

A2

SPEECH 16

1971 E. No.3670

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

GROUP B.

Royal Courts of Justice

Monday, 26th January, 1976

Before:

THE VICE-CHANCELLOR

ROTAN TITO

and

THE COUNCIL OF ELDERS

v.

HER MAJESTY'S ATTORNEY GENERAL

A IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

GROUP B.

Royal Courts of Justice

Monday, 26th January, 1976

Before:

THE VICE-CHANCELLOR

ROTAN TITO

and

THE COUNCIL OF ELDERS

v.

HER MAJESTY'S ATTORNEY GENERAL

E (Transcript of the Shorthand Notes of The Association of Official Shorthand-writers Limited, Room 392, Royal Courts of Justice, and 2, New Square, Lincoln's Inn, London, W.C.2.)

F MR. W.J. MOWBRAY, Q.C., MR. J.R. MACDONALD, MR. L.A. TUCKER and MR. C.L. PURLE

(instructed by Messrs. Davies, Brown & Co.) appeared on behalf of the
Plaintiffs.

G MR. J.E. VINELOTT, Q.C., MR. P.L. GIBSON and MR. D.C. UNWIN (instructed by the

Treasury Solicitor) appeared on behalf of the Defendants.

S P E E C H

DAY SIXTEEN

THE VICE-CHANCELLOR: Yes, Mr. Mowbray.

A MR. MOWBRAY: We were coming to page 47 of bundle 31, My Lord. That is from Mr. Barley, the Resident Commissioner, to the High Commissioner. (Reads first paragraph). The minute is 43A, nothing turns on it. He goes on: (Reads paragraphs 2, 3 and 4).

B Turning to page 52, one there finds some Colonial Office minutes. We are here back to the question of the arbitration and the currency question. These minutes are a 16C and 16D document. The first minute is by Mr. J. W. Allen and it is dated at the end 21st June, 1934. He says: "I agree with Mr. Jones" etc. (Reading to the words at the end of the minute) "any case they may have."

C Going back for a moment to page 52, one sees the words, "the Government being in the position of trustees for the Banabans". This was after the 1928 Ordinance and before the 1937 Ordinance, so there was a clear trust on the existing Ordinance. The interest of this is in seeing "which government?" We would say that as this is being considered in the Colonial Office and as the Secretary of State was being asked to make a decision about it, the government referred to there at any rate includes the Secretary of State. It is fair to add that just below there is reference to Mr. Neill as the Government Arbitrator.

THE VICE-CHANCELLOR: Yes, that phrase struck me.

D MR. MOWBRAY: He was appointed by the Government, whatever that was, to represent the Banabans. Your Lordship saw something about how he was appointed. He was appointed as a result of consultation between London and Suva.

E At page 53, in the last paragraph I read, one sees the words: "If, as I think it will prove necessary, we have to accept Australian currency for the royalty payments, that would be an executive decision within the competence of the government (which is as a matter of fact accepting revenue on that basis) as a totally different matter from the government as trustees". The royalty payment here, I should say, must be the 6d. Government royalty under the 1902 licence, and that passage helps to draw a distinction between the Government royalty which they were contemplating went into the general revenues of the Colony on the one hand, and the Banabans' royalty which was a trust royalty on the other hand. It helps to establish that there was, at any rate before 1937, something more than a merely governmental obligation on the Crown as regards the Banabans' royalty because the distinction is being drawn. I do not suppose anyone says that there was not a trust between 1928 and 1937 actually, so perhaps it is not very important.

F
G Now I will read on at page 53 in Mr. Duncan's minutes: "I entirely agree" etc. (Reading the minute). That is followed by a minute that I cannot read and which I do not think matters. There is then another minute reading: "I think that as" etc. (Reading to the words) "if they disagree." In (a) there is the Secretary of State, a Minister of the home Government, practically in the position of a trustee and the writer of this minute is saying there is a conflict. We would say that he is talking about the same government in both (a) and (b), because otherwise there would not be a conflict or it would not be so clear that there is a conflict. We would say for all practical and all legal purposes that the conflict was there between the Secretary of State as trustee and the Secretary of State as protecting the United Kingdom Treasury and we would
H

say either there is all one government or the United Kingdom Government is closely connected with what is happening.

A THE VICE-CHANCELLOR: So far as the Phosphate Commissioners are concerned, there is no possibility of any government of the Gilbert and Ellice Islands Colony being directly concerned in that. That plainly is the United Kingdom Government. So if you take that, which is plain behind a peradventure and then build back and say, "What is the conflict of interest unless you regard the Secretary of State and the United Kingdom as being either the same or so closely linked as to raise the conflict of interest point?" is that it?

B Mr. MOWBRAY: Yes, that is it. I had better read the rest of this. (Continues reading minutes on page 54 and page 55.) The telegram is on page 56. This is the telegram your Lordship has already seen on page 91 of the P.D. bundle and it is referred to in paragraph 29 of the Statement of Claim. (Reads telegram). In the first paragraph on page 56 it does not say expressly who is in a position of trust vis-a-vis the Banabans but the last thing that has been mentioned is H.M. Government in the United Kingdom and we would say that you could explain that telegram by reference to the minutes which considered it.

C On now to page 58. That is a cable sent on the 20th July, 1934 from the High Commissioner for the Western Pacific to the Secretary of State. (Reads cable).

D Page 59 is a telegram from the Secretary of State to the High Commissioner and is a 16C document. (Reads telegram). That is a 16C document because the merest detail of tactics is being dictated from London.

E At page 60 there is a letter from the High Commissioner to the General Manager of the BPC. (Reads letter). I need not read page 62. There is a draft of a letter at 63 and the letter itself is at page 70. I pass next to page 66 which is from Mr. Ellis to the BPC in Melbourne. (Reads the first two paragraphs and third paragraph down to the words) "payment has been inadequate" I do not want to read more. This helps a little with concealment by fraud. The Banabans trusted Mr. Barley, he told them it was all settled, they accepted that there was nothing they could do, though they did not agree with what had been done.

F May I go next to page 69 where Mr. Gaye writes to Mr. Allen at the Colonial Office. (Reads letter). One of our particulars of concealment by fraud is the concealment of the consideration of the currency question from the Banabans, and here we get Mr. Gaye inviting the Colonial Office to keep quiet about it.

G I need not read page 70. There is a reference to the fund being held by the Government as trustee, but the 1928 Ordinance was on foot at the time and it does not help very much. I can go to page 72 which is a letter from the Melbourne Office of the BPC to Mr. Ellis. (Reads paragraph 1).

H I had better read page 73 which is from the BPC to the High Commissioner. (Reads letter). So there is some concealment of that point. I need not read the next document, or page 78, but I had better read page 79 which is a letter from the High Commissioner to the Arbitrators. (Reads letter). The two answers are at pages 82 and 100. I can go first to Mr. Neill's answer on page 82. (Reads letter). There was some question subsequently about what he meant by the currency used in the

Colony, but he said it was not sterling.

A I will proceed next to page 88. We are back now on the continuing discussion about annuities and so forth, the way the Banaban Royalty Funds should be used. This is another memorandum by Mr. Vaskess. It is a 16C and 16D document. It starts off: "In his confidential despatch of the 9th April 1934" - that starts at page 24 of this bundle and your Lordship might like to note that the Resident Commissioner comments on this memorandum of Mr. Vaskess starting at page 5 of bundle 32. This is all of course leading up to the 1937 Settlement under which the 1937 Ordinance was passed and arrangements were made for annuities to be paid - B "Mr. Barley sets out the position with regard to the Banaban Royalty Trust Funds, and urges that the outstanding points should be settled." I can turn next to the end part of paragraph 6 on page 89: (Reading the last six lines of paragraph 6 to the last line on page 91) "Memorandum of the 4th October, 1932." That is page 113 of bundle 29 and it is reference to knowledge and acquiescence. Then it goes on: "Since 1928" etc. (Reading to the end of paragraph 11) "1913 Agreement." Your Lordship remembers section 7 dealt with royalties payable by agreement and said that they were to be held on trust for the former owners.

C THE VICE-CHANCELLOR: This is where acquisition rights had been the result of agreement.

MR. MOWBRAY: (Reads paragraph 12). That seems, in our submission, to be the right construction, that he had only got a discretion about the method of the expenditure and not about the entitlement to the money.

D THE VICE-CHANCELLOR: "To be used in such manner and subject to such directions as the Secretary of State may from time to time give".

E MR. MOWBRAY; Yes. Then in paragraph 13 he says: "If the grounds of justification of past payments from the old Banaban Fund, mentioned in paragraph 11 above, are admitted as valid" - that is acquiescence - "and if the principle mentioned" etc. (Reading to the end of paragraph 16) "legal decision." He is using "equity" in a broad sense as meaning something other than what is observed by the Court. (Reads paragraph 17). Your Lordship will find that commented on or really disagreed with at page 5 of bundle 32 by the Resident Commissioner. (Reads paragraph 18 and 19).

I think the suggested course at (b) is something on page 89 that I did not read about the disposal of money in the Banaban Common Fund.

F THE VICE- CHANCELLOR: It is not the same as his point (b) is it?

G MR. MOWBRAY: I beg your Lordship's pardon, it is the point (b) in the middle of page 91 "to obtain the consent of the landowners concerned to the desired modifications." He says it would seem that, if workable, "this would be the better solution." (Reads paragraphs 20, 21, 22 and 23). The Resident Commissioner rather disagrees with that at pages 5 to 6 of bundle 32. (Reads paragraph 24).

H THE VICE-CHANCELLOR: I still find this very hard to follow. Why would the 1913 landowners "undoubtedly be the gainers in the long run"? Here you have individual landowners entitled to an individual income. There is also another fund for the benefit of all the Banabans generally. If matters stay as they are the landowners will get their individual income from the whole fund and they will share equally in the benefit that all the Banabans get, unless you have some differential scheme which says that if you are the landowner getting something out of the old Fund you are not to have the same benefits from the new fund as other Banabans have. But unless you

discriminate against them in that way, taking away from them their individual income and pouring the capital into the general Banaban benefit, as far as I can see it must be to their disadvantage. Yet it is strongly contended that they will be the gainers in the long run. Will they be the gainers in the long run?

MR. MOWBRAY: I do not really know. Maybe they had some idea that the Banabans would spend it all.

THE VICE-CHANCELLOR: It depends what you mean by being a gainer, I suppose. Not having the money now to spend on comforts, and so on, it is an advantage to you because - well . . . I simply say I do not understand.

MR. MOWBRAY: - Because you have it when you are old and gray! (Reads paragraphs 25 and 26). With the remainder, one can understand.

THE VICE-CHANCELLOR: I understand bringing pressure to bear on them and so on. The reason why they have had the benefit of an income for 21 years is that their land has gone.

MR. MOWBRAY: Yes. (Reads paragraphs 27 and 28).

Page 98 is on a different subject. It is from the Resident Commissioner to the High Commissioner. (Reads telegram). Page 99 is from the Resident Commissioner to the High Commissioner. (Reads telegram). Then page 100 is Mr. Maynard's formal reply to the letter on page 79. (Reads letter).

THE VICE-CHANCELLOR: So both arbitrators have now said it was not sterling.

MR. MOWBRAY: They have, and one has said it was Australian. In the end it was concluded that Mr. Neill meant Australian as well and the matter was left there. I suppose that in law someone could have said, "No, that is not the right way, you must construe the award and ^{the} award is an award in so many pounds and according to law that means pounds sterling and we are entitled to be paid in sterling." But that never happened.

THE VICE CHANCELLOR: But from first to last the Banabans were not told anything that was going on.

MR. MOWBRAY: No.

THE VICE-CHANCELLOR: Of course I entirely follow your reliance on that on the point of concealment. Does it go further than that? If in fact the Crown (never mind which Crown for the moment) is a trustee for the Banabans in relation to the principal then for a trustee to negotiate and get the best terms he can for his beneficiaries and so on is an entirely proper thing to do and may often be done without informing the beneficiaries what is being done. Sometimes - often in fact - he will keep the beneficiaries informed, at least the adult beneficiaries, but a trustee, by virtue of being a trustee and having the property vested in him, can of course dispute and compromise disputes. So ^{that} if the Crown was the trustee then for the Crown to do these things without reference to the Banabans is understandable. If the Crown was not trustee, on the other hand, one wonders what the Crown was doing resolving the rights of the Banabans without a word to the Banabans. So does not this provide you with some support? If the Crown was acting rightly in doing what it did at the time, that points to the Crown being in a fiduciary position in relation to this money in doing what it did.

A MR. MOWBRAY: Yes, it does. I need not read the next document and after that I can go to page 106 where we come to some Colonial Office minutes. These are a 16C document.

THE VICE-CHANCELLOR: Page 106 starts in the middle of the minute?

B MR. MOWBRAY: Yes. There is a typed version starting at page 109. In fact it begins with the minute which starts at the bottom of page 106. I do not want to try to decipher anything before that, so I will read from page 109: "The award" etc. (Reading to the words) "the Award." Then Mr. Duncan says in his minute: "I do not think" etc. (Reading to the words) "reference to the two Arbitrators."

The next minute is by Mr. Allen and he says: "In view of" etc. (Reading to the words) "expressing it at any rate at this stage."

C The typescript continues at page 111. (Reads Mr. Duncan's minute on page 111).

Before leaving that may I call attention to the second line on page 111: "We are in a position of trust vis-a-vis the Banabans". He is writing from the Colonial Office and "we" means the home Government.

D At page 113 the retyping continues. This is an incomplete minute and the handwritten minute of which it is a copy is also incomplete (page 112). It says: (Reads incomplete minute).

I can now go to page 120. This is from the Assistant High Commissioner to the Secretary of State. He forwards a copy of the letter from Mr. Maynard and gives an account of it and then in paragraph 2 says: (Reads paragraph 2).

E At page 122 we are back on the trust funds. This from the Assistant High Commissioner to the Secretary of State. (Reads first paragraph). That is pages 24 to 32 of this bundle. (Reads paragraph 2).

THE VICE-CHANCELLOR: Why does the possibility of them seeking a judicial decision make it desirable for him to refrain from expressing any opinion? The High Commissioner is not a judge, is he, with a separate court?

F MR. MOWBRAY: There is a separate Judicial Commissioner.

THE VICE-CHANCELLOR: There is a Judicial Commissioner who is the Chief Justice also. I see this is written by the Assistant High Commissioner. Anyway, perhaps it does not matter.

MR. MOWBRAY: I do not think so.

G THE VICE-CHANCELLOR: It might be that he was a judicial officer.

MR. VINELOTT: There were judicial officers, but never came up ^{to him} for decision.

H MR. MOWBRAY: Since we have paused, may I say that paragraph 2 is relevant on the question of concealment by fraud, I suppose against me if anything, that someone thought the Banabans might seek a judicial decision at that stage. But we submit it goes no further than that.

THE VICE-CHANCELLOR: The question he is asking about is the administration of various Banaban trust funds.

A Mr. MOWBRAY: Yes. That is not really the point we are litigating today. Then he goes on in paragraph 3: "I enclose a memorandum which has been prepared by the Secretary to the High Commission" - that is the memorandum your Lordship saw starting at page 28 - "which I think sets out sufficiently clearly" etc. (reading to the end of the letter).

B I need not read anything more until page 128 where there is a despatch from the Acting High Commissioner to the Secretary of State. (Reads first paragraph). I need read no more until paragraph 5 on the next page. (Reads paragraph 5.)

I can now go to page 174 which is a memorandum from Mr. P.D. Macdonald on the question of the fund.

THE VICE-CHANCELLOR: Who is Mr. Macdonald?

C MR. MOWBRAY: It was thought to be someone with some knowledge of the Banabans.

THE VICE-CHANCELLOR: He seems to be some officer on the High Commission staff.

MR. VINELOTT: I think he was senior political officer. There is a reference to him earlier at page 84, half-way down the first paragraph where it appears that in September 1934 he was Acting Administrative Officer, Ocean Island. Later he goes back to Suva on the High Commission staff.

D THE VICE-CHANCELLOR: Is this the memorandum he refers to there?

MR. MOWBRAY: No.

THE VICE-CHANCELLOR: So Mr. Macdonald would then be on the Gilbert & Ellice Island Colony staff?

E MR. MOWBRAY: Yes. He is writing a memorandum as someone who has had some experience of the Banabans. I can start at paragraph 2 on page 134. (Reads paragraph 2 down to the end of sub-paragraph (b)). That is something your Lordship has not yet seen. (Reads on to the end of paragraph 4.) Then he sets out the various funds. I need not read that.

THE VICE-CHANCELLOR: No, but it does give a clear statement of four separate funds.

F MR. MOWBRAY: Yes, certainly. Then he goes into the history and I can turn to page 139, paragraph 3 under this heading: "The old Banaban Royalty Trust Fund". I do not know that one can put too much weight on it, but there is a reference to the old fund as having been a trust fund. The memorandum reads: "This has been built up between 1930 and 1931 by the payments paid into it of royalty money at the rate of 6d. per ton. Three points may be noticed in connection with this fund" - I do not think I need read more here, and I can go to paragraph 5 on this page "by the continued payment" etc. (reading to the end of paragraph 8).

G He then goes into the figures and I can turn on to page 142, paragraph 11: "With regard to (b)" - that was the sliding scale in the middle of page 140 - "the scheme hardly appears" etc. (Reading to the end of the memorandum).

H THE VICE-CHANCELLOR: Which was B.2 referred to in paragraph 13? If this is his recommendation, one wants to know what it is. It may be that it is his suggestion of an appointment of an officer which he says is almost essential if final settlement is to be obtained. He offers various possible solutions, but says "Whatever you are going to get, you do need an officer appointed." That makes sense.

MR. MOWBRAY: Yes. He is saying that someone has got to be appointed to play them at their own game and obtain their confidence.

A THE VICE-CHANCELLOR: And to hammer away at the Banabans to finality. Anyway, that is a good clear statement of the separate funds and giving proper recognition to the **rights** of the landowners who tend to be somewhat administratively submerged in some of the other discussions.

B Mr. MOWBRAY: Yes. Would your Lordship now turn to bundle 32 and look first at page 5. That is a despatch from Mr. Barley, the Resident Commissioner to the High Commissioner. It is a 16C document. He says: "With reference" etc. (reading to the words) "1st May last" - that is page 88 of bundle 31 - "but I must at the same time as this" etc. (reading to the words) "of the Secretary's memorandum" - that is page 94 of bundle 31 - "it is stated that there is undoubtedly" etc. (reading to the word) "based."

THE VICE-CHANCELLOR: And it was not clear to you, and it was not clear to me.

C MR. MOWBRAY: No. "Again in paragraph 23" etc. (reading to the figures on page 7) "£1,500."

(Continued on next page)

D

E

F

G

H

I do not know what cash carried over from old Fund would be. "Less cost of public services" £12,300-odd, leaving £20,800; "amount placed on fixed deposit" £15,800-odd; balance placed on fixed deposit" and then "balance of cash in hand" nearly £5,000. Then some interest on fixed deposits withheld pending decision of Secretary of State as to disposal - there is a decision of the Secretary of State going to be made; then Banaban Provident Fund 1931, stocks £8,300, F.D.R £11,700; amount since placed on fixed deposit £9,000; appreciation of stocks nearly £1,000; investment of interest earned £2,600-odd, making a total of £32,857. Banaban landholders (Mining Area) £22,500 (interest earned on fixed deposit paid annually to owners concerned)".

"In my confidential despatch of the 9th April, 1934" - that is page 24 of Bundle 31 - "I attempted to outline the existing position with regard to the administration of Banaban Funds" etc; (reading to fourth line of (b) on page 8): "plus compound interest to date of repayment".

So your Lordship sees some more references to the old fund as a trust fund. They again may not have great weight, but there is one in the third line of (a) and one in the fourth line of (b). I need not read any more of (b), I can go on to (c).

THE VICE-CHANCELLOR: There is another one at the bottom of page 6 "Old Banaban Royalty trust fund".

MR MOWBRAY: Yes, my Lord. reading at (c) on page 8: "That the interest on the invested capital of the new fund be in future earmarked to meet the annual cost of direct public services by the Government in the interests of the Banaban community". Then I need not read any more of (c), that is figuring, and so forth.

I can go on to (d) on page 9: "That after any deduction made in accordance with the proposal submitted in the preceding sub-paragraph" etc; (reading to bottom of page): "received in respect of each successive financial year", and then he gives some details and there is some figuring about that, and I can go to (e) at the bottom of 11.

THE VICE-CHANCELLOR: He is going to leave out the children of Banabans who marry Gilbert and Ellice Islanders.

MR MOWBRAY: Yes. That was not the solution finally adopted. I will not take up time on these further considerations, I will go on to (e) at the bottom of page 11: "That except for the purpose mentioned in the preceding sub-paragraph (d), the reserve funds of the Royalties Common Fund should only be called upon to meet" etc; (reading to eight lines from the bottom of page 12): "and rights in favour of the community as a whole".

That is all I need to read of that. I would just like to comment upon the last sentence I have read. It is relevant on the question of ultra vires, if we ever come to that, of the 1937 ordinance because the Banabans' consent was sought by the Government - their consent to the new

A arrangement - and here we have Mr Barley saying "Well, unless you secure for the landowners something quite substantial they won't consent" and we say that the whole arrangement, including the arrangement for the payment of annuities, was part of the terms on which the Banabans consented to the 1937 settlement.

THE VICE-CHANCELLOR: I do not follow that. I do not follow how this particular passage helps.

B MR MOWBRAY: Mr Barley is saying that the landowners won't agree to whatever settlement is being proposed unless they get, or are assured, substantial payments from income, from the royalties, and that helps us to show that when the settlement was finally reached it was all one agreement with the Government and that the Banaban landowners consenting were only consenting as part of a package deal under which they got this.

C THE VICE-CHANCELLOR: But surely this is merely what the Resident Commissioner thinks is likely. His prophecies of the future do not seem to me to have any significance to anything. He may be right, he may be wrong. Is there some positive statement of fact that you rely on?

D MR MOWBRAY: He is saying the disposition of the landowners is that they would only agree to a new arrangement under which they were assured of something substantial.

THE VICE-CHANCELLOR: He is saying "I do not think the landowners will consent unless they get something substantial". All right, there we are, that is his psychological assessment of the situation. How does that psychological assessment assist your cause, that is what I do not understand?

E MR MOWBRAY: It helps to show that when they finally did consent, the terms of the arrangement, looking at it broadly, that they should have specified annuities was something that they considered important.

F THE VICE-CHANCELLOR: The Resident Commissioner is speaking early in 1936. How does his prophecy then prove anything about what actually happened when it came to settlement?

MR MOWBRAY: It does not prove what actually happened.

THE VICE-CHANCELLOR: But how does it help to show that somebody made a good guess, an informed guess? I just do not see how this really carries you anywhere at all.

G MR MOWBRAY: If your Lordship had a Banaban saying "I would not have agreed unless I had been promised that I would have had an annuity".

H THE VICE-CHANCELLOR: There would be one of the parties concerned saying what his state of mind was, and he is saying that after the event. This is someone simply giving a general opinion as to the future, as to what he thinks is likely. It is the most slender evidence.

MR MOWBRAY: Well, it is not as powerful as what I have just mentioned, but it does show, or helps to show, what the

Banabans' attitude was in 1937 when they agreed.

A I can go on to page 38. This is a 16(c) document. It is some Western Pacific minutes, and two-thirds of the way down your Lordship sees the beginning of the minute by Mr Vaskess in which he answers the criticisms of Mr Barley on page 5 about his not understanding how it could be in the long term interest of the landowners to take something as members of the community: "When writing paragraph 17 of 42" - that is page 88 of Bundle 31 - "I had in mind that if the signatories of the 1913 Agreement" etc; (reading to bottom of page): "they could not expect to retain those benefits and participate also in the benefits proposed for the community generally as a result of the later scheme".

THE VICE-CHANCELLOR: Whyever not ?

C MR MOWBRAY: Well, I do not know. "I find however that as 108 of the 154 landowners concerned in the 1913 agreement are also concerned in the land resumed in 1931" etc; (reading to end of paragraph 2).

D "Paragraph 3" - that is a reference to page 5 about the £20,000 sum being restored, and so forth - "The explanation is that once the 1913 agreement landowners had waived their claims" etc; (reading to line 10 of paragraph 6): "it might be as well that payments to children should be at half-rates".

E Then I can go to the next page, paragraph 8: "It is, I submit, clear that any settlement on the lines recommended in 48 will require the agreement" etc; (reading to end of paragraph). I was not able to indicate the question marks by tone of voice, but those last three sentences have got queries after them. Your Lordship sees the reference to the Secretary of State, he has to get it passed the Secretary of State first, and then there certainly is a disposition, at any rate on the part of Mr Vaskess, to conceal things from the Banabans. It is not quite clear what he is concealing, except that he refers to possible litigation and it is really the landowners' rights under the 1928 ordinance, presumably, or under the 1913 agreement, or both.

F On 42 we have the Assistant High Commissioner's minute on the same subject. It is Mr Barton and it is a 16(c) and 16(d) document: "Sir, We have discussed the method of dealing with the Banaban phosphate" etc; (reading to the words): "Get home Mr Barley's schemewith your riders" - pausing there, that seems to be putting it up to the Secretary of State - "(b) Say that it was clear that in this there was no lasting solution" etc; (reading to centre of page 44): "competitive marriage ceremonies" -----

THE VICE-CHANCELLOR: Is it "competitive" ? It seems an odd word to use.

H MR MOWBRAY: Yes, competing in display, perhaps. "... a native bride being put on a bicycle on which were plastered a large number of £1 notes" etc; (rrading to end of minute).

A I just turn back for a moment to page 43 about Mr Maude's reported views on the ownership of the phosphate, "(a) The Banabans definitely have individual tenure of surface rights, (b) They had no conception of the surface owner owning the subterranean rights." In fact they have caves there which are owned by people who do not own the surface. These caves are used for water purposes".

THE VICE-CHANCELLOR: That does not amount to much.

B MR MOWBRAY: No, that is what our submission will be, the fact of communal or family ownership of caves does not prove there is no ownership of anything under the surface. Then he goes on and argues that even if the Banabans had mineral rights "this would not generally be held to include 'new' minerals as phosphate or radium". Well, actually it cuts the other way, because they did not know that a mineral had any use at all until 1900. So there cannot have been any ancient custom about minerals separating them from the surface, and we say it puts the whole thing upside down to say there is a custom separating what is under the surface from what is on the surface.

C THE VICE-CHANCELLOR: What is the distinction between "new" minerals and old minerals ?

D MR MOWBRAY: I do not know my Lord; all minerals would be new to the Banabans.

THE VICE-CHANCELLOR: You get into one question: new to whom ?

E MR MOWBRAY: Yes. They did extract stalactites for making fish hooks, that is quite right, but where it takes you I do not know.

F Then I can go on to page 61. This is a confidential despatch from the Acting High Commissioner to the Secretary of State. It is a 16(c) document. It sets out the history at some length and I can go to page 66, the first break: "In view of the rights conferred by the 1913 agreement" etc; (reading to paragraph 8): "support Mr Barley's recommendations but subject to the modifications which follow". The wording there was reproduced at a subsequent meeting between the High Commissioner and the Banabans - the wording in that quotation "to waive their individual interest and rights in favour of the community as a whole" - and we place some importance on that phrase as meaning that the trust was not extinct but that it was the beneficiaries who changed.

G Reading on from the last break of paragraph 8: "It will, however, be seen that I make a general reservation in paragraph 10 to 15 of this despatch in the hope that full consideration may even now be given to the future of the Banabans. The modifications I would make are" - and these are the Vaskess qualifications which your Lordship saw in Mr Vaskess's minute: "It is open to doubt whether any such 'earmarking' would serve a useful purpose. The services have to be paid for, and it is immaterial whether the expenditure is met nominally

from royalties or from interest received on investments, especially in view of the adjustments between the two sources which are contemplated in the concluding sentence.

A "Recommendation (d); I am strongly opposed to such payments being made on too liberal a scale" - your Lordship remembers the suggestion was that children should be paid half.

B Then over on 69: "I prefer also that, for a few years at any rate and until the results are clearer, the total amount distributed annually as annuities should be limited to a fixed percentage of the royalties received", and I do not think I need read any more of that despatch.

C I can go back now to page 60, which bears the same date. It is a petition on behalf of the Banaban community by Rotan. It is a 16(c) document: "We, the Banaban community, have prepared this letter" etc; (reading petition). It does not say what the petitions are but your Lordship will find that at page 76, which is the next document.

THE VICE-CHANCELLOR: Who is this addressed to ?

D MR MOWBRAY: That is also considered in the letter. It was considered to be addressed to the highest authority which controls the destiny of the Banaban community, and it was sent straight on to the Secretary of State as well as to the High Commissioner.

E Page 76 is a 16(c) document too. The petitions were made orally, your Lordship sees in this letter: "With reference to my confidential despatch of the 12th February" etc; (reading letter). He does not suggest what the answer ought to be, but your Lordship has there a reference to the Secretary of State as the highest authority which controls the destiny of the Banaban community.

F On page 78 we come to some Colonial Office minutes considering Rotan's letter. Before I read them, I think I should take your Lordship to page 89 to see some of the intervening correspondence. Page 89 is a personal letter from the Assistant High Commissioner to Sir John Shuckbrugh. It is a 16(c) document: "By the mail which left here on the 21st August" etc; (reading letter). It is a personal letter asking for a speedy decision but your Lordship will see there is a reference at the beginning to the Gilbert and Ellice Islands Colony Administration holding the royalties in trust.

G Then there is the despatch of the same date, the more formal despatch. It is a 16(c) document too. He invites attention to the Resident Commissioner's confidential despatch covering Rotan's letter, and says: "I have been unable to trace the various 'petitions' referred to by Rotan" and I do not think I need read any more of that and we can go back to page 78 where these matters are discussed.

H The first minute is by Mr Rundell: "I have not yet had time to go into this thoroughly and some of the old pp. referred to are at Canterbury" etc; (reading to the words): "Before this can be done the Secretary of State's approval in principle is essential". That is an important paragraph,

in our submission. Willing and knowing consent was needed after unreserved consultations, the Banaban landowners did not know that all justiciable rights were going to be taken away from them by the 1937 ordinance.

A THE VICE-CHANCELLOR: Why is this important? If that is the law it is the law, and it cannot make it any more the law or any less the law by knowing what was minuted.

MR MOWBRAY: That is true.

B THE VICE-CHANCELLOR: It shows that someone in the Colonial Office was applying his mind to the vital criteria. Apart from that I do not see that this is anything except shorthand repetition of what is the law.

MR MOWBRAY: If your Lordship pleases.

C On page 86 is something entirely different. These are the Gilbert and Ellice Islands estimates for 1936-37. They begin with a general warrant to the Treasurer to disperse money in accordance with the estimates, and then on page 81 your Lordship sees the estimated revenue, £39,000, and then various other sums added in: appropriation from surplus funds £750, contributions from Banaban Fund £2,220, and various other sums, making £69,193, and estimated expenditure the same amount.

D Then I can take your Lordship on to page 86, which is the other reference to the Banaban Fund. There are three appendices there. The first is expenditure on Banaban Hospital at Ocean Island; the second, Appendix V, expenditure on miscellaneous Banaban services; and Appendix VI expenditure on Banaban education; and with respect to contributions from Banaban Fund of £473, £1,527 and £220 I make those add up to £2,220 which is just the same as the contribution from Banaban Fund referred to on page 81. So it looks from that as though that contribution was going straight through the Colony Accounts on to these Banaban purposes.

E On to page 89: your Lordship has seen that, and up to 92 your Lordship has seen. I can go to page 99. This is a personal letter from Mr Gaze to Mr Gaye in Melbourne. It is a 16(c) and 16(d) document: "My dear Gaye, Thanks for your letter of the 27th August. I am glad to hear that the new High Commissioner impresses you favourably. The 'Strathnaver' by which he is to travel, is due in Sydney on the 12th November".

F Then going to the next paragraph: "One of the things which I think should be taken up again on this visit" etc; (reading to end of paragraph) I read that to show the continued interest of the BPC in the Banabans getting a square deal from the royalties. I need not read any more of that; conceivably our expert may want to refer to it.

G I can go on to page 105. This is a letter from Mr Gaye, the United Kingdom Commissioner, to Mr Jones of the Colonial Office. It is a 16(c) and 16(d) document and I had better read it all: "My dear Jones, You will remember that when we met" etc; (reading letter).

At page 111 is a letter from Mr Gaze in Melbourne to Mr Gaye in London. I just read the second paragraph: "Phosphate land- Ocean Island. I have read with interest your letter to Mr Jones dated 19th October and his reply. I hope he will not communicate to anyone on this side what you have said to him about our requiring more land shortly, as if this should become the subject of discussion at Ocean Island I think our difficulties will be increased".

On page 113 the reply, paragraph 2: "I entirely agree with you that it is most undesirable that the probability of our requiring more land in the near future should be known to the Banabans at present" etc; (reading paragraph)

I can go to page 117. This is a Colonial Office note by Mr Arundell. It is a 16(c) document and he deals with the history for a long way and I think I can go to page 123: "On page 6 of his despatch Mr Barton comments on the Secretary of State's telegram at No.43" etc; (reading to the words): "Naturally he finds difficulty, because that statement" I think it is "and the 1913 agreement is entirely inconsistent", but I cannot read it. I do not think anything turns on it. "That practice was, after deducting any sums required for the maintenance of Banaban services" etc; (reading to the words): "and to pay the interest thereon bi-annually to the Banabans for distribution by native custom among the individuals whose land was alienated in 1913" - that is one of the places where it is assumed it is the 1913 landowners who got the royalty. "The main purpose of the 1913 agreement was to constitute" etc; (reading to the top of page 124): "and must be recognised in any new plan of administration adopted".

I do not think I need read the next two paragraphs, I can go to the last break on this page: "These provisions" - that is section 6(2) and 7 of the 1928 ordinance - "resemble those of K.R.7/1927" etc; (reading to bottom of page): "for loss of surface rights", and then he puts a footnote against "royalties": "This, of course, does not include the royalty payable to Government under the licence from the Crown of 1902". So there is a reference to the two royalties in the same breath.

THE VICE-CHANCELLOR: Well, there is a somewhat different emphasis.

MR MOWBRAY: And he says it is not included, and we would agree that it was not included in the 1928 ordinance.

Then on page 125: "The land acquired in 1931 amounted to 150 acres of mining land" etc; (reading paragraph)

Then I think I can go to page 128, the first break: "In 1933 the Acting High Commissioner sided with Mr Grimble on this minor point" (reading to the words): "The recommendations that we are now asked to approve are", and then he sets them out and your Lordship has seen those. I cango to the next page, 129: "These recommendations embody the essential points of Mr Grimble's proposals" etc; (reading to end), and those initials are Mr Arundell's initials.

That is a note by Mr Arundell. On page 130 is a minute

of his attaching that note, and it is a 16(c) document. I need not read the first part of his minute.

A THE VICE-CHANCELLOR: Do you not need the second manuscript note ?

MR MOWBRAY: Yes. "It has always been recognised that the Banaban's rights extend to full ownership of land and minerals".

THE VICE-CHANCELLOR: That is not initialled, but the previous note is HD.

B MR MOWBRAY: That is Mr Duncan. It looks rather like Mr Arundell's writing, on page 134.

I can go to page 131, just over half-way down: "Round about the time of the acquisition of new mining land in 1931" etc; (reading to top of page 132): "in 1931 as compensation for loss of surface rights".

C THE VICE-CHANCELLOR: So that the new landowners were going to get something for their surface rights.

D MR MOWBRAY: There is a sidenote at the bottom of 131: "Those who part with land in 1913 received compensation in cash" - at least, my guess is "cash", underlined. The original does not help much, but that is my guess of what the note on 131 says.

E Then over on 132: "In his minute of the 9th November Mr Jones raises the question of the interpretation to be placed upon Ordinance 4 of 1928" etc; (reading to bottom of 132): "it is far better to tackle the question now before it becomes acute". Then he suggests certain telegrams, and so forth, and perhaps your Lordship would just like to read the handwritten note at the end: "I mentioned this today to Mr Macdonald who has spent some time on Ocean Island. He did not think the Banabans would agree to move. He also mentioned that the Banabans were dissatisfied because the Naurians are paid more than they out of royalty funds".

F On page 135 there is a minute of Mr Duncan, who seems to be a legal adviser: "This is a very complicated matter, but the short point on which I am asked to advise is whether the provisions of the Mining Ordinance 1928" etc; (reading to end). So your Lordship sees Mr Duncan said that even if the landowners had agreed the Resident Commissioner could not comply in the face of the 1928 ordinance.

G THE VICE-CHANCELLOR: I suppose there is nothing to stop the landowners setting up a new trust.

MR MOWBRAY: I suppose not, my Lord, or assigning their interest.

THE VICE-CHANCELLOR: A mere consent by the surface owners in question is one thing, a new trust set up by the surface owners would presumably be another.

H MR MOWBRAY: Presumably, yes. Then he adds a postscript: "I have not dealt with the second question in (ii) of Mr Jones' minute" etc; (reading to end) I will see if I can find Mr Jones' minute.

THE VICE-CHANCELLOR: It is not in chronological order if it is 9th November, 1936. 109 is the 23rd October and 113 is the 13th November.

A MR MOWBRAY: We do not seem to have got it, I am told.

Then at 138 there is a telegram from the Secretary of State to the High Commissioner. It is a 16(c) document: "I am advised that the Government is precluded by express terms of Ordinance No.4 of 1928" etc; (reading telegram).

B Would your Lordship take Bundle 31. At page 1 the High Commissioner passes on to the Resident Commissioner the telegram your Lordship has just seen, and on page 2 he says: "If you concur please proceed with explanation to owners as directed by Secretary of State and endeavour to obtain their consent".

C On page 3 the Resident Commissioner replies: "Before approaching Banaban owners it would be of great assistance to be in a position to inform them from what fund it is proposed to meet the annual cost of public services (please see my despatch of 12th February paragraph 6(c) and Barton's despatch of the 5th August to the Secretary of State, paragraph 8). Intimation of Your Excellency's views on the point would therefore be appreciated".

D THE VICE-CHANCELLOR: The Secretary of State was telling the High Commissioner to proceed and he was telling the Resident Commissioner to go ahead. Was there some compact statement of what the proposal was? One would have thought that, before negotiation on something like this, one would really want to have some agreed document setting out just what your proposals are. Was there such a document?

E MR MOWBRAY: Yes, my Lord. Your Lordship will see what is being proposed at Bundle 32 page 61. That is the beginning of Mr Barton's despatch. He says on page 67 he supports Barley's recommendations. It is paragraph 8 on page 67: "I am forced by the past history of the matter to support Mr Barley's recommendations subject to the modifications which follow", and then there are those modifications. There is not any properly collected version.

F THE VICE-CHANCELLOR: What I had in mind was this: there is sufficient argumentative material here as to what is the best thing to do and one would have thought that before going into any sort of negotiations one would want to have a simple document avoiding all argument, simply saying "The proposals are 1, 2, 3, 4, 5 and 6".

G MR MOWBRAY: Yes. That was not done - nothing quite like that.

H THE VICE-CHANCELLOR: I just wanted to make certain there was not something like that. You can take the Resident Commissioner's suggestions and you can take the variations to the Resident Commissioner's suggestions and when you have worked out what that comes to you have got the basis on which the Resident Commissioner is proceeding.

A MR MOWBRAY: Yes, my Lord, that is right. The Resident Commissioner's recommendations start at page 7 of Bundle 32. In paragraph 6 of that despatch he sets out (a), (b), (c), and so forth, and then your Lordship sees Mr Vaskess's qualifications. Perhaps it was not quite as inconvenient as it seems to us, because the Resident Commissioner had made those recommendations himself and would have had them in mind.

B THE VICE-CHANCELLOR: Certainly. I fully follow that, but I just wanted to know whether there was any other document somewhere setting out under headings just what it was that was proposed.

C MR MOWBRAY: We have had, on page 3, the Resident Commissioner's request about out of which fund the public services were to be paid for, and on page 4 we have the High Commissioner's reply: "the proposal in the correspondence to which you refer is that Banaban public services should be met from the Royalties Common Fund. I agree. Unless you have good reason to urge otherwise you should proceed accordingly".

D On page 8 there are some notes of discussions with Mr Gaye, the United Kingdom Phosphate Commissioner, at His Excellency's office on the 18th February, 1937. That is the High Commissioner. There was a new High Commissioner, Sir Arthur Richards, and I can go to page 15. They were talking about what should be done about the future, the life of the phosphate, future financial policy generally, and reading from the top of page 15: "His Excellency mentioned the possibility of building up a reserve fund for when the phosphate would be worked out" etc; (reading to bottom of page): "Mr Gaye stated that the local relations with the Administration in the Gilbert and Ellice Islands Colony were very satisfactory".

E Your Lordship remembers I think I pointed out the provision for payment of interest at 6% on the Government's £3,500,000 contribution to the Commissioners and the sinking fund. That is all I need to read of that, and I can go on to page 18.

F THE VICE-CHANCELLOR: We will do that at 2 o'clock.

(Adjourned for a short time)

A THE VICE-CHANCELLOR: Mr. Mowbray, could you help to see if I have the picture in perspective. We are coming up to the proposed rearrangement of the funds, and I want to see that I have followed correctly what the funds are that are going to be rearranged. There may be some details in this that you will want perhaps to think about or look up and so on, but I want to put before you what seems to me to be the position so that if I have got anything wrong I can be put right at a relatively early stage.

B There seem to be four separate funds. The first of those, called in some documents the old Banaban Royalty Trust Fund was essentially a fund 1913 to 1931. When I say 1931 I think the new royalty had started in the beginning of July, 1931, but that was a date I was not clear about. That can be checked, but I am calling it 1931 at the moment. This was a fund fed by the 6d. royalty from 1913 to 1931.

MR. MOWBRAY: Yes.

C THE VICE-CHANCELLOR: That was a fund where the interest was paid to the Banaban authorities for distribution among the Banaban landowners and that seems to have been treated as being for the Banaban landowners who transferred their land under the 1913 agreement.

MR. MOWBRAY: Yes.

D THE VICE-CHANCELLOR: Those who had previously transferred their land under the old P & T D's got whatever the P & T D's gave them, but they had no part of this fund. That is on the credit side. Then that fund had two things taken from it. First, at any rate until 1931, moneys were taken from that fund for Banaban services.

MR. MOWBRAY: Yes.

E THE VICE-CHANCELLOR: Secondly, there was the £20,000 taken from it to start what became known as the Banaban Provident Fund. From the useful document in bundle 32 at page 6 - we need not trouble to look at it - I see that in 1936 the total amount to the credit of that fund was a little under £30,000.

F Then secondly, there was the new Banaban Royalty Trust Fund, as it was called in some documents, from 1931 onwards. This was the 8½d. a ton royalty credited from 1931 and as from the setting up of this new fund it was this new fund rather than the old fund that was resorted to for payment for Banaban services. That fund seems to have been simply kept; apart from dipping into it for paying for Banaban services, it was not distributed to anyone, and there was the fund building itself. It was, in effect, for the time being at all events until the new arrangements were made, simply being accumulated.

MR. MOWBRAY: Or at any rate piled up.

G THE VICE-CHANCELLOR: Yes, and again by 1936 that was a little over £20,000.

Thirdly, there was the Banaban Provident Fund which started off life with £20,000 taken from the Old Banaban Royalty Trust Fund and that was fed by a 2d. royalty which was to go on until the fund had reached £175,000. The fund was being accumulated at compound interest.

MR. MOWBRAY: Yes.

H THE VICE-CHANCELLOR: So that was simply building itself up. Again, nobody was being paid anything out of that fund. That was essentially the provident fund to provide for the future of the Banabans, whether by way of a new island, or whatever else.

A Lastly, there was the fund which was called in some places the Banaban Landowners' Fund. This consisted of the £22,500 for the purchase of the 150 acres which was the subject of the 1931 transaction and the 150 acres at £150 per acre. Of that fund the capital was retained intact, but the interest on that capital was paid to landowners whose land was taken under the 1931 transaction.

I had forgotten to say that the third fund, the Provident Fund, had reached just under £33,000 by 1936.

B The fourth fund was still of course £22,000 because the interest was going to the 1931 landowners.

C Those were the four funds that had to be juggled with in this rearrangement, and one of the proposals was to take the first two, that is the Old Banaban Royalty Trust Fund and the New Banaban Royalty Trust Fund, the 6d. fund and the 8½d. fund and amalgamate them into one common fund. As regards the Provident Fund, the third of those funds, it was proposed to take the £20,000 out of that and pay it back into the Old Banaban Royalty Trust Fund which was going to be amalgamated. Those were two of the proposals. There were of course others.

MR. MOWBRAY: Quite a lot of others, yes.

D THE VICE-CHANCELLOR: But that is the backcloth against which these rearrangements were going to operate. That is what they had to deal with. I am sure your junior has been taking a diligent note and if there is something wrong with that you can either tell me now or perhaps when I sit tomorrow. I just wanted to have a brief conspectus in front of my eyes when we go through these rearrangements.

Mr. MOWBRAY: I do not hear anything wrong with that as your Lordship says it, but we will look at it overnight.

E THE VICE-CHANCELLOR: I will put it down that you provisionally think it is right. The trouble with a case like this is always the problem of seeing the wood despite the manifold trees. Thank you, Mr. Mowbray.

F MR. MOWBRAY: We were looking at bundle 33 and I next want to refer to page 18, which is a telegram from the Officer in Charge of Ocean Island to the High Commissioner and that is a 16D and 18D document. (Reads telegram).

There are some notes of discussion at page 20 at which the High Commissioner and Mr. Barley were present. This is a 16D and 18D document. (Reads notes.)

G The next is page 22. This is a 16D and 18D document. These are notes of a discussion with Mr. Gaye, the United Kingdom Phosphate Commissioner on Suva. (Reads list of those present). I can take your Lordship to page 30, paragraph 22. They are talking about commuting the tax payments of the BPC. Paragraph 22 says: "His excellency stated that if commutation had been necessary it should have been a fixed sum." At that moment the BPC were guaranteeing the deficit, whatever it was. "The present arrangement" etc. (reading to the end of paragraph 23.) That is all I want to read of those notes, and I can now go to some notes of some further discussions between the High Commissioner, Mr. Barley and Mr. Gaye, and the Secretary, Mr. Vaskess at page 44. (Reads first paragraph.) Then at page 46 in these minutes it says: (reads paragraphs 10 and 11). I need not read more about that meeting, nor need I read page 49 or page 50, which is another minute by Mr. Vaskess.

H

I will go to page 53, a telegram from the High Commissioner to the Officer in charge of Ocean Island saying: "Confidential, your telegram No.40" - that is page 18 - "presumably it will be necessary" etc. (reads telegram). (d) was payment in place of (c), graduated annuity to landowners in both 1913 and 1931 areas, and then they got between £2 and £10 per head depending on the size.

THE VICE CHANCELLOR: And the High Commissioner is saying presumably that would also extend to those who have not handed over their land yet, they would have the land and the money too.

MR. MOWBRAY: That is answered at page 57. At page 54 Mr. Barley, who at that time was in Auckland, sent a telegram to the High Commissioner. (Reads telegram).

Page 55 is from the High Commissioner to the Secretary of State and is a 16C, 16D, 18C and 18D document. (Reads telegram).

Page 56 is also 16C, 16D, 18C and 18D and is a telegram from the Secretary of State to the High Commissioner saying: "I concur."

At page 57 there is another telegram from the officer in charge to the High Commissioner saying: "Confidential, your telegram No.37" - that is on page 53 - "it was with this consideration in view that unequal spacing of categories was suggested." That is that future landowners who will hand over land in future should be included. He says: "It was with this consideration in view that unequal spacing of categories was suggested". That is the spacing of the landowners' payments from £2 to £10, not according to acreage, but "according to cumbersome, and therefore fallible; semi-mathematic and semi-graphic computation" etc. (reading to the end of the telegram).

THE VICE-CHANCELLOR: I do not understand that.

MR MOWBRAY: No. There is some complicated, as he says, cumbersome and semi-mathematic, semi-graphic computation. He goes into it subsequently, and I do not think I need take your Lordship through that. I can go to page 62, from the High Commissioner to the officer in charge. Telegram 52, which is referred to there is page 57. (Reads page 62/63).

I need not read 64. On page 65 the Officer in Charge telegrams to the High Commissioner "Confidential, your telegram No.46" - that is the one on 62 - (reads telegram).

Would your Lordship turn next to page 72. (Reads telegram). My friend reminds me that there are some accounts of the Banaban Fund at page 66. They are a 16D and 18D document.

On page 67 we have a summary, not quite as convenient as the one before, but your Lordship sees reference to school fees and at the bottom there is reference to reimbursement account, education, labour, etc. Your Lordship saw those in the Colony's estimates, but here they are shown in the Banaban Fund.

THE VICE-CHANCELLOR: This is simply talking about "the Banaban Fund." If I had to guess, I would say that is probably No.2, the new Banaban Royalty Trust Fund.

MR MOWBRAY: Yes.

THE VICE-CHANCELLOR: Because the old Banaban Fund, I think, ceased to yield anything serviceable after the 1931 transaction, so it must be this new one.

A MR. MOWBRAY: Yes, but that point is referred to on page 4 of this bundle, though rather more for the future than for the present. That says: "The proposal in the correspondence to which you refer is that Banaban public services should be met from the royalties common fund."

THE VICE-CHANCELLOR: There was a proposal to amalgamate the old and the new and that had not happened yet.

B MR. MOWBRAY: That is true. Now I can pass to page 73, from the Secretary of State to the High Commissioner saying: "Confidential. Your telegram No.17" - that is page 49 - "I approve" etc. (Reads telegram). I do not think I read page 49, but that was about converting things to Australian currency and your Lordship need not be concerned with it.

C I turn now to page 77. This is from the High Commissioner to the Secretary of State and it is about the commuted taxation proposals. I read from paragraph 2. (Reads paragraph 2 and 3). There is a reference to the Secretary of State deciding on the expenditure of the Colony. (Reads first sentence of paragraph 4).

Turning on now to page 79, in paragraph 7 he says: (Reads paragraphs 7 and 8.) (Reads paragraphs 10 and 11 on page 81.) (Reads paragraphs 17 and 18 on page 84.)

D I go straight on now to page 99, a telegram from the Resident Commissioner to the High Commissioner which is a 16D and 18D document. He refers to telegram No. 46, which is page 62 of this bundle and he says: (Reads telegram). The reply to that is at page 103 and is a 16D and 18D document. (Reads telegram). The reply to that is page 104 and is a 16D and 18D document. (Reads telegram).

E Then we come to one of Mr Vaskess's minutes at page 106 which is a 16D and 18D document. He refers to that last telegram from the Resident Commissioner and goes on: "submitted with 77" - that is that telegram - "Mr. Barley's early optimism" etc. (Reading Mr. Vaskess's minute and the subsequent minute on page 109). The telegram referred to there is page 110 and is a 16D and 18D document. He refers to telegram No.82, which is page 104 and says: "Please state" etc. (Reads telegram).

F The reply is at page 111 and that is a 16D and 18D document. The answer is at page 134. (Reads telegram at page 111).

I can now go to the minutes on page 129 which are minutes by Mr. Vaskess. It is a 16C and 18D document. (Reads minute).

At page 132 there is another minute. (Reads minute at page 132). Then the High Commissioner writes a minute at page 133. (Reads High Commissioner's minute).

G THE VICE-CHANCELLOR: Is Mr. Macdonald's memorandum here, or is it not of importance?

MR. MOWBRAY: That was the undated one that your Lordship read in bundle 31 at page 134 Numbered 80. On page 132 of this bundle Mr. Vaskess says: "Submitted with 80" and this memorandum is headed "80" so it looks as though that is it.

H THE VICE CHANCELLOR: Then we can date it properly.

MR. MOWBRAY: Yes. It is at present in the wrong order.

THE VICE CHANCELLOR: So it is 1937, not 1934/35.

MR. MOWBRAY: Yes. At the top of page 132 one sees: "The Secretary, WPHC, Memorandum Submitted as Requested. PDM. 18.5.37". So that seems to be the date of the memorandum.

On now to page 134, a telegram from the High Commissioner to the Resident Commissioner which is a 16D and 18D document. He says:
(Reads telegram).

Then at page 147 there is a Western Pacific High Commission precis which is a 16D and 18D document all about the history except for the last paragraph which is a kind of summary of the previous history and which appears at page 156. (Reads paragraph 18 at page 156). That is all we have to read in that bundle.

THE VICE-CHANCELLOR: Nobody seems to have signed that. It is simply something within the Colonial Service in the High Commission Office.

MR. MOWBRAY: Yes. Now would your Lordship turn to bundle 34 and look at page 1 which is an extract from Hansard and which is a 16C, 16D, 18C and 18D document. (Reads extract from Hansard). It is true that there is a reference in the last four lines there to the proceeds of the 10 $\frac{1}{2}$ d. royalty being held on trust by the government and that a few lines higher up there is a reference to the difference between the government's other revenue and expenditure which must be the Gilbert and Ellice Islands Government.

On page 14 there is an extract from a letter from Mr. D. J. Bridger, Ocean Island, to Mr. Gaze. It is a BPC letter. (Reads letter and refers to note).

At page 17 one finds notes of a meeting with the Banabans which are a 16D and 18D document. The High Commissioner was there and the Secretary. They read: "The native magistrate" etc. (Reading to the words in paragraph 3) "Banaban community" - I think I have read that - "on the following conditions" etc. (Reading to the words) "send boys away".

(Continued on next page)

THE VICE-CHANCELLOR: What does (d) mean ?

A MR MOWBRAY: I do not know that it means any more than that there is to be no reduction if the royalties are enough to pay. "Other matters that they wish to put forward. They ask the High Commissioner to be allowed to send boys away for education in Australia or New Zealand" etc; (reading to end of paragraph 8).

B Then request that boys should be sent to Australia or New Zealand I need not read. New store in Ocean Island I need not read that. 11 Phosphate weights I need not read that. I will start again at 12: "Attachment of boys to Treasury and Secretary's Department" etc; (reading paragraph 12).

C I need not read 13 or 14. "15. Rotan spoke. He first of all thanked His Excellency for coming there and listening to them" etc; (reading to end).

D There are two passages in that record of the meeting. One is at page 19, where the Banaban spokesman said "that the Banaban landowners whose lands were alienated in 1913 and 1931 are ready to waive any rights to phosphate royalties in favour of the Banaban community" and the other is at page 27 at the top where it says the High Commissioner said that "the Secretary of State had decided that the benefits from the phosphate industry should go to the community and not to the landowners".

E I can go to page 70. This is a telegram from the Resident Commissioner to the High Commissioner: "every Banaban landowner concerned has now signified acceptance of terms of settlement" etc; (reading telegram)

F Mr Vaskess's minute of that comes on the next page: "His Excellency, Submitted with 83 and 84" - 84 is the last page, 70, and 83 is at page 17, that is the record of the meeting your Lordship has just seen - "83 is a transcript of my notes of the meeting" etc; (reading to bottom of page): "and then to proceed to put the settlement into effect by making the agreed payments".

G I should have told your Lordship this is a 16(d) and 18(d) document.

He goes on: "The question arises: from what date should the payments commence", and then he considers that and I can go to paragraph 8: "the necessity for legislation - see 56" - that is in Bundle 32- "will require to be borne in mind" etc; (reading to end).

Then the High Commissioner minutes: "I think we must risk it".

THE VICE-CHANCELLOR: Where are you reading ?

H MR MOWBRAY: I am sorry, my Lord, we have a new 73a and 73b to insert. "I think we must risk it" etc; (reading minute)

We can go to page 77, from the High Commissioner to

A the Resident Commissioner: "Your telegram No.160" - that is page 70 - "have you secured acceptance in writing signed and in such form that subsequent repudiation could not be maintained?" etc; (reading telegram)

On 79 from the Resident Commissioner to the High Commissioner, the answer. It is a 16(d) and 18(d) document: "I now hold separate document signed by every individual landowner concerned" etc; (reading telegram).

B I can go to page 86. This is the reply. It is a 16(d) and 18(d) document: "Your telegram No.165, it is considered that Rotan" etc; (reading telegram)

C Those are all telegrams, and now we get the despatch at page 88. It is a 16(d) and 18(d) document, a despatch from the Resident Commissioner: "I have the honour to forward, for purposes of record, a specimen copy of the document which every landowner except Rotan and his immediate family has signed to express his concurrence in the Banaban Funds settlement which is now nearing completion. A free English translation is also enclosed".

D Then if your Lordship turns to the English on page 91: "I being a landowner in the mining areas acquired by the British Phosphate Commissioners in 1913 and/or 1931 agree to the division of phosphate royalties which have accrued, or shall accrue, from that land as follows" etc; (reading to the words" etc; (reading translation). I will make some submissions about that in due course.

E On 92 we get someone submitting a draft amending the ordinance: "My draft seems almost too simple to be adequate. Perhaps the amending ordinance should have a preamble something like this: Whereas by an agreement entered into on the ... day of ... 1913 certain native landowners did And whereas by subsection two of section six and section seven of Ordinance No.4 of 1928 it is provided that And whereas by an agreement now entered into on the ... day of ... 1937 certain native landowners have ... Be it therefore enacted by the High Commissioner as follows".

F Mr Vaskess says: "His Excellency, I submit draft ordinance 88 for Your Excellency's consideration. A copy of the Mining Ordinance 1928 is attached in a black jacket. I understand that the Chief Judicial Commissioner is not expected back until about the 7th November".

G The High Commissioner says: "The draft ordinance seems to me to be adequate but I should like to have the opinion of the C.J.C before enacting it".

Then the High Commissioner says: "I should be grateful for an expression of your opinion on this draft. Mr Vaskess will attend at any time convenient to" -----

H THE VICE-CHANCELLOR: I think it is "Y.H", or Your Honour.

MR MOWBRAY: Yes - "convenient to Your Honour to explain its origin and possibly save Your Honour from a search through these voluminous papers. The matter is of some urgency".

A The reply: "Sir, I have revised the draft on the basis agreed at our Conference. Unless there is some reason to the contrary it seems preferable that directions as to application of money paid to the Resident Commissioner should be given by the High Commissioner rather than the Secretary of State".

B Mr Vaskess: "His Excellency, Submitted with minute 106 above the revised draft ordinance 89. His Honour discussed the draft with me on Saturday last. There is just the one point whether it should be the Secretary of State or the High Commissioner who gives the directions. In practice it is usually the High Commissioner after the Secretary of State has approved the expenditure in the annual estimates. I cannot see that the Secretary of State can raise any objection to its being the High Commissioner who is named in the ordinance".

C Then I can go to 103. This is a letter from Mr Macdonald to the Manager of BPC on Ocean Island of the 14th December. I should just remind your Lordship that the amending ordinance is dated the 10th December, so it comes in here.

THE VICE-CHANCELLOR: That is 93, is it ?

D MR MOWBRAY: That is right, my Lord. This letter is from Mr Macdonald, who is back as Administrative Officer on Ocean Island: "With reference to our recent conversation on the subject, I am directed by the Resident Commissioner to forward to you for your information a copy of the rules which have recently been framed to govern the payment of annuities to the Banaban community".

E Your Lordship sees 103 encloses some rules defining full and half Banabans. The rules are on pages 104 and 105 and I will just read the first few: "1. Payments are to be made twice yearly, on the first day of January and the first day of July in each year" etc; (reading rules 1 to 6 inclusive) I do not think I need read any more detail of the rules. It also includes people who leave and come back and so forth.

F THE VICE-CHANCELLOR: So a child of a half Banaban and a non-Banaban is a half Banaban and if that child marries a non-Banaban his child is still a half Banaban.

MR MOWBRAY: Yes. I do not think anything turns on that.

THE VICE-CHANCELLOR: What is the status of these rules ?

G MR MOWBRAY: I suppose they are a kind of interpretation of the agreement which the Banaban landowners signed on page 91.

THE VICE-CHANCELLOR: It is extraordinarily non-informative. Do you say this was agreed by the Banabans ?

MR MOWBRAY: No, my Lord.

H Then at page 106 we have a 16(d) and 18(d) document. It is a telegram from the Resident Commissioner to the High Commissioner: "sum of £4,340 paid out as general Banaban annuity on 10th December" etc; (reading telegram)

A THE VICE-CHANCELLOR: The only point at which the full Banaban and the half Banaban comes in here is with regard to residence on Ocean Island. If you reside on Ocean Island it does not matter whether you are a full Banaban or a half Banaban, you get the full payment. If you cease to reside on Ocean Island, then the full Banabans go on being paid, whereas the half Banabans cease to be entitled. Is that right?

MR MOWBRAY: Yes, that is it.

B On page 107 the Resident Commissioner to the High Commissioner: "I have the honour to ask that Your Excellency will be good enough to make payment to certain Banaban leper patients now at Makogai of sums due to them under the recently-inaugurated scheme of annuities to the Banaban community. The intended recipients, and the sums to which they are entitled are", and then the names are given there is £4 for children and £8 for adults. "The equivalent sum of £32 has been paid into Deposits, Sundries, at Ocean Island".

C At 108 we get a despatch from the Resident Commissioner to the High Commissioner. It is a 16(c), 16(d), 18(c) and 18(d) document and I will start with the first paragraph: "With reference to my confidential telegram No.214" etc; (reading first paragraph).

D I will read some of this because it is helpful as showing just what it was the Banaban landowners understood they were agreeing to.

THE VICE-CHANCELLOR: Yes, it is.

E MR MOWBRAY: "2. The final stage of this settlement opened on the 8th January" etc; (reading to the bottom of page 110): "This proposal was substantially agreed to by the Banabans and involved payments for royalty-bearing lands at the following rates", and then he set them out.

Just pausing there, perhaps : it is not so surprising because it is the landowners who would be entitled, the landowners whose phosphate had been taken.

F Reading on at 5: "The Acting Secretary was sufficiently encouraged by the attitude of the Banabans towards this modified form of settlement" etc; (reading to first paragraph on page 112): "The method of arriving at these estimates was so doubtful, and their accuracy so questionable, that I consider it desirable to recount in full the steps by which the resultant figures were obtained", and then he does so and I will not read that.

G We can go on to page 116, paragraph 8: "Official sanction of the general principles underlying the modified scheme was conveyed in your Excellency's confidential telegram No.46 of the 10th March" - that is page 62 of Bundle 33 - "and this general approval was passed on to the 'Committee' representing the Banaban interests" etc; (reading to the words, on page 118): "I enclose a copy of the rules finally decided upon and accepted by the community" -- your Lordship sees that.

THE VICE-CHANCELLOR: Yes.

A MR MOWBRAY: "... and bearing in mind these two desiderata, I do not think that any further comment is required" etc; (reading to end of paragraph 13) Just pausing there, your Lordship sees the reference there to "an intelligent native with too much knowledge" in the middle of that paragraph "or by an unintelligent European with too little". There is an idea there that too much knowledge, like too much money, is not good for the natives and it rather shows the disposition not to make full disclosure to the natives.

B THE VICE-CHANCELLOR: I wonder whether "knowledge" is being used there in relation to knowing the facts as opposed to learning some of them - a little knowledge is a dangerous thing?

MR MOWBRAY: Well, the truth of that is "a little learning".

C THE VICE-CHANCELLOR: It does exist in both parts.

D MR MOWBRAY: It does. "14. It should be noted that the payment of the 10th December is regarded as being in respect of royalties received during the financial year 1936-37" etc; (reading to paragraph 15): "In exercise of the permission granted in Your Excellency's confidential telegram No.72 of the 15th April" - that is page 103, Bundle 32 - "I decided not to proceed" etc; (reading to the words, on page 121): "they know the Commissioners to be interested in their lands or the funds derived from them", and I need not read the rest of that.

E THE VICE-CHANCELLOR: We have got this agreement now, apart from Rotan who is standing out on his own and his money is being paid into a bank account. Considerably later I think he drops his opposition, does he not?

MR MOWBRAY: Well, he drew out the money.

F THE VICE-CHANCELLOR: In effect accepting the status quo. Leaving that on one side, we have still got the four separate funds. We have got the agreement of all the landowners to drop their claims to payment either out of the Old Banaban royalty trust fund or out of the Banaban landowners' fund.

MR MOWBRAY: Yes.

G THE VICE-CHANCELLOR: Instead we have this system of the per capita payment plus the payment based on acreage, or roughly proportionate to acreage, to those landowners.

H MR MOWBRAY: Yes, my Lord, and you also have the change of the trusts of the royalties from the former owners to the community as a whole by the enactment of the 1937 ordinance. That really tidies it up for the future, and your Lordship remembers that semi-retrospective provision in the 1937 ordinance which ratified everything that had been done as if the 1937 ordinance had been passed at the same time as the 1928.

THE VICE-CHANCELLOR: There is no reason why the Banaban Provident Fund should not go on exactly as before.

MR MOWBRAY: That was the idea.

A THE VICE-CHANCELLOR: Building up and accumulating compound interest, waiting until it has reached £175,000. It has still got £20,000 in it and nothing is taken out.

MR MOWBRAY: It never got taken out, and in the end that money, or most of it, was spent on buying Rabi.

B THE VICE-CHANCELLOR: Then as far as the old Banaban trust fund, the new Banaban trust fund and the landowners' fund are concerned, is there now any difference as to what can be done with the money in those funds as a result of the agreement of the landowners and the enactment of the 1937 ordinance?

MR MOWBRAY: The landowners' fund is unaltered, my Lord.

THE VICE-CHANCELLOR: Yes, the landowners' fund stays, I am sorry.

C MR MOWBRAY: If your Lordship would look back to page 91 of this Bundle, your Lordship will see that the agreement expressly provides that the Provident Fund and the Landowners' Fund are not to be altered at all.

THE VICE-CHANCELLOR: So it is only a question of the two royalty funds.

D MR MOWBRAY: There are two royalty trust funds; one was from the 1913 6d royalty and we would say that the capital of that was held on different trusts from the capital of the 1931 8½d royalty fund, because we say that the landowners' rights exhausted the whole of the beneficial interest in the 1913 royalty whereas the 1931 royalties were held after 1937 on trust for the community as a whole.

E THE VICE-CHANCELLOR: That is under the ordinance.

MR MOWBRAY: Under the 1937 ordinance.

THE VICE-CHANCELLOR: So you say the two funds, the old and the new, remain separate?

F MR MOWBRAY: They were amalgamated in 1947.

THE VICE-CHANCELLOR: If they were intact, on your contention, held on different trusts, we have to consider what that entails.

MR MOWBRAY: I had not thought as far as that, my Lord.

G THE VICE-CHANCELLOR: No, you see, but that is where we are going, is it not, because if they are two trust funds held on different trusts, that is not a proper thing to do.

MR MOWBRAY: There was a further ordinance in 1948 and that contained some express trusts.

H THE VICE-CHANCELLOR: We will see that in due course.

MR MOWBRAY: What I have just been saying, and what I said first thing this afternoon we will see on the transcript and I will have a look at it.

THE VICE-CHANCELLOR: If you would.

A MR MOWBRAY: That had not occurred to me, my Lord.

Perhaps we can pass on to page 122. It is a 16(d) and 18(d) document. This is the reply to some of Rotan's letters: "Sir, I am directed by the Resident Commissioner to acknowledge the receipt of your three letters" etc; (reading letter).

B My friend asks if we have those three letters. The answer is "No", I do not think we do. That is all in this Bundle, my Lord. The 1937 ordinance is set out at the end.

(Adjourned until tomorrow morning at 10.30)

C

D

E

F

G

H