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IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION  
GROUP B

1971 R. No.3670

Royal Courts of Justice,  
Friday, 23rd January, 1976

Before:

THE VICE-CHANCELLOR

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ROTAN TITO

and

THE COUNCIL OF ELDERS

v.

HER MAJESTY'S ATTORNEY GENERAL

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

G 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.

H SPEECH - DAY FIFTEEN



A MR MOWBRAY: There were two questions your Lordship asked yesterday about the disposal of the annuity income from the 1913 royalties. One was did it all go to the landowners, and the other was in what proportions? The documents all assume that the annuity fund went to the 1913 landowners, and, as far as we know, that is what happened. It is what should have happened under the 1913 agreement and we are making enquiries to see if we can get some confirmation of that. I do not know whether we can or not. It is a slow process and we may be able to find it or we may not.

B THE VICE-CHANCELLOR: It may be something that does not matter. Do not go to any great effort to find it, I simply wanted to make certain that I had not misunderstood it. I had been assuming, from the documents, that the whole of that income went to the landowners, , but something that was said yesterday or the day before made me wonder whether my assumption was correct and, therefor , I asked the question. It was no more than that.

C MR MOWBRAY: That is the assumption in a lot of the documents. As to the basis of division among the 1913 landowners, I do not think there is any indication in the documents of the basis of division and I do not think we would be able to get any other information.

D THE VICE-CHANCELLOR: It simply went to the Banaban authorities and they divided it in some way.

MR MOWBRAY: Exactly. It looks a bit - in fact there were hints in some of the documents - as though the administration rather deliberately kept out of that.

E Turning to Bundle 29, would your Lordship go to page 11. That is a despatch from Mr Grimble on Ocean Island to the High Commissioner: "I have the honour to report that there was incurred in the quarter ended the 31st December, 1930, the expenditure of £15 charged against HeadXIII, Miscellaneous, now Subhead 18, in connection with the grant of a sum of money which, at the request of the Banaban community, I authorised to be paid to certain of their delegates during 1930, when there was a likelihood of their proceeding to Fiji with the object of interviewing Your Excellency" - your Lordship recalls there was the prospect of some expedition. "As the money had already been expended by the persons concerned on purchases preparatory to their departure, I was reluctant to call upon them for a refund of the amounts, which I now propose to recover from the Banaban Fund. I trust in the circumstances that Your Excellency will approve of the Special Warrant that has been issued in this connection".

H Then I can go to page 16. This is a letter of Mr Maude enclosing his report on the Native Lands Commission, and then follows at page 20 the account of Banaban land conveyances recognised and on page 22 those not recognised. Your Lordship is familiar with this. It is common ground between the parties. Nothing much turns on the customs recognised or not recognised in this case. The only thing that turns on it is that the individual plaintiffs own the title, and I do not want to read this again in this case, if we can agree your Lordship has already seen it.



A THE VICE-CHANCELLOR: Well, I have seen it and I have some general idea about it. I am not asking you to read it or anything like that, but do not assume that I have immediate familiarity with the circumstances under which a landowner's land might validly be conveyed.

MR MOWBRAY: It is not really the conveyances, it is more a question of descent. Very well, we will not assume that and we will refer to it if necessary.

B We can go on to page 32. This is from Mr Grimble to the High Commissioner and it is about the expected volume of exports: "With reference to paragraph 18 of my despatch No. 119 of even date, covering the Draft Estimates for 1932-33" etc; (reading letter). Your Lordship remembers that previously there was an indication that the export might be 150,000 tons in the previous year.

C Page 33 relates to Mr Grimble's report or memorandum in the 60's of Bundle 28. It starts at page 62. This is Mr Vaskis: "His Excellency. Submitted. The question now to be decided is how the Banaban funds are to be dealt with" etc; (reading to top of page 34): "The Resident Commissioner has set out his views at length in 5 and 5a from which it appears that the Administration is unable to avoid the recognition of individual rights of landowners" - and the reference there is 28-62.

D "Attention has been drawn to the Agreement of 1913 between the P.P Company and the native owners" etc; (reading to end of paragraph 2): "In short the 1913 lessors were to receive the product of the royalty from other owners' lands", and then someone has written - I do not know who it is - "If the crown owns the minerals this is unexceptionable" and someone else says "under (?)".

E Then 3: "The strict observance of the terms of clause 10 of the 1913 agreement would have meant the payment into the Banaban Fund of all royalties" etc; (reading to end of paragraph 6).

F THE VICE-CHANCELLOR: The answer is to be found in clauses 7 and 8 of the 1913 agreement.

G MR MOWBRAY: Would your Lordship like to look at that? It is in the PD Bundle at 32. 7 deals with handing over the first year's contribution, and 8 says after making a deduction it is to be applied for the benefit of the existing Banaban community. Your Lordship remembers that really only applied to the first year's contribution and not the subsequent years, and what Mr Vaskis is saying is it seems to have been applied to the capital of other years' royalties.

H Then reading on: "7. In 1925 the auditor raised the question" etc; (reading to end of paragraph 10): "We agree with all that, my Lord! 11. With regard to (a), it is now clear that the owner's interest in the land was a life interest only" - this is writing post-Maude - "It may be argued that, as the worked out land reverts to the native owner, the land is still there for the man's heirs and successors" etc; (reading to end of paragraph 12): "providing for medical services for the Banaban community generally".



A Just pausing for a moment, Your Lordship sees here Mr Vaskis talks here about the 1913 royalties being paid to the 1913 landowners although some of the phosphate had been taken from earlier land, if I may put it in that way. That was a thought which persisted with Mr Vaskis through various other memoranda which your Lordship will be seeing. In the end he recognises that very many of the landowners are the same people, which rather reduces the importance of the point. It does not take it away, but it reduces the importance.

B THE VICE-CHANCELLOR: That rather depends on the basis on which the royalty was being distributed.

MR MOWBRAY: Yes, and if per acre whether the earlier land was taken into account.

C He goes on at 13 on page 39: "I would now offer the following comments on 5a" - that is Mr Grimble's memorandum. 14. Paragraph 9(a). This apparent misconception of the purposes of the Banaban Fund is dealt with above. 15. Paragraph 10(b). Actually rights in the minerals below the surface? This point is dealt with further by the Resident Commissioner in paragraph 11(c). It is part of the 1913 agreement". Perhaps your Lordship ought to look at that.

D THE VICE-CHANCELLOR: Yes, I have got it out.

MR MOWBRAY: Paragraph 9(a) is about the payment of Banaban services out of the fund. Paragraph 20 is on page 69.

THE VICE-CHANCELLOR: First of all is paragraph 9(a) and then 10(b).

E MR MOWBRAY: Yes. The practice of 7 years has recognised the payment of surface values to the landowners. It says "Actually rights in the minerals below the surface", and we agree with that. Then paragraph 20 is on page 69, that is the trees: "The individual amounts are so small that it is hardly worth while withholding from the owners the capital sum - the interest would be negligible".

F THE VICE-CHANCELLOR: As far as trees are concerned, you can regard trees as being the fruit of the land, certainly as regards timber. Trees grow again and phosphate does not.

MR MOWBRAY: Yes. Then paragraph 27 is the £20,000 transfer: "The legality of this ... is open to question", we agree.

G Paragraph 28, the reserve money to be treated as Provident Fund. Your Lordship remembers he was treating what was left in the Banaban Fund as reserve money: "The disposal of this money is bound up with the question of the observance of the 1913 agreement".

Paragraph 29 is change of local law.

H THE VICE-CHANCELLOR: This is the former owners point.

MR MOWBRAY: Yes, this is the former owners point. The former owners entitled to the royalty were the individual natives,



A and we say that meant they were the owners of the phosphate as well: "The land has been resumed under the 1928 ordinance which gives the landowners certain rights, section 6(2). Can these rights now be equitably, or legally, taken away in part and conferred on others?"

B Then paragraphs 32 to 34 are rights created by contract. This is where Mr Grimble was saying what happened to the fund in which the landowners were entitled to the whole income: "This will depend on the decision taken with regard to the strict observance of the 1913 agreement.

C Paragraphs 35 and 36, page 73. Mr Grimble has quoted clause 10. He said the income from the invested royalties should be paid to the landowners in the proportion recommended by the Banabans themselves and then he proposes the £6 a year annuity: "I submit that to be equitable the individual shares should be roughly in proportion to the size of the individual holdings in the land. But it would, I suggest, be advisable to allow distribution on the basis adopted in the past by the Banabans themselves - whatever that may have been".

D Paragraph 37 is the other annuity payments: "This would appear to depend on the answer to the query in paragraph 19 above.

D Paragraph 38, every Banaban is a landowner whose land will be taken or has been taken. Grimble suggested they should all get annuities: "This too would appear to depend on the answer to the question in paragraph 19 above and also on the interpretation of 'former owner or owners'".

E Paragraph 42 deals with the cost of maintaining the Banaban services: "I submit that these services might perhaps, if necessary (that is, if it is decided that they cannot properly be defrayed from native royalties) be financed by a tax on all royalties and interest derived therefrom?".

F "Please see also Mr Neill's memorandum, especially paragraph 6 on the interpretation of the Mining Ordinance 1928. The fact remains that section 6(2)" - that is on page 79 of Bundle 28 and paragraph 6 is page 81. "The fact remains that section 6(2) provides that moneys payable by way of royalty shall be paid to the Resident Commissioner" etc; (reading to end). I should have told your Lordship that those minutes starting on page 32 are a 7(b) document.

THE VICE-CHANCELLOR: Starting on page 33. 32 is a letter from the Resident Commissioner, you do not want that?

G MR MOWBRAY: No, it is 33. That is a 7(b) document and it is the last one. It is a 7(b) document as tending to reinforce our argument that there were legal rights in the landowners.

H Then on to page 84. These are notes of a discussion at an interview between the High Commissioner and representatives of the BPC, including Mr Ellis, Mr Lodge, the United Kingdom Commissioner, Mr Gaze and Mr Maynard. It is about taxation of the B.P.C and I do not want to read very much of it, but there are some passages we rely on. I will start at



A the beginning: "Mr Lodge referred to his letter to Mr G.A Jones of the Colonial Office" etc; (reading to end of paragraph 2): "many important matters of administration requiring extra funds - salaries, living conditions, removal of headquarters, medical service, etc", and then a discussion ensued and we can take your Lordship to page 88, paragraph 11: Mr Lodge stated that they" - that is BPC - "were bound to sell at cost" etc; (reading to end of paragraph 15): "that the United Kingdom did not require her share and obtained her advantages from the undertaking indirectly" - that, incidentally, must be a reference to cheap food stuffs.

B "16. His Excellency stated that it was only fair that the natives of the Colony should benefit" etc; (reading to end of paragraph 21): "His Excellency thought that probably they would not, and Mr Lodge emphatically repeated they would never consider it".

C THE VICE-CHANCELLOR: He was suggesting an equal division between the Colony - not the Banabans, the Colony - and the farmers in Australia and New Zealand.

MR MOWBRAY: Yes. There was a three-way tug.

D THE VICE-CHANCELLOR: Of course. The British Government - using an indefinite term - had for a long while been in a very difficult position, dealing with the Commissioners as such, being, as you say, trustees of the funds for the Banabans, and also the Government of the Colony, and those three-way pulls would have pulled many a man off course.

E MR MOWBRAY: Yes, my Lord. It is three people with their interests and all this opens one's eyes to what one reads in the papers about North Sea Oil because one sees similar kinds of things going on now. It is just the same sort of thing.

THE VICE-CHANCELLOR: I am happy to think that North Sea Oil does not come within the terms of this inquiry!

F MR MOWBRAY: I was going to miss out about two pages and go on to page 93, if my friend agrees; "Mr Lodge stated that under an acceptable scheme the Commissioners would now be prepared to guarantee" etc; (reading to end of paragraph 32): "He asked how they proposed the revenue should be raised".

My learned Junior points out that page 10 is missing and we will ask the Crown if they can produce that.

G THE VICE-CHANCELLOR: I like paragraph 33!

MR MOWBRAY: Yes - "On Ocean Island as Commissioners think fit, on other islands as the Government think fit". You can see who is the boss there.

H Reading on at 34: "His Excellency enquired why it should be necessary to continue levy of Custom duty on Ocean Island" etc; (reading to end of paragraph 35).

Then I can go down to 38: "Mr Lodge here stated that



A they would not be guaranteeing the revenue but the expenditure on the present Scale", etc; (reading to end). Your Lordship knows that in the end an agreement somewhat on those terms did eventuate.

I can go over to 95. This is a petition from the Banaban community, written by Rotan: "Sir", and it does not quite appear who "Sir" was.

B THE VICE-CHANCELLOR: It is signed "Your Lordship's most pitiable people", so it is probably either the Secretary of State or the High Commissioner.

C MR MOWBRAY: It was subsequently interpreted, I think, as being addressed to the highest person having any control. If your Lordship would look back at page 81 - and I am coming back to that - they took it as being addressed to the Secretary of State. I am coming back to the minutes at page 81 because they considered this matter.

D "We, real Banaban community, have the honour to apply respectfully" etc; (reading to end of second paragraph): "They also make out the price for this land as follows", and then he sets out the prices. "They forced us in a frightful way so that we will give away our land and to agree with satisfaction to the above prices" etc; (reading to end).

E It is considered in the Colonial Office minutes which start at page 81, about the middle of the page "3 Banabans (Memorial re prices paid for lands and trees). Mr Neill had a good deal of unfavourable comment to make on Rotan, the writer of this petition. ? return to the writer under cover of" something. Then this is Mr Jones now: "The proper course would be to require this to be forwarded through the correct official channel" etc; (reading minute).

I can go on again to page 98.

F THE VICE-CHANCELLOR: When he is talking about the compensation being fixed by arbitration, that is so as regards the surface rights but not, of course, as regards the royalties.

MR MOWBRAY: No, that is right, my Lord.

G Page 98 is a telegram from the Resident Commissioner to the High Commissioner: "With reference to paragraphs 21 to 25 of memorandum enclosed in my confidential despatch 27th February, 1931" etc; (reading telegram).

On page 100 the Resident Commissioner writes: "Banabans pressing for copy of arbitration award. May I please have instructions?" and on 101 the High Commissioner replies: "Banabans may be furnished with copy of Arbitration award".

H THE VICE-CHANCELLOR: Then there is another copy of the Banaban petition.

MR MOWBRAY: Yes, it is a duplicate; it duplicates 98 and 99. I need not read 105 or 106.



A At 107 there is a letter from the General Manager of BPC in Melbourne to the High Commissioner. It is about taxation and it was answered by the Colonial Office at page 99 of Bundle 30, for your Lordship's note. I do not want to read it and I can go on to page 112.

On page 112 begins a memorandum by Mr Neill about what is to be done with the Banaban Fund.

B THE VICE-CHANCELLOR: Just turning over, 110 and 111 are about the £12 paid to the Banabans.

MR MOWBRAY: Yes, I should have referred to that.

C This memorandum is the 18th October, 1932: "The question of the administration of Banaban funds is complicated by the terms of the agreement entered into in 1913" etc; (reading to end of paragraph 3): "It is therefore suggested that they are estopped from challenging payments made".

D That passage is referred to by another memorandum of Mr Vaskis at page 91 of Bundle 31. I think he refers to it as a justification. Perhaps you would not call it an estoppel, but if that was so - as it may well have been - there would be acquiescence and by now, after all this time, I suppose there would be laches in the sense of mere delay.

THE VICE-CHANCELLOR: Laches is never mere delay. Laches, surely, is always delay plus ?

MR MOWBRAY: Well, let us not go into that, my Lord!

E "4. The difficulty, as it present itself to me" etc; (reading to end of paragraph 9): "The Fund, referred to as the Common Fund, is financed by a royalty of 8½d per ton exported. The lowest estimate of annual income from royalty is £7,000. It may, however, amount to as much as £14,000".

F THE VICE-CHANCELLOR: He is talking about two funds. What about the old fund, the original Banaban Fund? He cannot be treating that as part of the Common Fund.

MR MOWBRAY: No. It is in paragraph 10: "At the present time a sum of approximately £18,500 remains in the old Banaban Fund after the transfer of £20,000 from this Fund to the new Provident Fund".

G THE VICE-CHANCELLOR: So he is treating the old Banaban Fund as being part of the Common Fund. Is that it ?

MR MOWBRAY: Well, he suggests an amalgamation.

THE VICE-CHANCELLOR: At 9 he says "The Fund, referred to as the Common Fund, is financed by a royalty of 8½d per ton exported". That is a new thing.

H MR MOWBRAY: In fact he does make a proposal about this later.

THE VICE-CHANCELLOR: I see. So he has not at this stage touched on the old Banaban Fund.



A MR MOWBRAY: No. It looks as if 10 might have been inserted as an after-thought.

B "12. Under the 1913 Agreement, as pointed out above, individual payments were made to owners" etc; (reading to beginning of paragraph 14): "The Act does not, in my opinion, recognise individual ownership of mineral rights" -- well, that is what he said. "Section 6(2), however, is difficult if the former owners successfully claimed individual rights" etc; (reading to top of page 118): "... would in effect be tantamount to a derivation of existing rights which have been assumed to exist and which are not, as I see the position, admitted". The sense might have been better served by "existing rights which have been assumed to exist but which are not, as I see the position, admitted".

C "It should be added that the Secretary of State settled the draft of the new lease to the Commissioners" etc; (reading to the bottom of page 120): "If incomes fall further services would be curtailed accordingly", and I need not read the rest of that. And I do not think I need read the summary.

D THE VICE-CHANCELLOR: I hope I am not doing him an injustice, but he does appear to be saying: never mind what was strictly the natural and legal rights of those concerned, administratively the only thing that makes sense is to treat the community as a whole and we had better do that.

E MR MOWBRAY: Yes. My friend would like me to read (d) in the summary: "Transfer of residue of old Banaban Fund to new Common Fund; interest to be used to finance, in part, (b) and (c)".

F THE VICE-CHANCELLOR: He is saying there should only be two funds.

G MR MOWBRAY: On page 123 there is a despatch from the High Commissioner to the Secretary of State. At 2 he is giving an account of the discussions on Ocean Island on his recent visit, and then at 3 he sends on Mr Maude's report, and at 4 "I have reported to you elsewhere that Mr J.S Neill came with me from Tonge" etc; (reading to end). The main thing there is Sir Murchison Fletcher agreeing with Mr Neill's memorandum.

H THE VICE-CHANCELLOR: He is talking about the immediate payment of interest upon the money awarded by way of compensation.

MR MOWBRAY: I do not think there was ever any question but that that belonged to the landowners.

Then I need not read 125 or 126.

At 127 there are some Colonial Office minutes: "A meeting was held in Mr Bushe's room on the 28th October in connection with the recommendations made by the Currency Committee regarding the currency position" - Mr Bushe was the Legal Adviser. "Mr Bushe drew attention to the fact that



A the strict interpretation of the Committee's recommendations regarding the non-reopening of past transactions was that they only applied to payments made in Australian pounds, past payments in sterling not being affected".

B Then there is some discussion about technical matters connected with that, and at the bottom of the page Mr Bushe says: "that whilst the procedure" etc; (reading to the words): "Mr Jones said that he was not happy about the position of the Banabans for whom the Government were trustees, and on whose behalf payments made by the British Phosphate Commissioner were accepted by the Government" - he does not say which particular one. "The Banaban payments were the result of an arbitration award" etc; (reading to top of page 129): "making certain that the Banaban interests were being safeguarded", and I do not think I need read any more of that.

C Then someone called Duncan says "Seen, thank you", and then: "After writing the above three words Mr Bushe and I discussed this matter" etc; (reading to the words): "any high crimes or misdemeanours!"

D Then Mr Bushe: "I was not aware that anybody had accused the Currency Committee of making improper and mean proposals" etc; (reading to the words): "which we ought to have before a decision is taken on the main proposal", and I do not think I need read the rest of that.

On page 132 there are some more copies of the Banaban petition duplicating pages 95 to 97.

I do not need to read 134.

E At 135 we have a telegram from the Secretary of State to the Acting High Commissioner: "Confidential your despatch of 18th October" etc; (reading despatch). That is referring back to 124, paragraph 5, "Shall we pay the interest on the compensation sums to the landowners?".

F I need not read 136. At 138 the Acting High Commissioner passes on that last telegram from the Secretary of State on page 135. And that is all I need to read in that Bundle.

G Going to Bundle 30, would your Lordship begin at page 8. These are more Banaban accounts for the years ended 30th June, 1931 and 1932. So they cover the change of regime and the next period. The first summary is on page 11, and your Lordship sees at (c) amount transferred to Provident Fund £7,200. That was just part of the transfer. Your Lordship will see shortly, in another document, a complete account of what was transferred and the payments that were made. There is some more cricket materials, but otherwise much the same as usual.

Then the other summary is at page 15.

H THE VICE-CHANCELLOR: That item on page 11 "Expenses of arbitration" would include Mr Neill's payments, I suppose ?

MR MOWBRAY: His expenses, yes.

Then on to page 19, from the Acting Resident Commissioner to the High Commissioner. (Reading letter)



A Then on page 20 the Acting High Commissioner approved that and I can go on to page 27, which is a despatch from the High Commissioner to the Secretary of State. It is a 16C and 16D document. I read from paragraph 2: "You have directed" etc. (Reading to the words at the end of paragraph 7) "doubtful validity".

THE VICE-CHANCELLOR: Doubtful propriety is one thing. Validity is another.

B MR. NOWBRAY: Part of our case is that it was invalid, ultra vires unless all the landowners agreed because of the limited legislative power under which the 1937 Ordinance was enacted, so we would rather agree about that. He goes on: "(8) subject to the foregoing" etc. (Reading to the words in paragraph 9) "of the 17th December" - that is page 135 of bundle 29 - "that you have approved" etc. (Reading to the words) "their heirs" - pausing there, that was the telegram in which the Secretary of State approved the payment of the interest to the landowners - "The interest being paid" etc. (Reading to the words at the end) "owners concerned."

C On page 35 there is a letter from Mr. Lodge to Mr. Jones about taxation. I do not think I need to read that and I can go to page 37, which is a despatch from the Secretary of State to the High Commissioner. It is a 16C document. He transmits a copy of the Memorial received direct from Rotan and goes on at paragraph 2: "I request" etc. (Reading to the words at the top of page 38) "Native Magistrate, Ocean Island." I did not read that, but Mr. Grimble was in England and was consulted. "I am doubtful" etc. (Reading to the end). That is signed by Sir Philip Cunliffe-Lister who was the Secretary of State at the time.

D Turning to page 39, that is another landowners' complaint. It is a different one in which they say; (Reads complaint). That is witnessed by Mr. Swinbourne, the Acting Resident Commissioner, Mr. Maude, the Acting Secretary to the Government, and a native magistrate. Page 40 is another copy.

E At page 41, we get a completed draft of the reply to the letter at page 35 from Mr. Lodge to Mr. Jones about taxation. I will not read the reply, but would ask your Lordship to turn to page 46 which is a completed draft of the same date in which Mr. Jones writes to Sir Murchison Fletcher, the High Commissioner, on the same subject. It is a 16C document. He writes: "I enclose a copy" etc. (Reads first paragraph). I can now go to page 49 at (d): "The payments 'in respect of royalties on phosphate' are to be included in the scheme" - that is the commutation scheme - "This presumably" etc. (Reading to the words) "dissatisfaction with the award of the arbitrators." I only read that to show the two types of royalty referred to by the same name and in the same way.

F I can now pass to page 53, another letter from Mr. Lodge to Mr. Jones about taxation. I would like to read starting at the first break on page 54: "The only royalties we regard as general revenue are those stipulated in the original concession." That is the 6d. Crown royalty. "We do not contemplate" etc. (Reading to the end of the letter). That was written in the context of some taxation negotiations. It is a possibility which is ventilated in every negotiation with the BPC. It is a possibility which never came about.

G On now to page 61. I do not want to read it. It concerns a meeting of the Currency Committee. Your Lordship might like to note that the currency proceedings are all summarised at page 719, and I do not even want to read that in fact. So I can pass on to page 69, a telegram from the Acting

H



A Resident Commissioner to the Acting High Commissioner. (Reads telegram). At page 70, in a telegram from the Acting High Commissioner to the Secretary of State, that is passed on. That is a 16C document.

I need not read page 71, but page 72 is a letter from Mr. Jones in the Colonial Office to Sir Murchison Fletcher which is a 16C document and that says: (Reads first page of letter).

THE VICE-CHANCELLOR: I thought it had been done.

B MR. MOWBRAY: It was assessed in so many pounds and the question is whether those are Australian pounds or English pounds.

THE VICE-CHANCELLOR: Oh, it is still the currency question?

C MR. MOWBRAY: Yes, and the Secretary of State is being asked to say whether it was one or the other. The letter goes on: "In a case" (Reading to the words at the end of the letter, page 74) "compensation for trees." Mr. Jones may have understood that the excessive surface figure was an offset against a low royalty rate, but I have not myself found anything which has hinted that.

D Page 75 is a 16C document from the Secretary of State to the Acting High Commissioner asking: "When was the sum of £20,000 transferred to new Provident Fund and have payments referred to in paragraph 9(b) of memorandum in your despatch of 8th May, 1931, since been discontinued." That is a reference to Mr. Grimble's 1931 memorandum at page 60 of bundle 28. (Reads remainder of telegram).

THE VICE-CHANCELLOR: In the first paragraph he says: "payments referred to". Is that payments of interest on the old Banaban Fund?

E MR. MOWBRAY: The paragraph 9(b) referred to is on page 65. The answer is yes, it says: "The annually increasing interest from the fund is distributed every sixth month among the landowners whose land was alienated in 1913."

Over the page, at 76, the High Commissioner passes on that request for information to the Resident Commissioner. We will get the reply shortly, but the next page, 77, is a telegram from the Secretary of State from the Acting High Commissioner about taxation which I do not need to read.

F The document which starts at page 78 is headed: "Subsequently cancelled in office". It was apparently withdrawn after it was despatched. I will not read it.

G On page 82 there is an important letter from Sir Murchison Fletcher, then in England, to Mr. Jones of the Colonial Office. It is a 16C document. He says: "Dear Jones, In your letter of 22nd May" - that is page 72, the personal letter I have just read - "you invite my views" etc. (Reading to the words at the end of paragraph 2) "is not satisfactory." May I pause there and comment. He is talking about the total payments to the Banabans and he says that they fall short of market value and he deduces from that that the Government has some interest in the phosphate. That is not now contended for, but the fact that Sir Murchison Fletcher deduces from the low total paid to the Banabans that someone else must have had an interest in the phosphate emphasises that he considers the total 10 $\frac{1}{2}$ d. royalty or that plus the £150 is less than a commercial return. H The Banabans individually or collectively own the phosphates and individually or collectively have got less than a commercial return for them.



THE VICE-CHANCELLOR: Yes, if they could sell in the open market, but have not the Commission got a monopoly on the Island?

A MR. MOWBRAY: The Commission have a monopoly, but in fixing a compulsory purchase price that does not come into it, it is irrelevant, because the Commission is acquiring. Then Sir Murchison goes on in paragraph 3: (Reads paragraph 3). He <sup>continues</sup> by talking about the currency and I do not think I need read <sup>what</sup> he says about that.

B I need <sup>read</sup> nothing now until page 89 where we have a telegram from the Acting Resident Commissioner to the Acting High Commissioner which is a 16D document. It is the reply to the request for information about whether the £20,000 has been paid.

My friend would like me to read page 86. This is from Mr. Lodge, the United Kingdom Commissioner, to Sir Murchison Fletcher. (Reads letter).

C As to page 89, that says: (Reads first paragraph). Those sums add up to £20,000. Then he goes on: "With transfer of above-mentioned stock £8,300 annual interest payable to Banabans <sup>fell</sup> to approximately £1,066 which sum has been paid to Banabans half yearly." The £8,300 in that sentence is rather hard to understand. It cannot be the amount of the annual interest.

D THE VICE-CHANCELLOR: It cannot possibly be. You take £20,000 out of the fund and the income goes down by over £7,000.

MR. MOWBRAY: I do not know what that figure is. It must be just a wrong figure. The telegram continues: (Reads to third line on page 90) "£8,300."

E THE VICE-CHANCELLOR: He says there: "with the transfer of above-mentioned stock £8,300 annual interest payable to Banabans fell to approximately £1,066." If the £8,300 is not income but is the amount of the stock transferred that accounts for the figure of £8,300 in the third line.

MR. MOWBRAY: Yes, but even so there are all those other things on deposit that have been transferred and presumably the deposit interest would also be lost so it is still very hard to understand.

F THE VICE-CHANCELLOR: Yes, but it is fairly plain that the £8,300 is not intended to refer to interest on anything, it is a capital sum.

MR. MOWBRAY: Yes, that is where the figure came from. (Concludes reading telegram). There are some more problems there.

G THE VICE CHANCELLOR: From that I get the statement that the income payable from the old Banaban fund was naturally reduced when the fund had £20,000 taken out of it and the Banabans did not seem to have protested.

H MR. MOWBRAY: Yes, it was explained to them, but they did not protest. The reply to that, which appears at page 91 says: "Check and repeat figure given" etc. (Reading telegram).

Then we come on to an entirely different topic at page 92. The Resident Commissioner says he supports the suggestion contained in the letter from Mr. Grimble that an oral reply should be sent to Rotan's petition and delivered to the Banabans in a general meeting. At page 93 the High Commissioner tells the Resident much the same thing, that he



A thinks the reply should be addressed to the native magistrate.  
Page 94 is a duplicate, and I need not read the minute on pages 95 and 96 because that is summarised at page 97.

Page 97 is from the Acting Resident Commissioner to the Acting High Commissioner and begins: "Confidential, your telegram of 12th June, No.124, Banaban Fund, regret error in coding. Group 82 '£2,400 +' should read '£24,000 +'." That has been corrected in the copy on page 90. (Reads remainder of telegram).

B THE VICE-CHANCELLOR: Have I got to understand that?

C MR. MOWBRAY: No, the only thing for which we rely on this is that part which says: "Profit and Loss; stocks are sold and reinvested at the discretion of Crown Agents and resultant profit or loss accrued invested in Fund, profits being added and losses deducted." That shows that it was being treated as a separate fund which took its own profits and bore its own losses and was not treated as a Government balance of any fixed amount or anything like that. It was being treated like a trust fund.

D Turning now to page 99, that is a letter from the Colonial Office to the BPC and it is a 16C document. (Reads first paragraph). Then various details follow and I can ask your Lordship to turn to paragraph 6 on page 100. (Reads paragraph 6). That is as much as we want to read of that letter. That shows that the Secretary of State was the government. Would your Lordship now turn to page 113.

THE VICE-CHANCELLOR: Just pause a moment. My bundle leaps from page 100 to page 111. Is that right?

E MR. MOWBRAY: Yes, it is the same in mine. If your Lordship will turn to page 113 you will find there Mr. Lodge passing on to Mr. Jones a cable saying: (Reads copy of cable). I need not read 114 or 115, so passing to 116 I come to a telegram from the Secretary of State to the High Commissioner which is a 16C document. (Reads telegram). That is a reference to page 29 of this bundle, the middle of the Acting High Commissioner's recommendations, and paragraph 8(a) is the annuity of £6 to each member of the Banaban community. So that is a 16C document because the Secretary of State is going to decide and the High Commissioner's advice is asked.

F I need not read the next page and I can turn to 118 where the Secretary of State cables the High Commissioner. (Reads telegram). That is the tax commutation agreement.

G There is a memorandum starting on page 119. This is a Colonial Office memorandum by Mr. Jones on the Gilbert and Ellice Islands colony currency question. It is a 16C document and contains a good summary of everything that has happened to date about the currency question, but your Lordship is not concerned with the details of that and I can turn to page 128 which is a 16C document. It is a letter which the Acting Resident Commissioner wrote to the native magistrate as contemplated about the Rotan Memorial. (Reads letter).

H On now to page 130, some Colonial Office minutes. They are a 16D document. Mr. Duncan minutes: "I am not clear" etc. (Reading to the words) "As Mr. Bushe said in his minute of 14.11.32" - that is page 131 of bundle 29 - "There is undoubtedly a position of trust" etc. (Reading remainder of Mr. Duncan's minute). The matter was referred to the arbitrators and they both said in effect that they meant Australian currency and the whole



A question disappeared. (Reads handwritten minute concluding on page 131).

B Next, page 132, there is a telegram from the Acting Resident Commissioner to the High Commissioner. (Reads telegram.) The High Commissioner replies on page 133; "I approve payment of interest. Have any further boundaries been disclosed". The Acting Resident Commissioner replies on page 134: "Boundaries of 40 additional areas totalling approximately  $14\frac{1}{4}$  acres surveyed since my telegram of 17th January ... Banabans now co-operating in disclosing boundaries for survey purposes."

C At page 135 we get a despatch from the Acting Resident Commissioner to the High Commissioner about the administration of Banaban funds and enclosing a minute of the Treasurer. Then page 136 from the High Commissioner to the Secretary of State is a 16C and 16D document. Before I go to that I will tell your Lordship something about the Treasurer's query. The Treasurer's query related to the treatment of the Banaban funds in the Gilbert and Ellice Islands accounts and we would submit, if we wanted to go to the trouble of going through all that, that they help to show that someone thought the Banaban funds were trust funds. But in 1933 there was an ordinance that said they were trust funds, so it does not really prove anything much.

D THE VICE-CHANCELLOR: Was it an ordinance saying anything about the old Banaban fund? Does it call that a trust fund?

MR. MOWBRAY: It applies to all royalties.

E THE VICE-CHANCELLOR: Yes, but if royalties have been paid in the past and a fund has been built up and then you have a later ordinance that says the royalties are held in trust, do you say that goes back and bites on royalties which have long since disappeared into a previous fund?

MR. MOWBRAY: No, but if people <sup>at</sup> ~~at~~ <sup>that</sup> ~~stage~~ start discussing the treatment of the funds in the accounts and whether they should be ~~creatd~~ <sup>creatd</sup> as trust funds --

THE VICE- CHANCELLOR: That is a different matter.

F MR. MOWBRAY: It does not carry much weight, and I am not anxious to go into the detail of something which is not going to carry much weight.

THE VICE-CHANCELLOR: That is a different matter. If you say this document on that point is not going to carry much weight and you do not want to go into it, let us take it no further.

G MR. MOWBRAY: It refers to some regulations we have not got and I do not want to carry it further and I do not think we would be justified in going into it.



A Page 136 is concerned with the same topic, and although it is a 16C and 16D document I am not going to read it. I can therefore turn to page 138. That is a 16C document. It is a despatch from the Secretary of State to the High Commissioner. (Reads despatch on pages 138 and 139). So, it is a 16C document because the Secretary of State is asking for views and not for a decision.

That is all I have to read in that bundle, and I can now pass to bundle 31 and ask your Lordship to look first at page 5, a telegram from the Resident Commissioner to the High Commissioner. (Reads telegram).

B THE VICE-CHANCELLOR: I thought the rent for the non-mining land had to be paid direct by the Commissioners to the landowners.

MR MOWBRAY: That would be right.

C THE VICE-CHANCELLOR: Then I do not see how the Resident Commissioner comes into this question of withholding the rent. Is this something to do with currency? If it is simply a question of the Commission paying the landowners the rent direct, not going through the Resident Commissioner, and so on, I do not see how he comes into it.

MR MOWBRAY: I think it must be something to do with currency.

THE VICE-CHANCELLOR: It may be some dispute about whether the rent is to be paid in Australian money or sterling.

D MR MOWBRAY: I think it must be that. Then on page 6 the acting High Commissioner passes on that telegram to the Secretary of State, and towards the end says: "May I have your telegraphic approval to make these payments?" At page 7 the Secretary of State says: "I approve" and on page 8 the acting High Commissioner says that he approves. So those four telegrams help, in our submission, to show that it was all one government.

E THE VICE-CHANCELLOR: It is very odd. The question that the High Commissioner asks the Secretary of State is "May I have your telegraphic approval to make these payments?" It is as if he, or the Resident Commissioner, was going to make payments, whereas in fact it was the British Phosphate Commission that was going to do the paying.

F MR MOWBRAY: It should be. Well, we read those four telegrams as showing that really there was only one government, and it was the United Kingdom Government.

G On now to page 24. This is a longish despatch about the Banaban Fund. Your Lordship might like to note that it is replied to at page 88 of the same bundle. It is from the new Resident Commissioner, Mr Barley, to the High Commissioner, and it starts off with a history which I can ignore, and so I pass to paragraph 5 on page 26, where he says: "So far as I have been able to ascertain from the date of coming into operation of the 1931 lease agreement, the situation as regards the residue of the Royalty Trust Fund ~~has~~ never been clearly defined."

THE VICE-CHANCELLOR: Where he speaks of the residue of the Royalty Trust Fund, presumably that is the old Banaban Fund.

H MR MOWBRAY: Yes. Then he goes on: "Mr Grimble" etc. (reading to the words at the foot of page 28) "no payment of any description out of royalties should be made to the Banabans."



THE VICE-CHANCELLOR: That is not saying that interest from the old Banaban Fund should be stopped.

A MR MOWBRAY: No. He goes on: "In the meanwhile the 8<sup>1</sup>/<sub>2</sub>d. royalties paid into the Banaban Common Fund, which has become merged in the old Royalty Trust Fund, have continued to accumulate." There are quite a lot of references to the old Fund as being a Trust Fund. They may add a little but I do not suppose anybody turned his mind to whether it was a trust fund at that stage, because there was an existing statutory trust.

B Reading on at paragraph 9 he says: (reading through to the end of paragraph 11). Then he does some sums, but as I think paragraph 12 is referred to in a later document, I had better read it. (Reads paragraph 12). It was because of that, the feeling of the 1913 landowners, that I wanted to read that. (Reads paragraph 13). That last paragraph is referred to in a further memorandum by Mr Vaskiss on page 94 of this bundle. I need read nothing more from that bundle.

C THE VICE-CHANCELLOR: He is very apologetic in paragraph 15, but he seems to have got a very good grasp of a highly complicated subject soon after his appointment.

MR MOWBRAY: He certainly does. Then at pages 33, 34 and 35, there are figures about the Funds. They are 16C and 16D, but I do not need to read them. I do not think any point of principle arises on them.

D I would next like to read page 37, a telegram from the High Commissioner to the Resident Commissioner. (Reads telegram).

E Turning to page 41, one sees there some Colonial Office minutes. They are a 16C document. I can commence reading at the first break on the page where it is said: "As to the rest of the problem of that colony, i.e. the position of the Banabans' and officials' salaries, an equitable settlement is a matter for the Department rather than for general devision." Then Mr Jones reads a minute which is dated 16th June, 1934, and he says: "There is an important question" etc. (reading to the words on page 42) "before the arbitration took place." Your Lordship remembers the suggestion that there might be a final appeal to the Secretary of State. "An alternative method" etc. (reading to the end of the minute).

F We have inserted here a document numbered 43A and 43B, and I will hand a copy to your Lordship. I do not want to read it.

(Adjourned until Monday morning next at 10.30).