

Then there was the bounty from 1941 to 1950, which may have some small effect on the 1947 price or royalty. Those are all the documents we want to read in bulk.

A The parties have been talking about amendments, and we have now, each of us, got the amendments we want to make and neither of us has any objection to the other making them. They are not quite in a form to put before your Lordship and we will do that tomorrow.

I can turn now to our legal submissions. I gave your Lordship at an earlier stage some provisional outline heads of arguments for the plaintiffs.

B THE VICE-CHANCELLOR: Yes, that was on Day 2.

C MR. MOWBRAY: I will try to keep pretty close to those outline heads of argument and to the numbering so your Lordship should be able to use the heads as an index to the submissions. Just before I come to Head 1 I will try to explain why we want to go into these questions of the sources of law and so forth. It helps our case in various ways to show that the Banaban landowners own the phosphate under their land. To show that I want to show that English law applied in 1902 to 1916 or 1900 to 1916. If English law applied to the question whether the owner of land owned the phosphate underneath, the ownership would follow. Alternatively I will show that English law applied subject to native customary law.

D THE VICE CHANCELLOR: Why is that an alternative? Surely you have got to accept that English law applies subject to native customary law. You cannot have pure English law when the evidence is overwhelming that there is a rather peculiar type of Banaban landownership which is variously described as a life interest or an entail or full ownership but in all respects qualified in some way; so it must be English law as modified by local customary law.

E MR. MOWBRAY: Yes, I agree. It is an alternative submission because, accepting that, I say that the customary law itself recognises individual ownership of the minerals. There are two ways of putting it. You can either say English law applies subject to the customary law and there is nothing in the customary law to take away the rights which English law would give. The other way is to say - it is rather a technical way of looking at it - it was English law and there was a perfectly good customary law running along with it and it was pretty clear that the individual owner owned the phosphate under his land.

F THE VICE CHANCELLOR: The peculiarity of Banaban law in that respect goes not to what is owned but to what rights of disposition the owner has.

MR. MOWBRAY: Yes, not whether the phosphates are included but whether their owner can dispose of them freely.

THE VICE CHANCELLOR: The subject matter of ownership is one thing; the quality of that ownership is another.

G MR. MOWBRAY: Yes.

THE VICE CHANCELLOR: That is why you want English law, anyway.

H MR. MOWBRAY: That is why I want English law, and that is why I want the Banaban customs about the ownership of the minerals in the alternative. That is how I come on to outline Head 1, that Ocean Island was originally a colony by settlement. When you are considering whether English law is imported subject to local law or whether the local law is taken over intact or whatever it may be, the question whether a colony is a colony by settlement

A for that purpose is not quite the same as whether it is a British settlement within the meaning of the British Settlements Act of 1887. The definition of "British Settlements" within the Settlement Act is a special definition and it does not necessarily coincide quite exactly with a colony by settlement for the purpose of seeing how English law is received. I only mention that so that there shall not be any inaccuracy in my submissions. In our submission the answer is the same for both purposes: it was a British settlement within the British Settlements Act and also it was a colony by settlement for the purpose of seeing what law was received or how English law was received.

B THE VICE CHANCELLOR: Mr. Vinelott, of course you cannot tell exactly what Mr. Mowbray is going to say until he has said it, but obviously if you find his proposition is one to which assent you will make it unnecessary for him to develop his argument at great length on that point by a timely intervention.

MR. VINELOTT: I will do what I can. I have in fact noted on this outline of heads by a tick in the margin with one qualification, that is, proposition 6. I will check it over the adjournment.

C THE VICE CHANCELLOR: All I am saying is that obviously you will not think it necessary for Mr. Mowbray to prolong his argument on points that you accept.

MR. VINELOTT: I will certainly do what I can to see that he does not extend his argument unnecessarily.

D MR. MOWBRAY: I hope to be able to get through this early part quite quickly. Paragraph 1 of the defence, page 96 of the Pleadings Bundle, says in the third sentence: "Ocean Island became a British settlement within the meaning of the British Settlement Act 1887 on the 5th May, 1900."

THE VICE CHANCELLOR: It says the 5th May, but it is now the 5th October, is it not?

E MR. MOWBRAY: Yes, when the authority was given. I would like to refer your Lordship to a passage in Halsbury's Laws of England, fourth edition, volume 6, paragraph 1017: "Modes of Acquisition of Colonies" etc. (reading to the words) "conquest."

F I will read the next page as well: "Settlement" etc. (reading to the words) "with previous authority". That seems to be the position here. "Thirdly, uninhabited" etc. (reading to the words) "tribal chiefs or by the inhabitants." Then at 8 your Lordship sees a reference to the Gilbert and Ellice Islands in a footnote to "tribal chiefs". "Annexation" etc. (reading to the words) "conduct of the Crown."

G While we are about it - as your Lordship will see something about it a little later - would your Lordship look at paragraphs 1027 and 1028. "The powers of the Crown vary according to whether it is a settled colony or a colony by cession." We will look at the United Kingdom Parliament powers first. "The conduct" etc. (reading to the words) "local conditions and restrictions." "The Crown powers" etc. (reading to the words) "for administration and control." I need not read any more of that.

H I was going to refer your Lordship to some parallel passages in Sir Kenneth Roberts-Wray's work on Commonwealth and Colonial Law but I understand there is difficulty about finding a copy for your Lordship. We will try to find some way round that tomorrow and then we shall have another chance to look at those passages.

There was no civilised government or internationally recognisable legal system on Ocean Island when the flag was raised or when the Pacific Phosphate

Company arrived and therefore it was a colony by settlement and it received English law. As we say in head of argument 2 it therefore received English law but subject to native customary law so far as recognised by the Crown.

A THE VICE CHANCELLOR: It was just as well it was not settled by the British Phosphate Commission, was it not? To have it settled by a British chartered company would be one thing, but to have it settled by a mixed company might have been very difficult.

MR. MOWBRAY: We might have had a condominium!

B THE VICE CHANCELLOR: We have not got that. You say this is a case of a settled colony and so it automatically has the powers of the English Parliament over it.

C MR. MOWBRAY: I can give your Lordship a proposition or general rule under head 2. I will call it 2.1. The general rule is that British subjects can settle a primitive country, take with them English law written and unwritten as it stands at the time, so far as applicable to local circumstances and subject to local customary law so far as recognised by the Crown. There is authority for that in Halsbury, paragraph 1196: "Introduction of English law to a settled colony" etc. (reading to the words) "infant colony." That is a quotation from I think it is Blackstone. "Thus, while the general laws" etc. (reading to the words) "occur."

D THE VICE CHANCELLOR: A very interesting catalogue!

MR. MOWBRAY: Yes. We will show an even longer catalogue in Roberts-Wray.

THE VICE CHANCELLOR: One wonders how the ejusdem generis rule would apply. I suppose the genus is one law is suitable and the other law is not suitable.

E MR. MOWBRAY: Yes, it will not translate. (Reads on to the words) "specified dates." Then paragraph 1197 says: "customary or native law" etc. (reading to the words) "circumstances render necessary." Again I will show your Lordship parallel passages in Roberts-Wray which are a little fuller and perhaps a little more explicit, but on those passages, in our submission, proposition 2 is established.

F Head 3 is: "The recognition of native customary law was not precluded by the Pacific Order in Council." The Pacific Order in Council is not in the PD Bundle in this action but it is in the PD Bundle in the previous action, as are one or two other things that I wish to refer to. I am sorry that I have not given warning of this.

G THE VICE CHANCELLOR: I have the papers in the other case segregated from the papers in this. If you are going to need any papers in the other case then it will be convenient to give warning so that the necessary arrangements can be made.

MR. MOWBRAY: Yes. In the Replanting PD Bundle the Pacific Order in Council is at page 3 and under our Proposition 3.1 the relevant section is section 20 at page 13: "Subject to the other provisions of this Order" etc. (reading to the words) "and authority." So this is an example of what Halsbury referred to, English law being brought in as in force for the time being.

H THE VICE CHANCELLOR: What is the date of the Order in Council?

MR. MOWBRAY: 1893. In Section 20 it says that the jurisdiction shall "so far as circumstances admit" be exercised upon those principles.

THE VICE CHANCELLOR: Why is that?

A MR. MOWBRAY: That lets in the native law because it is all part of the reception of English law so far as circumstances permit. Circumstances only permit the reception of the English law subject to native law if the native law is recognised.

B THE VICE CHANCELLOR: Yes, but they might have some provisions of native law which are wholly repugnant to English ideas of justice and others which are perfectly consistent.

MR. MOWBRAY: Yes

C THE VICE CHANCELLOR: The words are "so far as circumstances admit". Circumstances may possibly admit of the whole of English law being in irrespective of what native custom or law says, but some of the native custom or law may go out anyway because it is repugnant to English ideas. Why do you say that they are going to prevail over English law?

MR. MOWBRAY: Because they are part of the local circumstances to which this provision is expressly subject

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A THE VICE-CHANCELLOR: But English law, for example ecclesiastical jurisdiction, would not apply to Ocean Island because circumstances do not admit because the English ecclesiastical jurisdiction is not suitable for Ocean Island. That follows. But if English law says one thing about land ownership and native custom says another, there is nothing to prevent circumstances admitting that English law applies, is there?

MR MOWBRAY: A priori no, but if you find the government recognising local customary law and the local customs continue, then they are a circumstance which makes it inappropriate for English law to overrule them assuming they are the kind that ought to be and have been recognised.

B THE VICE-CHANCELLOR: But this is not, is it, inconsistent with native law and custom? So so far as circumstances do not indicate the contrary and that sort of thing, what is there in native customs which says there is this native custom and it simply does not admit an English law which is different being allowed in? What is it it does not admit?

C MR MOWBRAY: It is, I suppose, part of the social customs of the people that are similar to other sociological circumstances. I was about to cite some authority for the proposition in 3.1

THE VICE-CHANCELLOR: If there is authority, that is admirable.

D MR MOWBRAY: It is not altogether admirable because it is another of the books we have had trouble with, and I am afraid I can only hand your Lordship a photocopy. This is a report of a case in the East African Court of Appeal. I will read the headnote, with this warning, that the point for which I cite the case does not appear in the headnote. "The respondent filed an action" etc. (reading to the words) "likely to be invoked." So the case was really about where the cause of action was covered by both kinds of law and which court should have jurisdiction. The ordinance which was construed and the part on which I rely is not in the headnote but is set out on page 285 at I. This is Section 2 of the Judicature Ordinance of 1962. "Subject to the provisions" etc. E (reading to the words) "render necessary." That proviso was held to let in the local law, and that is why I cite this case as authority for my proposition 3. It is a longer phrase and there is an express reference to "subject to such qualifications as local circumstances may render necessary" and it says "So far as the circumstances permit" and not as in the Pacific Order in Council "so far as the circumstances admit."

F THE VICE-CHANCELLOR: You have read that part of the judgment which sets out the provisions of the ordinance. What does it say about it?

MR MOWBRAY: I really read that as my headnote.

THE VICE-CHANCELLOR: What does anyone say about it?

G MR MOWBRAY: Let us look at Judge of Appeal Law. He deals with the other point in the case and then at H on page 281 he says: "As the repeal of section 20" etc. (reading to the word) "exercised." Then he gives a shortened version and goes on: "Counsel for the respondent" etc. (reading to the words) "such qualifications as local circumstances may render necessary."

H THE VICE-CHANCELLOR: Before the 1962 ordinance it was quite plain, apparently, that the English law applied only so far as native law did not provide to the contrary.

MR MOWBRAY: Yes.

THE VICE-CHANCELLOR: So you have got that at G at page 281.

A MR MOWBRAY: Yes.

THE VICE-CHANCELLOR: That gets repealed.

MR MOWBRAY: Yes, and someone says that means "native law has gone, at any rate from this court." Then Judge of Appeal Law says: "No, that is not right" etc. (reading to the words) "may render necessary" and he treats that as letting in the native law again.

B THE VICE-CHANCELLOR: Yes, but this is all against the background that for a considerable period native law prevailed over the common law.

MR MOWBRAY: That is true.

C THE VICE-CHANCELLOR: Then you get this new form of 3 in the new statute and that does not, as it were, expel native law. It is held that the new 3 does not have the effect of expelling native law. The new provision of the 1962 statute does not have the effect of expelling native law, is that right?

D MR MOWBRAY: Not quite, with respect. It was held that the repeal of the provision about native law did not have that effect because of this proviso to the provision about English law. Section 20 was repealed. I do not think it is set out, but the effect of it is that set out at page 281G: "It is clear" etc. (reading to the words) "common law." So when they repealed it they had taken native law out of the court altogether. Held: No, they had not, because of this proviso.

E Would your Lordship look at what was said by the other judge at page 286, after he has quoted from section 2. He says: "It will be observed" etc. (reading to the words) "clearly not contemplated."

F THE VICE-CHANCELLOR: There he is resting it on the earlier part of the ordinance, in conformity with the written laws in force in Uganda. He says you have got a system of native courts to administer native customary law and then along comes the 1962 ordinance and says that the jurisdiction of the high court shall be exercised in conformity with the written laws which are in force in Uganda and this is part of the written laws in force in Uganda and therefore at least that part of the judgment seems to reach home without construing the proviso.

G MR MOWBRAY: I submit he is giving different reasons. In that paragraph he is relying on the Baganda law as a statute, but then between B and C he is relying on the proviso, he is saying that the English law is only applicable as far as the circumstances of Buganda's inhabitants permit, so that lets in the local law.

THE VICE-CHANCELLOR: Yes.

MR MOWBRAY: For those reasons we submit that section 20 of the Pacific Order in Council does not stand in the way of the Banaban customary rights.

(Adjourned till tomorrow morning at 10.30).