.

While this 1937 waiver (as I may call it) was being obtained, steps were at last being taken to amend the 1928 Ordinance; and this amendment, under the title of the Mining (Amendment) Ordinance 1937, was enacted on 10th December 1937. I shall turn to this in a moment. On the same day, the resident commissioner paid to the Banabans the annuities of £ 8 for adults and £ 4 for children; £ 36 was refused by Mr Rotan, his two adult daughters and three children, and this was placed in a deposit account. The resident commissioner also reported that the necessary schedule of landowners for payment of the landowners' annuity was not complete, but that he hoped to be able to pay the annuity by the end of the year. On 17th December he sent to the High Commissioner a long letter which provided a useful summary of the position. In it, the resident commissioner explained that he had decided not to proceed with the proposed retransfer of the £ 20,000 from the Provident Fund to the old Banaban Royalty Trust Fund, which had become merged in

the General or Common Fund; for this transfer had never proved to be the inducement to the Banabans that had been expected, and they had shown not the slightest interest in it.

In relation to the Banaban funds, that was a point of repose. Vigorous discussions were going on with the British Phosphate Commissioners about sums to be paid to the government in lieu of taxation; but I need not discuss these here, and can turn to the 1937 Ordinance. By s 1, the Ordinance was to be read and construed as one with the 1928 Ordinance. Sections 2 and 3 then repealed ss 6(2) and 7 of the 1928 Ordinance respectively, and substituted quite different provisions; and s 4 provided for a degree of retrospection.

First let me take s 6(2) of the 1928 Ordinance. This, it will be remembered, dealt with moneys 'payable by way of compensation or royalty'. It required them to be paid to the resident commissioner, to be held by him 'in trust on behalf of the former owner or owners', if a native or natives of the colony, and subject to the directions of the Secretary of State. The new s 6(2) was much narrower. It applied to compensation, but it did not apply to royalties at all; it omitted all words of trust; and it substituted the High Commissioner for the Secretary of State. It ran as follows:

'(2) Any moneys payable by way of compensation for any land acquired from a native or natives of the Colony under this Ordinance shall be paid to the Resident Commissioner who shall pay the same to the former owner or owners or apply the same for their benefit in such manner as the High Commissioner may from time to time direct.'
This, of course, was apt to apply to the Banaban Landholders Fund.

The new s 7, on the other hand, was far wider than the old s 7. The new s 7 ran as follows:

'Any moneys payable by way of royalty whether prescribed under section five hereof or fixed by agreement shall be paid to the Resident Commissioner who shall pay or apply the same in such manner as the High Commissioner may from time to time direct to or for the benefit of the natives of the island or atoll from which the minerals were derived in respect of which the royalty was payable.'
The new s 7 accordingly embraced all the royalties, irrespective of whether they were payable by agreement or as a result of compulsion. Once again, the words 'in trust' that had appeared in the old s 7 were omitted from the new s 7; and once again the High Commissioner was substituted for the Secretary of State. There was also the important change that the persons to benefit were no longer the natives from whom the land had been acquired ('such native or natives') but were to be the natives of the island or atoll from which the minerals had been derived, in this case the Banabans generally.

Finally, there was s 4 of the 1937 Ordinance. This ran as follows:

'Any act or thing done or omitted under the provisions of the Principal Ordinance which would have been validly and properly done or omitted if section six and section seven of the Principal Ordinance had been as provided by this Ordinance shall be deemed to have been validly and properly done or omitted.'
At one stage there was some discussion about whether it was correct to describe this as being a retrospective provision. It seems plain to me that in some degree it was retrospective. Putting matters broadly, the result was that as regards acts and omissions occurring between the 1928 Ordinance coming into force and the 1937 Ordinance coming into force, the act or omission was to be valid and proper -- (a) if it complied with the 1928 Ordinance as it stood at the time, or (b) if it would have complied with the 1937 Ordinance if that had been in force at the time. In short, the act or omission was given alternative forms of salvation. The most important practical effect of this was that the past use of royalties for the benefit of the Banabans generally, contrary to what the old s 6(2) had provided but in accordance with the new s 7, was at last made valid and proper.

(5) 1937-1947: the war, Rabi and the 1947 agreement. With the 1937 waiver and the enactment of the 1937 Ordinance another stage in the history of Ocean Island came to an end. The next period, the fifth, covers the ensuing ten years up to the making of the 1947 agreement; and it includes, of course the havoc worked on Ocean Island by the war. First, the waiver and the 1937 Ordinance were carried into effect. By this time, the old Banaban Royalty Trust Fund and the new Banaban Royalty Trust Fund (or Common Fund) had been treated as being merged into one fund, called the Banaban Fund, or the Banaban Common Fund. The 1913 landowners no longer received separately the interest due on the old Banaban Royalty Trust Fund, but with the 1931 landowners received out of the common fund the agreed scale of annuities based on

acreage. No further payments were made to the Banaban elders or for drought relief; but payments for services to the Banabans continued to be made, out of the Common Fund, replacing the old Banaban Royalty Trust Fund for this purpose. There were thus three funds instead of four. These were as follows: (i) the Common Fund that I have been discussing. This paid for services, and in addition provided both the flat-rate annuities payable to all Banabans and also the annuities on an acreage basis payable to all 1913 or 1931 landowners; (ii) the Provident Fund, which was accumulating money to make provision for the Banabans in the future; and (iii) the Landholders Fund, which paid to the 1931 landowners the interest on the £ 22,500 compensation paid for their surface rights.

On 19th May 1938 the landowners were paid their 'bonuses' (as they were often called) for the year ended 30th June 1937. The delay had been caused by various disputes concerning the partitioning of land and the preparation of a complete register of lands. On 15th and 16th August 1938 both the annuities to all Banabans and the bonuses to the landowners were paid in respect of the year ended 30th June 1938. Mr Rotan was continuing to object to what was being done, but obtained no satisfaction for his requests. Towards the end of 1938, the British Phosphate Commissioners' need for further land for mining, about which nothing had been said to the Banabans during the various negotiations with them, was beginning to come to the fore. The British Phosphate Commissioners had only enough land for a further two or three years, and they considered that it was time to open negotiations with the Banabans. By the end of 1938 the view had been formed by the British Phosphate Commissioners and the resident commissioner that any negotiations should be conducted between the British Phosphate Commissioners and the Banabans, with the government taking no hand in the negotiations in the first instance.

Meanwhile the Banabans had made various proposals for increasing the payments to them and making some rearrangement in the division of the royalties, as well as other matters; and these proposals were considered by the High Commissioner when he met the Banabans on a visit to Ocean Island on 29th June 1939. But the most striking feature of this period was a petition by the Banabans to the Secretary of State dated 7th June 1940, seeking a new home for the Banaban people somewhere in the Fiji group, so as to be under the same High Commissioner. This request was made in view of the continued gnawing away of Ocean Island by mining operations. The Banabans wanted this other island not instead of Ocean Island but in addition to it, as a second home, and in order to preserve their racial identity and culture. They had in mind the island of Wakaya which they believed would soon be in the market; but if that was not available they would prefer some other island in the Fiji group. This was a striking volte face in the Banabans' attitude, and showed a realistic approach to a subject which for some while had been being avoided in any discussions with the Banabans, in view of their strong opposition to any idea of an alternative to Ocean Island. The Banabans also asked that Mr Kennedy, who was an officer in the Colonial Service, should be permitted to retire from it so that he could become the Banabans' adviser and help them in their settlement on an alternative island. The latter proposal was regarded by the resident commissioner as being premature.

On 16th July 1940 representatives of the British Phosphate Commissioners met the Banabans and put before them proposals for the acquisition of some 230 acres of land on Ocean Island for mining. The offer was to pay £ 175 per acre (in place of £ 150) and 1s a ton royalty (instead of 10 1/2d), with 2d of that 1s continuing to go to the provident Fund and 10d to go to the Trust Fund. The payment to the Provident Fund would continue until the Provident Fund reached £ 250,000, instead of £ 175,000. There was much discussion of this proposal at this and another meeting on 29th July. The burden of the Banabans' attitude, after some skirmishing, was that the offer was acceptable but that they wanted the government to pay over to them more of the money that the government received on their behalf. The British Phosphate Commissioners duly carried out their promise to put this request before the government. Mr Rotan, however, still adhered to his attitude of independence. The resident commissioner wrote to the High Commissioner on 24th September 1940, stating that he considered that the British Phophate Commissioners' offer was 'exceedingly generous', and supporting the Banabans' request that they should receive more of the money themselves. He suggested increasing the annuities and also the landowners' bonus. At about this time, I may say, the Banabans, with government assistance, formed a co-operative society.

Arrangements had been made to investigate the availability and suitability of Wakaya; and on 17th February 1941 an agricultural officer inspected it and made a detailed report which showed that it was unsuitable for the Banabans. Other islands were considered. By 20th September 1941 Rabi, which was

much more suitable, and was to become the second home of the Banabans, had come on the scene; and its owner confirmed that it was available for purchase at LA25,000. The Banabans, however, still hankered after Wakaya, but in the end, with a few dissentients, they agreed that both islands should be bought. Wartime conditions had made impossible a proposed visit of inspection. Wakaya was on offer at LF12,500; the High Commissioner offered LF5,000, and this offer was refused. On the other hand, on 22nd April 1942, a solicitor reported the completion of all documents necessary to vest Rabi in the High Commissioner at the asking price of LA25,000. The arrangement was that the vendor should continue to occupy the island (which was producing copra) on a leasehold basis for a short while. There was also some discussion about a Fiji government reserve of 50 acres on Rabi which I need not consider.

At the end of August 1942 the Japanese occupied Ocean Island. They made little or no attempt to work the phosphate, but heavily fortified Ooma Point. I do not propose to detail the great hardships that the Banabans suffered during this time. By the time of the Japanese surrender most of the inhabitants of Ocean Island had been either killed or deported to other islands. Of some 150 who were left on Ocean Island at the time of the Japanese surrender all save one were later killed by the Japanese; and the sole exception, after a remarkable escape, survived to give evidence in Ocean Island No 1. All the Banabans' houses on the island had been destroyed, and many of the trees as well. The island had been reoccupied in August or September 1945, but plainly the immediate return of the Banabans to live on the island was completely impracticable. After a detailed inspection of Rabi had been made by Major Kennedy, whom the High Commissioner had appointed to do the work, it was plain that the sensible course would be to attempt to arrange at least a preliminary resettlement of the Banabans on Rabi. Rabi had the disadvantage for the Banabans of having a much greater rainfall than they had been accustomed to on the often parched Ocean Island, but it had not been ravaged by war, and it had many advantages. Major Kennedy's 14-page report dated 8th October 1945 set out an admirably practical and detailed plan for the occupation of Rabi by the Banabans, and the High Commissioner promptly gave it his approval in principle. A month's notice was given to determine the tenancy of Rabi on 20th November 1945.

A camp was prepared for the Banabans on Bairiki Island, on Tarawa Lagoon, and Major Kennedy collected them from various villages throughout the northern Gilberts, and from Kusaie and Nauru, where many had been taken by the Japanese. All agreed to go to Rabi for an initial period of two years on the footing that they would all retain their rights in Ocean Island and the Banaban funds, and that their transport and maintenance for the first month would be met by the Gilbert and Ellice Islands Colony and not be a charge on their funds. Furthermore, if at the end of two years they wished to return to Ocean Island, the government would bear the cost of their transport. There were some 700 Banabans in all, and also a further 300 Gilbertese who had become associated with them, either on Ocean Island before the Japanese came, or after deportation; and in the latter case the Banaban families with whom they had become associated were required to sign bonds for their good behaviour.

On 14th December 1945 the Banabans and Gilbertese arrived on Rabi. Initially they were received in a camp that had been prepared for them: but soon some began to move away. On 27th December 1945 a Fiji Ordinance called the Banaban (Settlement) Ordinance 1945 established a Rabi Island Council, and empowered it, subject to the approval of the governor, to enact regulations on a wide variety of topics. On 26th January 1946, at a meeting of Major Kennedy with over 150 Banaban elders, representing over 150 families, councillors were nominated for the Rabi Island Council. The Banabans expressed the firm view that they preferred not to consider the question whether to settle permanently on Rabi until further agreements with the British Phosphate Commissioners had been made: the 1940 agreement in principle had never become a formal agreement. By this time the change of climate had produced a heavy incidence of pulmonary illnesses; and there were many other ailments, due in many cases to wartime hardships.

On 19th, 20th and 21st March, Mr Maynard, who had been the Ocean Island manager for the British Phosphate Commissioners from 1933 to 1936, met many of the Banabans on Rabi. One of the questions raised by the Banabans and discussed at that meeting was the British Phosphate Commissioners' 1940 offer for more land for mining; and Mr Maynard told the Banabans that the offer had been asleep but was not dead. The Banabans then raised the question of marking the boundaries of the individual plots of land that would be taken for mining. The general view was that the Banabans would accept the 1940 offer; but one Banaban asked for better terms, and suggested 1s 6d a ton royalty and £ 225 an acre. Mr Maynard promised to report matters to the British Phosphate Commissioners, and said that he had not been sent to

get the proposed agreement signed. On 22nd March a number of the Banabans put the request for 1s 6d and £ 225 into writing.

In June 1946, there were meetings on the 13th and 17th of the month between the Banaban elders and Mr Windrum, the Fiji District Commissioner (Northern), with Major Kennedy present. The Banabans wanted Major Kennedy removed from his post as the Fiji administrative officer in charge of Rabi. The complaints against him seem to have been a mixture of personal complaints, misunderstandings, and visiting on him homesickness for Ocean Island and a variety of difficulties on Rabi. The district commissioner heard these complaints, and he also raised the question of holding a ballot on whether the Banabans wished to make Rabi their home or whether they wished to return to Ocean Island. The Banabans asked how much Rabi had cost, and at any rate some of them approved the purchase at £ 25,000. On 28th June 1946 the Banabans wrote a letter, repeating their objection to Major Kennedy, and confirming their agreement to the purchase of Rabi, provided Ocean Island was not lost to them. Another letter of the same date sought the payment to them of the money in the Landholders Fund and the Royalty Trust Fund; and by a third letter of the same date Mr Rotan enquired about a variety of matters.

On 20th September, the High Commissioner answered the first two of these letters. To the first the reply was that Capt Holland had replaced Major Kennedy, and that there was no intention of affecting the Banabans' right on Ocean Island. To the second the reply was that the matter had been referred to the Secretary of State for his decision. The third letter seems to have been answered, but the answer does not appear to have survived.

I must now turn to a memorandum dated 2nd September 1946, written by Mr Maude, who by then was the Chief Lands Commissioner for the Gilbert and Ellice Islands Colony; this was often called the 'Maude Report'. It is, if I may say so, a most lucid and valuable document, providing a survey of Ocean Island and the Banabans for the past and making recommendations for their future. Mr Maude was reporting in accordance with instructions that had been given to him by the High Commissioner. He had known the Banabans for some 17 years; and he had been impressed by the progressive moral and physical degeneration of the people. The three main factors were, first, the dislocation of their traditional economy by the growth of the phosphate industry, making them a denaturalised race dependent for life on imported goods; second, there was the lack of any sense of responsibility for the conservation of the Banaban funds, since these were spent without any consultation with their leaders; and, third, there was the system of annuities for the Banaban 'which has sapped his moral fibre, turning him too often into a dole-fed hanger-on of the British Phosphate Commission'.

Mr Maude's main hope for the future lay in persuading the Banabans to settle on Rabi and not to return to Ocean Island; and for this purpose he urged the government to effect a settlement of all outstanding points at issue. He put these under four heads. First, the government should make it clear that the Banabans' rights over land on Ocean Island would in no way be affected by a decision to settle on Rabi; and he made certain detailed suggestions as to the revesting of the title to worked-out lands in the Banabans. He also regarded it as being 'advantageous, from every point of view', that the British Phosphate Commissioners should effect 'a single and final settlement' with the Banabans covering all the land on Ocean Island that the British Phosphate Commissioners required either in the present or in the future. Second, he recommended that the ownership of Rabi, which stood in the name of the High Commissioner, should be vested in the Island Council on behalf of the Banabans residing there, subject to a number of detailed provisions. Third, there were the Banaban funds. Mr Maude discussed the unsettled question whether a landowner was owner of the minerals as well as the surface, and then he considered the control of the Banaban funds. He recommended the amalgamation of the Royalty Trust Fund (or Common Fund) with the Provident Fund, which had served its purpose, a reference, no doubt, to the purchase of Rabi. He advised that the control of the fund should be vested in a Banaban Funds Committee, with certain limitations on the expenditure, and that there should be control by the Banaban Welfare Officer (the new title suggested for the officer in charge at Rabi) and by the governor, by means of a system of estimates and so on. This committee would be an addition to the Banabans' other organisations, the Island Council, the Island Court and the co-operative society. Fourth, the report dealt with the annuities. These, said Mr Maude, 'have done nothing but harm to their recipients', and almost all connected with the Banabans had recommended their abolition. But they were too firmly entrenched to be abolished, and so they must be continued, though all attempts to have them increased should be resisted.

The report recommended that these proposals should be explained to the Banabans and embodied in an agreement to be signed by them and the government; and most of the recommendations of the report were conditional upon the Banabans electing to settle in Rabi. I should add that there is much in the report that I have not attempted to summarise; but I hope that I have indicated the main features of a document which shows an admirably unsentimental but real concern for the Banabans and their future.