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EVIDENCE

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(A.M.)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
GROUP B.

1971 R. No.3670

Royal Courts of Justice,
Wednesday, 31st March, 1976.

Before:

THE VICE-CHANCELLOR

ROTAN TITO

and

THE COUNCIL OF LEADERS

v.

HER MAJESTY'S ATTORNEY GENERAL

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and

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D v.

HER MAJESTY'S ATTORNEY GENERAL

E -----
(Transcript of the Shorthand Notes of The Association of Official
Shorthandwriters 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 and Co.)
appeared on behalf of the Plaintiffs.

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.

G -----
EVIDENCE

DAY TWENTY-FOUR

A MR VINELOTT: My Lord, before I turn to the corrections to the transcript, I do not know what your Lordship's view would be on this, but I see from the transcript that the discussion about amendments is always included but I do not know whether it is really worth including because the amendments are then made.

B THE VICE-CHANCELLOR: Very occasionally one gets the sort of thing that happened yesterday where a discussion on an amendment is taken instead of the amendment. But as far as I am concerned, there is no objection to leaving out from the transcript the discussion on amendments unless any or all of it is needed by the other side. I should have thought that would be something Counsel could agree amongst themselves. Anyway, shall I say I do not need the discussion on amendments.

C MR VINELOTT: I am much obliged, my Lord.

D THE VICE-CHANCELLOR: I think also it might be convenient if in future cases, if there are going to be corrections to the transcript, the witness were not put into the witness box until the discussion is over. Professor Maude, would you prefer to stay there or go and sit in the court? A. Sit in the court, my Lord.

E MR VINELOTT: Page 4 line 1, "and that was translated by my learned friend Mr Mowbray into 11d or a 6d down payment", that should be "for a 6d down payment".

The next page: "(Q) And your calculation shows that taking the top of Mr Collins' range 10 cents, and taking a 6% discount rate, which you say is the highest for the period, you get a royalty equivalent of 10.46; that is 5.23" and I think it should be "doubled".

F THE VICE-CHANCELLOR: Take out "times" and put "doubled".

G MR VINELOTT: Yes. Then page 8, just above B: "I think that what I have now done is refined, if you like, by going back and looking at the actual calculations, instead of saying it is 5¹/₄ or 5¹/₂d, that it is actually 5.23 pence, which makes it" it should be "10.64 pence" because you double it.

Then the next page, three lines below D, "... and then the alternative translation" it should be "novation" not "innovation of earlier agreements".

H THE VICE CHANCELLOR: Well it is novation and something else.

MR VINELOTT: Yes, novation and something else, but I cannot remember what that was. It is translated as "Renewal or novation".

Then page 12: "Did you have any documents relating to the " 1913 negotiation.

Page 16, just below E: "What about the suggestion that there should be a fixed royalty of 2/- (A) That is coming back to a similar scheme as on Ocean. Of course, this is later, but it is a similar scheme.

A Then page 20, just opposite C: "(Q) It was put to you that in looking at Nauru purely as a comparable - assuming you can accomplish that difficult exercise - it was not any use as a comparable because it was negotiated by the" Nauruans. I may have said Banabans, but the sense is Nauruans.

Page 23 starting at the top: "You were asked by my friend to look at Nauru purely as a comparable, if you could, and put out of your mind the competitive situation. Can you tell my Lord which of those two" aspects.

B Then page 25 at C: "If you take the 1/- which you said you thought you might conceivably have got, or the equivalent, and you compare that with the 1/- offered and accepted, subject to contract, in 1940, I think the point my Lord has made is that you have got, in terms at any rate of sterling, a" lower "royalty".

C Then just below E: "(Q) And 1/3 was the figure" agreed.

Page 26, the line above C: "... I have to consult with the Board, the Commissioners, and then I will come back", and if he then came back and said 'Your 1/3' - I think the word "your" is wrong.

THE VICE-CHANCELLOR: It might be "the" 1/3.

D MR MOWBRAY: Or "Now 1/3 is as high ..."

MR VINELOTT: Yes, I think that would be all right, "Now 1/3".

E Then the top of page 27: "I asked you these questions because I wanted to try to explain a passage in your evidence". I think, or I hope, I said "because I wanted you to try to explain a passage in your evidence".

Then just above D on the same page: "Looking at that passage again, when you gave that answer which situation were you envisaging: going out with plenipotentiary powers to negotiate ~~to~~ " for "the Banabans".

F Page 32, starting at the question just below A: "Working simply, repairing what their installations were on Ocean Island in 1942, when the Japanese came, just making do and mend, no elaborate schemes, supposing somebody had said, the Crown had said: 'You aren't going to have any land on Ocean Island, keep it for some other purpose'". I think what I must have said was "You aren't going to have any land on Ocean Island, we want to keep it for some other purpose".

G MR MOWBRAY: I do not know that it was not Crown Land; they might have been going to keep it.

MR VINELOTT: It does not make sense.

THE VICE-CHANCELLOR: Suppose instead of "keep it" we say "leave it for some other purpose".

H MR VINELOTT: Yes, my Lord.

Then just below D: "(Q) 1946-47. (A) I think they would, yes, because it must have been worth spending" it

should be "£100-150,000".

A Then over the page at C: "(Q) The Colony was going to welcome the association of phosphate mining". I think it is clear from what comes afterwards that it should be "cessation of phosphate mining".

B Page 34 at E, the answer: "Yes, unless the value of the strongest card you have got could be like your" innocence, not "innocent, or "you are innocent".

THE VICE-CHANCELLOR: "... the strongest card you have got could be like you are innocent".

MR VINELOTT: Yes, I accept that. It is a slangy way of speech, but I think that is what it means.

C Page 39 just at C the answer, "Because I do not think that the remaining acreage was going to be a great deal of use to the Banabans. I am trying to think of it in terms of" prospective bargaining.

D Page 43 just below B, I say "One of the companies there is" I think it is Broken Hills South. I have not got that document available, but that is my recollection.

Over the page at 44 just below C your Lordship says "That is taking 1929 to 1930? The trouble is that in D.1 the phosphate years run from the end of June, but D.7 is the year ending, so they are calendar years". I am recorded as having said "Yes", but I think what happened was I first of all agreed with your Lordship and then I said "No".

E THE VICE-CHANCELLOR: I remember that quite well and I went on and said a bit more than that because I suddenly noticed on the document that it was to June 30th. Certainly that is far too simple.

MR VINELOTT: I think if we added to your Lordship's observation something like "No, looking at D.7 it runs to the 30th June".

F THE VICE-CHANCELLOR: "No, D.7 shows years ending 30th June". I have added that to my comment.

MR VINELOTT: I am very much obliged.

G Page 51, the question at D: "Before you arrived had any other Banabans outside shown a profound knowledge of Banaban custom". I think the question was "Before you arrived had any other outsiders shown a profound knowledge ..."

Then the last one on page 58: "Apart from the presence of phosphate, if land had no phosphate". Then four lines below D: "... he could not utilise more than say 12 lands, because even with the " help "of his family ..."

H Those are my corrections, my Lord.

A MR MOWBRAY: I have a few, my Lord. On page 25 at G, your Lordship's question, it should end not "on Banaba" but "for the Banabans".

B Then on page 50, the next to the last line on the page, I think I picked up something which perhaps was a turn of phrase the Shorthand Writer was not familiar with. I had better read the sentence: "Then you go on adding more and more land cases and for each specific case you may find that you can have to modify your provisional code because you find a certain thing which just does not fit with the code and you discuss that with the members". I think what I heard was "which is out of tune" - not that it makes any difference.

THE VICE-CHANCELLOR: This is Professor Maude's answer.

MR MOWBRAY: Yes, my Lord.

C THE VICE-CHANCELLOR: "... you find a certain thing which is out of tune", is that right ?

MR MOWBRAY: Yes, my Lord.

THE VICE-CHANCELLOR: He certainly used that phrase at some time.

D MR MOWBRAY: Yes. Then on page 49 above B. I am not surprised because I am not sure how to spell the word myself, but that word "aepproximate" should be "autochthonous". That is how I spell it and our Greek scholar tells me that is right. It occurs in two other places on that page, one the question above E and the first line below B.

E I am told there is another on page 30 at D: "Do you think, in the situation of the Banabans as it was in"1946-47.

F Page 40 there is a slip: "Of course it depends on what is the starting point within the operation with the review clause as well. If the starting point is 760, two-thirds, 75 per cent above the flat rate, which is available". I do not know what is wrong with that, perhaps we can put it in a square bracket.

THE VICE-CHANCELLOR: I will put a question mark by it.

MR MOWBRAY: My learned Junior suggests to me "If the starting point is approximately two-thirds ..."

G THE VICE-CHANCELLOR: I have put in "approximately" with a question mark and a question mark round "760".

MR MOWBRAY: Then we can leave the transcript. Your Lordship will be pleased to hear my learned junior has now prepared the agreed summary.

H MR VINELOTT: This is put in really as a convenient reference, I do not know whether it needs a number ?

THE VICE-CHANCELLOR: Yes, it does. That is fairly simple because I have got X.1, which we called X because we could not think

of another letter, and this can become X.2.

(Summary put in and marked Exhibit X.2)

A MR VINELOTT: Perhaps I can take your Lordship through it. Starting on page 1 you get May 1900 agreement with 'King and Natives' £50 a year. 1900-01 'Freehold' sales. Average £15-£16 an acre. And then there is Note (1) and the reference there is the LS Bundle, page 3: "Sales after 28th November 1900 were validated by the Gilbert and Ellice (Ocean Island) Regulations 1903, Bundle 2, page 8.

B Then 1903-09 P & T Deeds. £6-£30 an acre", LS Bundle page 4-12. "Price fixed by individual bargaining" Bundle 11 page 2. "Coconut trees usually paid for separately", and the reference is "The P & T deeds did not require trees to be paid for separately, but this seems to have been the usual practice: Bundle 11 page 130, Cl.4 of 1913 Agreement".

C Then 1913-22. 1913 Agreement plus A & C Deeds. 6d a ton on all phosphate shipped from 1st July, 1912" and the note is: "(A) The first year's royalty (£4,734 less £300) was spent 'for the benefit of the existing Banaban Community'. (b) Subsequent royalties were paid to the Banaban Fund from which (i) the interest was distributed annually among Banabans who leased land after 28th November, 1913; (ii) payments of capital were applied for Banaban services and for the general benefit of the Community". And that is £40-60 an acre. Additional payments for coconut trees - £1 for full grown trees and less for young trees".

D Then 1931. Compulsory acquisition. 10½d a ton on all phosphate shipped from 12th January, 1931. £150 an acre. No payments for trees", and then the note is: "2d a ton to the Provident Fund until it reached £175,000 (which it never did). (b) 8½d a ton for the native owners (under the unamended 1928 Ordinance); or for the benefit of the natives of the island (under the 1931 lease and proclamation, and under the 1937 amending Ordinance); (c) After 1937 there were (Bundle 34, page 91): (i) Annuities paid to all Banabans: £8 to adults and £4 to children; (ii) Bonuses paid to landowners: amount varying from £2-£10 according to acreage."

E F 1940: "Provisional Agreement. Not implemented. 1/- a ton" and a reference to note (7) "Of the 1/- royalty, 2d was to be paid to the Provident Fund until it reached £250,000 Bundle 36 page 45.

G Then the 1947 Agreement: "1/3 a ton on delivered weight of all phosphate shipped from 17th April, 1947" and the note: "From 1st January, 1949, control of the royalty funds passed to the Banabans. The 1/3 royalty was increased from 1960. See Bundle 48 page 61 for a table setting out these increases" and then it sets out the immediate payments.

H THE VICE-CHANDELLOR: That looks to me like a most helpful document and I am very much obliged to your Juniors for collaborating in its production.

MR VINELOTT: May Professor Maude now go back ?

PROFESSOR H.E MAUDE, Re-called
Examination continued by MR VINELOTT:

- A Q Professor Maude, you told us yesterday about the organisation of the Gilbertese society and their customs and I asked you some question about earlier investigations, and you mentioned Mr Telfer Campbell as somebody who knew nothing or very little about Banaban customs. A. Yes.
- B Q Is there any specific instance of his lack of knowledge which you could instance? A. Yes. I think that there was an applied, at any rate, assumption in some of Mr Telfer Campbell's statements that the Banabans had possessed the right to sell their land - that is the Gilbertese custom known as te bowi but the members of the Lands Commission were completely unanimous on this subject, that the Banabans did not possess in 1931, and indeed had never possessed, the right to sell their lands. In fact, this right had ^{not} been recognised in the Gilbert Islands except in Abemama and its two tributary islands Kurio and Aranuka ~~under~~ ^{under} very peculiar circumstances where the High Chief in the latter part of the last Century, having reduced the population from 4,000 to 100 on Kurio and on Aranuka from 3,000 to 100, all of them slaves with one caretaker family on each, had plenty of spare land and he introduced this custom to Baubi, but it is not a Gilbertese custom. The basic principle of Gilbertese Custom, and Banaban custom, is that a man is only the life tenant of his lands and he has no right to dispose of more than the usufruct of the land during his lifetime. He cannot dispose of it except in accordance with Gilbertese custom after his death and his custom of te bowi is completely contrary to that. But Mr Telfer Campbell, I think, by the P & T deeds implied - and I may be mistaken here - that they had such a custom. I would give that as one evidence.
- C
- D
- E The second evidence I would give is that he seemed to have implied that in selling their lands they had the right to sell the phosphate under their lands, and this is not the custom. Again, they cannot sell their lands and the phosphate under the lands belongs either to the hamlet or later on, as I have expressed yesterday, the view of the old men was that it belonged to the community in general.
- F Q The Banabans in these days of P & T deeds were apparently giving to somebody else, the Pacific Phosphate Company, the right to take all the phosphate from their lands. How does that fit in with the account you have given of the custom of retention? A. I think there was a misunderstanding in 1900, as expressed to me by the old men - or at least some of the old men who were quite vocal on this subject - that when Sir Albert Ellis, or Mr Ellis then arrived in 1900 they were under the impression that what they were selling to him, or rather in their opinion leasing to him, was the right to take the rocks which were lying on the surface of their land and the phosphate which they could dig down with the primitive impliments then available to them, which I suppose were the big shovels and picks and spades and things like that. But as they mentioned it to Mr Elliott in 1913, they put it in records which I imagine are in one of the bundles that they had been under the impression that they were selling the phosphate down to 3 feet, and it was not until a later stage - which, to be fair to Mr Ellis, I do not suppose he really envisaged himself in 1900 - that extractive machine would be coming later on which would not
- G
- H

A only take the iaon tano, which is on the surface of the land, but ian tano, which is under the surface of the land, right down, as one old man told to me "Down to the very bottom of Banaba".

Q When the Banabans found phosphate being dug down to this depth, when did that happen? A. When the extractive machinery arrived and enabled the phosphate company to go right down. I really do not know.

B

Q Before 1913 or after? A. I think before. Just at a guess I would have thought about 1909, but I do not really know. It is a thing which the phosphate company would no doubt know when they got the machinery. But certainly not when Mr Ellis came in 1900, and I do not really think he had those ideas. He collected the phosphates from the surface and they were put into wheelbarrows and taken down to the ships.

C

Q When the Banabans discovered that they were taking the phosphate right down to the bottom of Banaba, as the Banaban put it, how did they view that in relation to their rights? A. They viewed it as a breach of the agreement entered into between Sir Albert and themselves, and they brought this matter up in the official interview with Mr Elliott. My Elliott himself expressed the opinion, in that same interview, that sales of land were contrary to law; that a man being only the life tenant of his land could not dispose of more than the usufruct of it during his lifetime. He has expressed that and that has been published.

D

THE VICE-CHANCELLOR: Professor Maude, can you help me on this: I think you are saying that under the Banaban custom a landowner thought he was entitled to dispose of the rocks lying on the surface of his land? A. Yes.

E

Q And that he was also entitled to dispose of the phosphate under the land down to a depth of about 3 feet where primitive impliments would reach? A. Yes; as I understood it, he considered that to be the surface phosphate.

F

Q Supposing a landowner who had himself dug up his phosphate down to about 3 feet and handed it over to the Pacific Phosphate Company. What was the position about the land thereafter? Could his successor take another 3 feet? A. This I submit is a moot point, to which I never got a real answer from them.

G

Q It was something they had not really thought about, is that it? A. They had not thought about it at all, it had not occurred to them when Mr Ellis was there that extraction going down hundreds of feet was going to occur, and they are not terribly good at this -----

H

Q I quite understand you had the problem of trying to make an extraction of principle, as it were, from the single instances, and so on, and the general trend of this experience in Banaban customs. A. This is so, my Lord, but not for phosphate. I did this merely to satisfy my own anthropological curiosity, as it were.

A Q I can see that with the High Commissioner expressing the view that the Crown owned the phosphate this was something it was rather difficult for you to pursue from any more than a sense of curiosity, as it were. A. Precisely, my Lord.

B Q But doing that pursuing you never found any coherent theory about the 3 feet depth? A. They never said to me 3 feet depth, they only expressed that to Mr Elliott. To me they expressed the depth which they could get down with their implements.

Q Would that be consistent with 3 feet, knowing what their implements were? A. Roughly, I would say so.

C Q So the first 3 feet seems to have been recognised as something within the competence of the landowner even though he had only the equivalent of a life interest? A. It seemed to me to be so, my Lord, because, again to get to the analogy of the Gilbert Islands which I keep coming back to, my wife and I have on frequent occasions purchased the surface soil, the humus underneath the bigger trees, which we had carted away to make our own vegetable gardens, and this was considered perfectly in accordance with Gilbertese custom. I do not think there has ever been any question of that even to the digging of the pits for the sort of rock pile that they build.

D Q You get a curious situation where you have two landowners one of whom has sold the top 3 feet and it has been carted away and the other of whom has not, and then they both die and their successors may be in different positions. The successor to the landowner who has had the 3 feet taken away may thereafter be unable to sell any of the surface; the successor to the man who had still got the 3 feet there is able, as any landowner, to sell those 3 feet. A. Because he has not yet disposed of it, yes. It is really a supposition which I thought of at the time, but I never ascertained from them because they were still regarding land as coconut bearing tree bearing land and when they dug down to such a depth that the trees could no longer be conveniently planted in that area in the early stages they were digging around their coconut trees as far as they could to prevent them dieing, but that soon gave out.

THE VICE-CHANCELLOR: I am afraid I interrupted, Mr Vinelott.

G MR VINELOTT: In 1913 we know there was an agreement under which the company acquired an area of land and it is stated in the deeds that the owners got a surface payment and a 6d royalty would go to the Banaban Fund. Was that agreement recognised amongst the old men, the 16 Commissioners, in 1931 as something within the competence of the Banabans landowners, something which they could do? A. They regarded it as a reasonable agreement, the 1913 one, because they were enabled to have a good say in the disposition of the money which they got from the 1913 agreement.

H Q Who would "they" be? A. The Banaban people as a whole.

Q Was it regarded as within the competence, within the power, of a landowner to pass on the right to mine the phosphate like that on these terms that he got the surface payment and the

A royalty went into a fund for the benefit of the Banabans ?
A. For the benefit of Banaba, yes, but in which they had a tremendous say. I mean, the Banaban people had a great say in the 1913 agreement. The great change that I saw in the Banaban people was in the 1931 resumption, not owing to the 1913 agreement.

B THE VICE-CHANCELLOR: But what happened in 1913, the agreement and the deeds which followed, did you gather whether that was regarded as being authorised by Banaban custom - something they had power to do ? A. I never heard an expression to the contrary, my Lord, because it was the Banaban people that had the say over how this money was to be used.

Q But you have the landowner entering into the agreement ?
A. For the surface, yes; and for the under-surface it went to the people of Banaba.

C Q There was general assent to the 1913 agreement by the Banabans which would have authorised the payment, or part of the payment, going to the Banaban Fund ? A. I never heard anybody saying that the 1913 agreement was a fundamentally unfair agreement, no.

D Q Well, I think you are being asked, not so much about whether it was unfair, but whether it is in accordance with Banaban custom ? A. I would say it is in accordance with Banaban custom, and that they would have said so too.

E MR VINELOTT: You told my Lord that Mr Ellis came out and spoke to the Banabans in 1900. What was the attitude of the Banaban Elders in 1931-32 when you were there to Albert Ellis ?
A. I am sorry ?

Q How did the Banaban Elders regard Mr Ellis ? A. I would say with great affection towards him - the older Banabans most certainly, without any shadow of doubt - and he towards them too.

F Q You told my Lord something about Mr Telfer Campbell and his knowledge of their customs and you told my Lord about Mr Mahaffy and Mr Elliott. There is one person we have left out and that is Mr Quayle Dickson. What do you say about him ? A. I must confess that I really did not hear much about Quayle Dickson. I do not know how long he was there or how much he was involved in the phosphate business. I do not recollect anybody speaking to me about Quayle Dickson. I have learned about him since, but that is not from the Banabans.

G Q I believe you have published a monograph on Gilbertese ownership. A. It is a monograph, really, on the ownership, or rather on the rights of the clan in the Gilberts, but it does mention the lagoon on Mipanau Island which I regarded as, perhaps, analgous to the ownership of rights on Ocean Island because here there was an inland lagoon which had once been exposed to the sea but had been completely blocked up by land all round and this lagoon was owned by the whole people of the Island through an intricate interlocking system of clan rights and privilidges. That seemed to me to be the same sort of thing as the ownership of the phosphate.

- A The phosphate had no value before the Flag and therefore there was no custom regarding phosphate as such and so one proceeded by analogy from the Gilbert Islands and there was a clear analogy, and that I have published.
- Q When did you make that investigation ? A. In 1930. That would be some months before I went to Ocean Island. I published it in 1963.
- B Q I am going to pass on to a later period now. Just going back to P.17, which is the sheet I put in showing your movements in the 30's: in 1931 you say from 5th October "As Native Lands Commissioner, made lands settlement of Ocean Island", and in 1932 you say "to 7th March as above". Then from the 11th November you were Administrative Officer on Ocean Island. A. That is correct.
- C Q So between the 7th March and 11th November you were not on Ocean Island - that is the inference I draw. Is that correct? A. No, not from the 7th March to 11th November.
- Q You were on Ocean Island, or not ? A. Not from the 7th March to the 11th November, no.
- D THE VICE-CHANCELLOR: I am sorry. What was the position between the 7th March and the 11th November ? Were you away from the island some of that time, or all that time ? A. I am afraid I have got no year on my document.
- THE VICE- CHANCELLOR: Before we go any further, please give the witness a copy with the years on it.
- E MR VINELOTT: I just referred you to 1932. You see "To 7th March as above" and then from 11th November Administrative Officer. So there is a gap between the 7th March and the 11th November. Do you remember where you were at that time ? A. I would have been in the Gilbert Islands as District Officer, mostly for the Southern Gilbert Islands District, in 1932
- Q Away from Ocean Island ? A. Away from Ocean Island.
- F Q Did you come back to Ocean Island on the 11th November and continue until the 5th February, 1933, and then from the 5th February, 1933, to the 15th March, 1933, there is another gap. Were you then away from Ocean Island ? A. Yes, I was again back in the Gilberts, partly in the Central Gilberts District and partly in the Southern, I think. I think I had both those districts from time to time. Ocean Island was one of only seven districts in the Colony and there were 37 islands in the Colony of which Ocean was only one.
- G Q Then from the 15th March you spent three months there as Acting Secretary to the Government and Administrative Office on Ocean Island. On the 14th June, 1933, did you leave Ocean Island ? A. Yes, I left then and I did not come back again for a long time.
- H THE VICE-CHANCELLOR: You are in the Gilberts again, are you ? A. Not entirely, my Lord. I was partly on leave in England

and again I was transferred to Zanzibar in East Africa.

A

Q Anyway, during 1934, 1935 and 1936 you were away from Ocean Island ? A. From Ocean Island, yes.

MR VINELOTT: How long did you stay in Zanzibar ? A. Not quite a year.

B

Q And for the rest of the time you were on leave or in the Gilberts ? A. Yes. I suddenly got a telegram saying owing to ill-health I was transferred to Zanzibar, and as soon as I could get away from it I got away from it.

Q It is fair to say that your heart was in the Gilberts ? A. Very definitely indeed.

C

Q Going to 1937, in November, 1937, you come to Ocean Island in connection with arrangements for the Phoenix Island lands resettlement scheme ? A. Yes, that kept me very busy indeed this Phoenix Island settlement. Perhaps it is incorrectly called "resettlement" because they were uninhabited islands.

D

Q The Phoenix Islands were ? A. The Phoenix Islands, yes, and we settled them with Gilbertese. They had nothing but a few plantation labourers on one or two islands but there were no indigenous inhabitants whatsoever throughout the Phoenix Islands.

11.30

E

Q So you settled Gilbertese in other islands ? A. Yes. First I took a party of old men and we examined each island minutely and dug wells to see what the water was going to be like, we examined the vegetation to see how coconut trees would be likely to grow, and all that, and then we made a full report to the High Commissioner on the settlement possibilities, how much each island, in the opinion of the old men, would take, and after the authorisation of the settlement scheme we then started to select the least affluent people from the Southern Gilbert Islands and we took them across in schooners and settled them on the three Southern Phoenix Islands schooner load by schooner load, women and children and men.

F

Q Is this process of moving populations from one island to another island something that has happened often ? A. In pre-historic times it happened, before documentation, we know from early tradition.

G

Q But in modern times ? A. In modern times this was the first of our settlement experiments, but we did others too. When I bought Kiowa Island ----

H

Q Where is Kiowa ? A. Kiowa is nextdoor to Rabi in Fiji and I bought it at an auction in Suva. It is a beautiful island and the Ellice Island people authorised me to pay up to £3,500 for it and I got it for £3,000, which they refunded to me and they are now resettling it on a very good basis indeed.

Q Where did they come from ? A. Vitupu in the Ellice Group. There are many settlements. They sent me on a tour of the

A whole of the Eastern Pacific Islands with a view to examining each island for its possible settlement potentialities, and this was really my love. I would rather do settlement work than anything else because it is so rewarding taking people from under-privileged areas where perhaps they have only got two or three coconuts and putting them on an uninhabited island where they can build a future for themselves and for their children.

B Q I am going to come on, a little later, to the question of Rabi, but just to complete your connection with Ocean Island. We had got to the Phoenix Island resettlement scheme in 1937, and in 1938 you were Administrative Officer for a short period of two months from 9th September to 15th November. So between the Phoenix resettlement scheme and the 9th September, 1938, I take it you were not on Ocean Island? A. Only from September to November, that period.

C Q You were there from September to November, but until September 1938? A. As Administrative Officer, yes, but I was still engaged then on the Phoenix Island resettlement scheme.

Q Right up to September? A. Oh yes, I was still working on that.

D THE VICE-CHANCELLOR: You went to Ocean Island in about November, 1937, and you stayed there till when? A. I went there on the 9th September, 1938, my Lord.

E Q No, I am back in 1937. In or about November, 1937, you were on Ocean Island in connection with the arrangements for the Phoenix Island land resettlement scheme. How long did you stay on Ocean Island from November, 1937? A. A very short period.

Q This is a flying visit? A. That was a flying visit while I was getting preparations made for the Phoenix Island settlement scheme.

F Q And then you were away from Ocean Island after this flying visit until the 9th September, 1938? A. Yes, my Lord.

MR VINELOTT: And on the 15th November, 1938? A. On the 15th November I left again.

Q And went where? A. Went back then to the Southern Gilbert Islands and I was then engaged on land settlement work.

G Q In the Southern Gilberts? A. In the Southern Gilberts, yes.

Q And you remained there in 1939? A. Yes.

H Q Then reading the text of this, it says from the 8th February, 1940, you were an official of the Western Pacific High Commission in Suva? A. Yes, in 1940, I returned to Suva. I had a slipped disc and I had to go down; they put me on a stretcher and took me down.

Q How long did you stay in Suva? A. I was there, to the best of my knowledge, until after the war when I went back in 1945

A as Acting Resident Commissioner, the first civilian to go back after the war to take over from the Military Authorities.

Q Where did you go in the Gilberts ? A. When I first went back ?

B Q Yes. A. I stayed on Tarawa, but Tarawa is divided into islets like a sort of necklace round a lagoon and I was staying on the Southern Island of Betio, which was the American Military Headquarters, while I was taking over from the military authorities. The headquarters which we made were on the next island of Bairiki and my wife, who was not allowed by the American Authorities to live on Betio in an American emcampment lived on Bairiki in the Rssidency and so did some of the Officers of my service; but they wanted me to stay with them until handing over had taken place. So I was down on Betio but used to go frequently across to Bairiki.

C Q What sort of distance is Betio to Bairiki ? A. Perhaps 6 or 7 miles. At very low tide you can walk across from one to the other if you are pretty fast walker. I have done it more than once and it is a pretty good walk, but normally you go in a launch from one to the other.

D Q Is Bairiki where the Banabans came to after the war ? A. Major Kennedy gathered the Banabans together and he brought them to Bairiki Island, yes. That is where I went up to see them.

E Q We will be coming on to that. I want to ask you about your period at Suva. What was your position at Suva in 1940 ? A. Well, I did so many different pieces of work. I was sent to Pitcairn Island to prepare a constitution and a code of laws for the Pitcairn Islanders, and then I came back and I worked in the High Commission office. Then the Queen of Tonga asked for me and I was seconded to the Tongan Public Service from the British Colonial Service for the re-organisation of Her Majesty's public service. Then I came back again and engaged in various works as Assistant Secretary to the Western Pacific High Commissioner. Of course that was during the war period and I was working for American Naval Intelligence at Pearl Harbour for a considerable time, and I worked for the FBI and many organisations.

F THE VICE-CHANCELLOR: Before you go on, Mr Vinelott, may I say I find D.18 a rather difficult document to follow and I should like to have, in some simple form, some statement of when Professor Maude was first of all on Ocean Island, the periods he was on Ocean Island up to the time the Japanese came, and then secondly when he was on Rabi with the Banabans after they had been settled on Rabi.

G MR VINELOTT: Yes, my Lord. I think it is D.17. I will see that that is brokendown.

H THE VICE-CHANCELLOR: It must come down simply to his periods on Ocean Island and his periods on Rabi.

PROF. H.E MAUDE
Examined:

A MR VINELOTT: What we will do is amplify the statement by the
evidende which Professor Maude has given this morning and put
it into convenient form.

THE VICE-CHANCELLOR: It is not so much amplification I want as
reduction!

B (Continued on next page)

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A Q Now, coming on to the purchase of Rabi, were you concerned with that?
A. Yes, I was concerned with the purchase of Rabi.

Q What about Wakaya, were you concerned in the negotiations about the purchase of that? A. Some of them, not all.

B Q Can you describe to my Lord how Rabi came to be purchased? A. It really came to be purchased in connection with the purchase of Wakaya Island. The two purchases were rather inseparable for a time. We had been looking for possible homes for the Gilbertese for a long period in the early 1930's. Wakaya had been mentioned as a possibility, but in general it was then hoped that they might favour a settlement on Kuria Island in the Gilbert Islands, but they turned down this island, I think very wisely.

C Q "They" being the Banabans? A. The Banabans did, yes. That was one of the islands I mentioned, that the High Chief of Abemama had reduced in population from 4,000 to 100 and so there was plenty of land available for them there, but it would not have been a happy island for the Banaban people and they very wisely turned it down.

D Q Was Wakaya to be bought on its own or in conjunction with Rabi? A. Originally Wakaya was suggested by, I think, Major Kennedy, just before the war to the Banaban people and they were very keen on its purchase. Major Kennedy had discovered that it was likely to come on the market owing to the death of the owner and a possibility of the family selling it off, and they asked that the High Commission should examine the possibility of buying Wakaya Island for them. As a result the High Commissioner had the Island carefully examined by Mr. Parham, who was easily the best agricultural officer in the Fiji Government Service, and he took another officer with him and they went into it and made a thorough report on Wakaya Island. The conclusion of that report was, without doubt, that it was not suitable for the settlement of the Banaban people owing to the shallow soil, the insufficiency of the soil, and above all, I would say, the lack of a good water supply on the island.

E I was then on my way from Pitcairn Island, but the High Commissioner directed me by telegram to come to Fiji to discuss matters with him and we did discuss the whole question of the purchase of Wakaya Island and I made then the suggestion that the Banabans might like to purchase Fanning and Washington Islands in the Line Group which I had examined in 1938 with a view to their possible colonisation. This was put to the Banaban people and they did not favour that either.

F So Wakaya was the island which they wished to have and they asked if they could send some delegates down from Banaba to Fiji to examine Wakaya in person and also they wanted to have a copy of the Parham Report and the Parham Report was sent up to the Banabans and they did examine it, the authorisation was given for their delegates to come down to Fiji, but G unfortunately the only ship that could have taken them was the "John Williams" the London Missionary Society schooner, and that was full up with the evacuees, women and children, from the Gilbert Islands who were being taken down to Fiji at the time. This was at the beginning of the war period. So that the Banabans were unable to come.

H At that time the High Commissioner heard of the possibility that Rabi Island, which seemed to him suitable in every way, might become available on the market and he put that to the Banabans. This was very favourably reported to them by Mr. Garvey who was the Acting Resident Commissioner there and who himself knew Rabi very well, because his wife's brother was the Manager at Rabi Island and he had himself spent many periods there. I see reported

A in his telegram, which is in one of the bundles, I think, that the size and plenitude of Rabi Island was something quite beyond the grasp of the Banabans and they still wanted Wakaya to be purchased.

B Q What was the attitude of the Banabans towards Rabi? A. At that time they were averse to it because, as I said, it seemed too big and altogether something quite beyond their ideas compared with Ocean Island. They thought of Wakaya as something more in their size, you might say. But it was put up to them on several occasions and we got a six months option on Rabi from Lever Bros. who were wanting to sell it off at £25,000, which was a fantastically low price, and this worried me intensely, I could not get out of my head that we were losing a marvellous chance and I went to see the High Commissioner on two occasions and said could I Rabi Island and he said, "No, the Banabans do not want it. You cannot buy Rabi Island." Then I said, "What about Wakaya?" He said, "You cannot buy Wakaya because it is not suitable for the Banabans and we cannot put them in a place where they are going to be unhappy." So as far as he was concerned it was a dead letter.

C Then suddenly it came to me that there was another chance and I went to see him in the evening and I said, "May I buy Rabi Island purely as an investment? The Banaban funds are lying on deposit in the Bank of New Zealand in Sydney earning, I think, about 3%" and if we could buy Rabi Island and buy Wakaya we could get a fixed asset which at the end of the war would be worth a fantastic amount to the Banabans as against money which was, no doubt safe, in the bank, but was earning then practically no interest on their Provident Fund. And he agreed, he said, "All right, as an investment you can buy these two islands." So they were bought, or rather so Rabi was bought straightaway, although the option had then expired. Lever Bros. were so certain that the Japanese were going to take over Fiji that they were anxious to sell Wakaya at all costs and take the money and invest it in safer areas.

D Q You said a moment ago that Lever Bros. were anxious to sell Wakaya? A. I am sorry, Rabi. I get confused.

E Q What happened to Wakaya? A. Wakaya was on sale for us for £6,500, we thought, but the matter was put into the hands of Mr. Charlton, who knew the affairs very well, and he reported that it had been bought for less and that at that particular moment it was worth very considerably less and he did not recommend that we should pay more than £6,000 for it. But when the family who were the trustees of the dead owner heard that the Government was in the market for it they immediately put up the price to £12,500, I think, and at that figure it was considered by the experts on the subject as an unreasonable price to pay for Wakaya, so Wakaya was not purchased because of the unreasonable figure asked for it by the Bentley family.

F By the time the negotiations for Wakaya had failed but the negotiations for Rabi had succeeded, telegram communication with Ocean Island had ceased because of the Japanese occupation of Ocean Island and we were unable to inform the Banaban people, who had agreed to the purchase of these two islands as investments - specifically Mr. Rotan was mentioned in the telegram as having agreed to the purchase - and we were unable to tell them that we had succeeded in purchasing one island for them but not Wakaya Island, so this they did not hear until after the war was over.

G MR. MOWBRAY: My Lord, I do not want to prevent my friend from asking this witness about what is common ground on the pleadings or in the bundles within reason, because the witness has to be led on from one thing to another, if my friend is leading on something relevant, but I do not quite see where the purchase of Wakaya or whatever island the Banabans were to live on and

A so forth comes into this case. That is my point.

MR. VINELOTT: It is much easier to let the witness tell the story in his own way because there^{are} obviously matters we shall come on to a little later which are very material.

B THE VICE-CHANCELLOR: I think, Mr. Vinelott, it is undesirable to cramp a witness unduly; on the other hand you will of course have regard to what is fairly relevant to the issues I have to try.

MR. VINELOTT: Yes.

C Q You have told my Lord that a telegram was received saying that the Banabans wanted both islands bought, but you were unable to inform them, because of the wartime breakdown of communications, that it had proved impossible to buy Wakaya. A. Yes.

D Q When were the Banabans told about Wakaya? A. I presume they were certainly told by Major Kennedy when he went to fetch them from Kusaie and other localities to bring them all to Tarawa and with their agreement to take them to Rabi Island. He at no time mentioned the possibility of going to Wakaya Island and this would have been one of the first questions that the Banabans would have made to Major Kennedy, "Are we going to Wakaya or are we going to Rabi?" His report on the subject makes it quite clear that he told them they were going to Rabi Island.

Q After the war, you have told my Lord, you went to Tarawa in the Island of Betio? A. Yes.

Q And that Major Kennedy collected the Banabans together and took them to Bairiki? A. Yes.

E Q Did you see the Banabans at that time? A. Yes, on three occasions I went from Betio to Bairiki and saw the Banabans on each occasion. Only on one occasion did I address them as they were gathered on the beach at Bairiki and gave them a welcome and congratulations on getting away from the Japanese and told them how happy I was to see them again and I was glad to be informed by Major Kennedy that they had decided to go to Rabi Island for the temporary possibility and that within two years I would be coming to find out whether they wished to live on Rabi Island or on Ocean Island or to commute between the two.

F I explained why they could not go to Ocean Island at the time, because their villages had been smashed up by the Japanese to a large extent, and there was no food supply on Ocean Island. My wife was much more in connection with them because she was living on Bairiki and she was helping Dr. Tutu Tekanene to look after the women and children who had these TB glands and yaws and sores of all kinds and needed hospital treatment.

G Q The Banabans, we know, left on a ship called the "Triona" for Rabi. Did you go to see them off? A. On the ship, most certainly yes, especially because Captain Rhodes who was in charge of the ship was a personal friend of mine and he invited me there and I went on board and shook hands with everybody around and bid them good speed and a happy landing on Rabi Island. Certainly H I went out to the ship.

Q Do you remember whether Mr. Rotan was there at that time? A. Oh yes, Mr. Rotan was there. He was the leader of the Banaban people.

- A Q When did he become leader of the Banaban people? A. I would say that he consolidated his position as leader of the Banaban people at the time of the war when he was extremely brave in standing up to the Japanese on behalf of the Banabans and concealing foodstuffs and things from the Japanese on behalf of the Banaban people. After the war he was definitely regarded as their leader, an almost charismatic figure at the time.
- B Q It has been suggested that at this time Major Kennedy threatened the Banabans that if they did not go to Rabi, or any of them who did not go to Rabi would not receive any more money from the Banaban funds. Was anything of that sort said to you by the Banabans? A. No. I consider they would most certainly have brought that up with me if there had been any question of it. What was I there for but to listen to their complaints? It is not contained in Major Kennedy's reports, not so far as I have seen, anyway.
- C Q What was the purpose of transporting the Banabans to Rabi at that time? What was the plan? A. The purpose?
- Q The purpose or plan. A. They were transported to Rabi Island because they could not go back to Ocean Island. I had been the first civilian to land, or the first Government civilian to land on Ocean Island and I made an inspection of Ocean Island at the time and the place was a shambles. They could not have lived there, there was nothing to eat on Ocean Island.
- D Q What was their future going to be on Rabi? What was thought of as their future on Rabi at that time? A. Major Kennedy had gone at the request of the High Commission to examine Rabi Island and to make a thorough report as to everything which would be necessary in the way of tents and equipment, food supplies and everything for the reception of the Banaban people on Rabi Island and he had made that report before he went up to collect the people. The idea was that the Banabans would come down to Rabi Island and decide for themselves whether they thought this was an island they would like to live on and to make a permanent home or whether at the end of two years, when I made a pact, a guarantee with them that I would go to see them on Rabi Island and ascertain from them what their wishes were, and if their wishes were to go back to Ocean Island they could go back to Ocean Island or some could remain on Rabi and some could remain on Ocean Island or if they could get sufficient shipping they could commute between the two. Rabi Island, as far as I was concerned, was their island and Ocean Island was their island.
- E
- F Q At this time, during your discussions with the Banabans, do you think they knew that the Wakaya purchase had fallen through? A. Oh yes, there was not one person ever asked me a word about Wakaya. Surely if they thought that Wakaya was theirs I would have had not just one, but I would have had many people saying, "What about Wakaya?" It is incredible that they would not have brought that subject up, unthinkable.
- G MR. MOWBRAY: My Lord, this is what I feared. The Banabans' knowledge about Wakaya seems to me - I may be wrong, there may be some relevance that I have not seen - completely irrelevant.
- MR. VINELOTT: The relevance is that Mr. Rotan was asked questions about it and gave some evidence about it. The background of the negotiations in 1947 is important and it is important that your Lordship should see both sides of it.
- H MR. MOWBRAY: The fact that my friend asked Mr. Rotan irrelevant questions does not entitle him to ask this witness irrelevant questions.
- THE VICE-CHANCELLOR: Well, Mr. Vinelott, were they questions that you put to Mr. Rotan?

A MR. VINELOTT: I thought they were questions that my friend put. Certainly your Lordship will remember that Mr. Rotan gave evidence about threats that were made.

B THE VICE-CHANCELLOR: I recollect that evidence, but I think there is force in Mr. Mowbray's submission, if his foundation of fact is right, namely that you asked the questions. If his foundation of fact is wrong then I think you are entitled to ask them. I think perhaps the juniors might look to see what the foundations were.

MR. VINELOTT: Yes.

Q I am going to pass on to the period after the Banabans had arrived on Rabi. You went there, it appears from the P.17, in June, 1946, to arrange for Major Kennedy to leave, is that correct? A. Yes, in connection with some complaints which had been made by the Banabans with regard to Major Kennedy.

C Q At that time in June, 1946, what were the conditions like on Rabi? A. In 1946?

Q June, 1946? A. They were recovering, you could say, but they were not a happy people, it struck me, in 1946 really, not entirely. Of course when I saw them on the beach at Tarawa Island they were really in a bad physical state still. They had improved very greatly when I saw them in 1946, but there was still room for improvement admittedly.

D Q What about their physical condition? A. They were filling out and the sores were disappearing, there was hospital treatment available to them there and they were improving, but they were not 100%.

E Q What about the conditions in which they lived? A. The conditions in which they lived seemed to be adequate for their purposes. I did not go and inspect all around the place, but we did make enquiries and Major Kennedy considered them perfectly sufficient and no complaints were made to us on that subject. But admittedly we had not gone so much for that purpose.

THE VICE-CHANCELLOR: What were they living in? A. Some of them were living in tents, some of them had already constructed their own Gilbertese type housing.

F MR. VINELOTT: After this visit in 1946 did you receive or see any reports about the condition of the Banabans on Rabi? A. After 1946 - No, I was up on Tarawa Island. I think I was rather out of the picture then. I cannot recollect any reports on them at all. This was only just a brief visit and away I went back to my own work.

G Q We know that in 1947 you went to Rabi again. What was the purpose of that visit? A. That was for the purpose of taking the statement of intentions to them. This was the promise which we had made to them at Tarawa Island, that we would go back and find out what they wished done about Rabi Island and their staying there.

H Q What was the state of the Banabans on this second visit - the physical condition? A. They were very, very much improved indeed. But it was not really so much physically, as it were, they were psychologically ----- In my viewpoint in 1946 they had not made a decision in their minds and this was telling on them, it showed in the depression of spirits which I saw much more than any physical disabilities. In 1947 they had made up their minds and they were cheerful, resilient and they were certainly very talkative and when we were tired out at the end of the day they would go and dance half into the night.

A Q In your view at that time were they capable of carrying on a sensible discussion? A. Very much so; more than sensible, they were astute bargainers.

B Q How long did their discussions go on? A. Three days we discussed the matter. As I said in my report, they were endlessly repetitive, but the whole point was to let everybody have their say and then let them have it if necessary again, and it was not until a Banaban himself said "E a Tac", "It is enough," and then I suggested that it would be a good idea to have a secret ballot to find out what the people really wanted to do, and on that we would base it, and they said, Yes, they thought this would be a good idea. That was on the third day of discussion, if I recollect towards the evening.

Q We know what happened as a result of that ballot. After the ballot did you say anything to the Banabans about returning to Ocean Island?

C MR. MOWBRAY: This again is something of which I do not see the point. I find in Day 9 at page 12 in my learned friend's cross-examination something asked about Wakaya. Those sitting behind me tell me they do not find anything in chief. As I say, I do not myself see what relevance the choice of island to live on has to this action. It may have had some relevance to the last action but I do not see what it has to do with this one.

THE VICE-CHANCELLOR: Whereabouts in that transcript do you find it?

D MR. MOWBRAY: I see the word "Wakaya" just between ^{and} F/G on page 12 of day 9.

THE VICE-CHANCELLOR: That is a very long answer given by the witness to a very short question, is it not?

MR. MOWBRAY: Yes.

E THE VICE-CHANCELLOR: That is something that I noticed on a number of occasions with that particular witness; being asked a question about one thing he went on and said a very great deal about a good many other things. If you can show that Mr. Vinelott specifically directed a question to this sort of point and got his answer then I can see a great deal of force in your intervention, but I think if the witness is asked a question about one thing and then volunteers an answer or goes on to deal with other points it must be open to the other side, having heard all that answer, and I having heard that answer, to explore the matter and deal with what has been brought out and what has come out in that way.

F MR. MOWBRAY: The point was first raised, I think, a little earlier.

G MR. VINELOTT: On page 11 of day 9 it is raised by Mr. Rotan himself for the first time between E and F. He was there asked: "(Q) You agreed to go there for two years to see what it was like? (A) Yes. It was indeed the Banabans' desire to return to their land but word came to us from the company, through Kennedy, that if we were to return to Ocean Island at that time there were no houses for us because the Japanese had destroyed them and that it is why they told us it would be better for us to go to Rabi for two years while our houses were being built and we could return to Ocean Island after two years. The Banaban Elders agreed to this proposal in order that they might see this land and also to enable them to choose between Wakaya and Rabi." That is something entirely volunteered by the witness and I am asking Professor Maude questions about this occasion because we are anxious that your Lordship should not be left as a result of this with any false impression as to what the true position was.

PROF. H.E. MAUDE:
Examined.

A ~~THE~~ VICE-CHANCELLOR: It is of course very much on the margin of anything that I have to decide, but for the moment I do not propose to stop you, though you will at the same time bear in mind that the exploration of these very peripheral matters is something that should if possible be kept within very close limits.

B MR. VINELOTT: Certainly. I do not propose to take it at any great length. May I just say this. What has been said is that the Banabans at various times were coerced into doing things and they were not in the position to look after themselves. The totality of the situation is that it is very difficult to draw the line and say a thing comes down on one side of it or the other.

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- A Q After the 1947 meeting, after the ballot had been taken, did you say anything to the Banabans about going back to Ocean Island if any of them wanted to? A. I stayed behind for two further days in order to give an opportunity to those who wished to go back to Ocean Island to give me their names.
- Q Did any come forward? A. No one came. In the ballot, of course, 13 per cent of the people voted to go back to Ocean Island and I had anticipated that some of them would be coming: that is why I stayed for two days.
- B Q During the three days of discussions which you have described, would you say the Banabans were in normal health or less than normal health? A. In normal health.
- Q Intellectually would you say they were in normal condition or below par? A. Intellectually they were in very, very normal condition - they were of course naturally a bit excited, but they were I would say 100 per cent.
- C Q Now just one general question about the Banabans. Are they as a people able to conduct an argument and look after their own interests? A. Oh, very much so, the Banaban people are, yes. I have reported so in a printed report.
- Q Are they easy to lead? A. By their leaders, yes.
- Q And by others? A. By Europeans or others, no. No. As I put in my report, they know which side of the bread their butter lies.
- D Q Mr. Rotan has said that in these discussions which you conducted a threat was made **that** if the Banabans did not wish to remain on Rabi it would be sold. Was that said? A. No. It could not be sold. This is contrary to my own recommendations in my report which was printed; it was contrary to the instructions of the Secretary of State; it was contrary to the instructions of the High Commissioner; it was contrary to my own dearest wish.
- E Q I am going to ask you to look at the transcript of the Evidence of Mr. Rotan given in chief. Will you take first Day 7 and look at page 3. At D a document was handed to Mr. Rotan and the question was asked: "Is that a list of the landowners in the 150 acre mining area? (A) This I know is the truth because when I saw that the Company had started to destroy the land and also removed or caused the non-existence of the boundaries I went up to the Company to tell them about the owners of this land and we did not only give the names of the landowners but we also showed them the boundaries of the land, and that is why I know that these names are the names of the owners of the land. (The Vice-Chancellor): You said 'the Company'. Do you mean the Company? (A) Yes, because I wrote to Mr. Maude about this issue and the Company then made that survey and we showed them the boundaries of the land." Do you remember receiving that letter? A. I cannot say that I actually
- F remember it, but I am perfectly sure that it probably is quite true. It is very difficult to remember: this was in 1931, was it not?
- G Q Yes. A. Yes, it is half a century. It seems very probable.
- H Q Now would you turn on to page 6 where just below D Mr. Mowbray says: "Now I want to ask you about the water caves. According to the Banaban customs who owns the water caves? (A) There are two customs about the water caves. There are two water caves which belong to the community, and anyone - any female, that is, not anybody else - may draw water from these two water caves. Each day, every day of the year, these two caves are open for the public to draw water from. Besides these two water caves there are water caves also that belong to and are owned by certain families. The openings

A to these water caves are not usually left open, they are closed. When members of the families decide to open such water caves they have to meet, and after agreeing that this is to be done then they would approach the one who has been appointed to be the keeper of the water cave owner."

MR. MOWBRAY: That is a passage on which Mr. Rotan was not cross-examined.

MR. VINELOTT: The whole of the customary ownership of minerals was exhaustively gone into but of course if the witness was giving evidence himself it may be different, but the substance of it was gone into.

B THE VICE-CHANCELLOR: The water caves may be in a rather special category because if you wanted to controvert that proposition and you did not put to Mr. Rotan what you say the true position is, it hardly seems right that you should lead evidence in chief about it.

MR. VINELOTT: If your Lordship pleases.

C Q Now will you turn to page 11 where Mr. Rotan says: "When we asked Major Holland he said, 'No, there is none for you. This was for the Government'. When we handed him Mr. Maude's memo when he saw it he tore it up. It was in this context that I wanted to get the truth out of Mr. Ellis." Have you got a copy of the memorandum which belonged to Major Holland? A. Yes.

D Q It is in your possession. A. It has been in my possession since his death. Before his death he handed me his papers on Rabi Island and particularly this memorandum, which he had signed with his name and marked in various places.

Q How many copies did he have, do you know? How many copies did Major Holland have? A. He had the one copy which was sent to him by the High Commission.

E Q Would you turn now to Day 8, page 5 where my learned friend is asking Mr. Rotan some questions about a statement that was made in 1949. You, I believe, have seen that statement. It is set out on page 4 just above B where you see paragraph 8 is quoted. I think perhaps I should start at the top of page 3 just above A where my learned friend asks Mr. Rotan: "(Q) I want to ask you first about paragraph 4. Your Lordship has not seen this, so perhaps I could read it to your Lordship: 'First unpleasant incident. High Commissioner most displeased and disturbed. Matter must be put right. A few weeks ago at Island Council Rotan accused Maude, Macdonald and Holland of carrying through Statement of Intentions as trap to bind necks of Banabans. Bad words for anybody to use of officers who have done so much for Banabans; much worse for man in position of Rotan. Rotan has apologised to Holland but offending words were uttered in Council and apology and withdrawal must now be made.'"

12.30

G I am reminded that if you look at page 5 just below A Mr. Rotan was asked this question by my friend: "(Q) What did you say when Major Holland said that the Statement of Intentions prevented you from raising these points? (A) I was angry when Major Holland told me this and I replied 'Is that the paper by which the neck of the Banabans would be tied; is that the paper that would prevent the Banabans raising any matters at all?' Then Major Holland said 'Don't you know that those are the words of Mr. Maude and Mr. Macdonald in that paper', and he was angry and he said he would write to Fiji to the High Commissioner and also to Mr. Maude in London. (Q) What did you say to that? (A) When I saw him in great anger I apologised to him and told him that I did not intend it to make him angry, but that I would come to Fiji and tell Mr. Macdonald about this

and would also apologise to him."

A Was any apology ever made to you about this? A. No, no apology at all.

Q Now would you take Day 9, page 12 at E where it reads as follows: "(Q) What is that? (A) The Banabans' earnest desire was to return directly to Ocean Island. It was only I and the committee were to go to see these two islands, but through persuasion by Kennedy, mainly in connection with the non-availability of houses for us on Ocean Island, we accepted the proposal to go to Rabi."

B First of all, from your discussions with the Banabans on Tarawa and Bairiki in 1945/46, what do you say about that? A. This is the time when Major Kennedy had already told them about the proposal to go to Rabi Island and I again repeated this, why they had to go to Rabi Island, and they raised no objection to this matter provided they were to be given an opportunity after two years to express their desire either to stay on Rabi Island or to go back to Ocean Island.

C Q Would you just read on where it says: "The younger generation were very keen to return to Ocean Island to work. When I told this to Major Kennedy, Major Kennedy prevented the youths to join in the meeting, he sent them to work transporting our cargo. Kennedy told us that anybody who wanted and continued to insist on going to Ocean Island would lose his right to annuity and royalty." Was anything of that sort said to you by the Banabans? A. Not a word, no.

D Q If that threat had been made by Major Kennedy, do you think they would have mentioned it to you? A. I would anticipate they would.

E Q Now will you turn to page 15 at D. We are talking about the same period and here in cross-examination Mr. Rotan was asked: "(Q) Mr. Maude was at that time the Acting Resident Commissioner, he had moved his headquarters from Ocean Island to Tarawa, and he was well known to all the Banabans? (A) Yes, I know Mr. Maude very well, particularly from the time when he did the lands commission work on Ocean Island, but I cannot recollect, I really do not have any recollection of meeting up with him on Tarawa after the war." What do you say about that? Did you meet up with Mr. Rotan on Tarawa after the war? A. I met Mr. Rotan on Bairiki Island or islet.

F Q Now will you please turn to Day 10, page 13. I want to read a passage from the top of the page where my Lord says: "Is there possibly a translation difficulty here? (Mr. Vinelott): I was going to ask the interpreter if he could tell me what word was used which he translated into 'coerce'. (The Vice-Chancellor): Mr. Interpreter, what is the Gilbertese word used by the witness which you translated as 'coerced'? (The Interpreter): Kairoroaki. (Mr. Vinelott): I thought that might be so. We shall be calling Professor Maude who is very familiar with the language and my understanding is that the sense of the word in Banaban is 'strongly persuaded'. (The Vice-Chancellor): You see, 'coerced' has the meaning of putting improper or unfair pressure on somebody, threatening, persuading them by threats. That is the meaning of 'coerced' whereas 'strong persuasion,' or 'strong arguments' does not have the same meaning as being improper. Does the word that the witness used have this meaning of unfair or improper or threatening persuasion? (The Interpreter): Much has to do with the background or the context. Kairoroaki can be used in a good sense when I 'strongly invite you for dinner' but if we are arguing over a matter - (The Vice-Chancellor): Then it can be used in a bad sense, is that it? (A) Then it is quite the opposite. And there is another word I was thinking

A of, and that is kakamakaki and that would have the equivalent of threats. Kairoroaki and kakamakaki would really be a combination of coercion and threats."

You speak Gilbertese, Professor? A. Well, it is a bit rusty.

Q Can you help the court in the understanding of this word? A. Kairoroaki is a word which has a very wide meaning - I think that Tofinga is quite right here in saying that it has many different meanings according to the context in which it is used. I would not quarrel with that at all.

B Q Is it a word which has changed its sense over the years? A. It is a word which is frequently used. My own feeling is that, looking up seven or eight dictionaries on the subject, it is gradually becoming a stronger word, that is, it is more in the sense nowadays of coercion than it used to possess and my original suggestion was or had been that perhaps Mr. Rotan had not meant to use something quite so strong as "coerce", because I did not see how he would want to say "coerce", but if that is what he meant, then this is perfectly legitimate for him to use this particular word in that sense.

C Q In the sense of ... ? A. Of coercion.

D Q Now will you turn to page 19, please. I was asking some questions about the evidence Mr. Rotan had given in chief and at F I asked: "Is this what happened, that Mr. Maude said: 'If you don't want to stay on Rabi but want to go back to Ocean Island, Rabi can be kept as an investment or it can be sold, and there are many people who will pay more for it than the Banabans had to pay for it'? Do you agree with that? (A) No. Mr. Maude did not tell me there were many others who would like to buy Rabi at a price higher than what we paid for it. (Q) That is what I am suggesting. (A) What I really know of what Mr. Maude said to me was that if we did not remain on Rabi there were many others who would like to buy Rabi, and this would mean our losing Rabi. Our hearts became heavy over this, because should we return to Ocean Island then Rabi would be lost to us. (Q) Is it this statement by Mr. Maude that you had in mind this morning when you said that there was a threat that if you did not sell your land to the BPC, Rabi would be sold? (Mr. Mowbray): Mr. Rotan did not use the word 'threat'. I do not think he put it like that. (The Interpreter): I think this word is a bit different. (Mr. Vinelott): Would you ask Mr. Rotan not to reply to that? (The Vice-Chancellor): Can your juniors on either side help? F It might be simpler if you asked your question in a slightly different form. (Mr. Vinelott): Yes, I think so. (The Vice-Chancellor): It will save a lot of research in notebooks. (Mr. Vinelott): I may have put it too highly by using the word 'threat'. (Q) I am going to put this question in a slightly different way, and ask you a different question. You told my Lord this morning that when the Banabans agreed to sell the further land to the BPC they did not put forward a higher figure than 1/6 because they feared that if they asked too much Rabi would be sold? (A) Yes, that is true. This was between, at that time, Mr. Maynard and the Banabans. (Q) Are you saying that this fear of the Banabans arose as a result of anything Mr. Maude said? (A) No. We were frightened at that time of the words said by Mr. Maude to me and the Banabans, if they did not agree to remain on Rabi then Rabi would be sold. We were sad, because we thought we have obtained the land in the event of our Ocean Island being finished." G Do you see that? A. Yes.

H MR. MOWBRAY: Would my friend read the passage at H on that page to A on the next page?

A MR. VINELOTT: "(Mr. Vinelott): I have only two more questions to ask you about 1947, and I am going to ask them just to make sure I have not misunderstood your evidence. Firstly, am I correct in understanding that you say that nobody told the Banabans at any time that if they did not agree to sell land on Ocean Island to BPC, Rabi would be sold? (A) That is not the truth. The truth is that we were frightened that if we refused to hold on to Rabi and returned to Ocean Island, then Rabi would be lost to us. (The Vice-Chancellor): Did anybody tell you that? (A) No one told us that, but this is what I gathered in our discussions with Mr. Maude. (Mr. Vinelott): No one told you that, but this is what you felt. Is that right? (A) Yes, I felt this in our discussions with Mr. Maude."

B

C Did you say anything about selling Rabi at this time? A. Yes, I did, certainly, because you will remember that Rabi was bought as an investment for the Banabans and I was anxious to point out that I had not made a bad investment on their part and if the unfortunate events had come about that they really wanted to sell Rabi Island, which after all was bought from their own provident fund, it could be sold if necessary. It would be against my wishes, of course, but I wanted to make sure to them that they would not be losing money after selling Rabi Island if they wanted to sell Rabi Island but they would be making a very large profit indeed. We had been already asked by Lever Bros. if they could purchase the island again for £80,000 once they found the Japanese were not going to take it over. There is a case in point where they would have made far more than they could have done in any possible investment of their funds. But £80,000 is a very small amount to what we could have got for Rabi Island after the war. At the moment we could get £3¹/₂ million for it I suppose. That was all my idea was, to point out that I was not doing a bad bargain for them, but that if they really wanted to sell Rabi Island - and I hoped very, very, very much that they would not want to sell it - it could be sold for them.

D

E Q Yesterday you told my Lord that Sir Murchison Fletcher held the view that minerals belonged to the Crown. A. So I understood, yes.

F Q So far as you know was that view ever entertained or expressed by other High Commissioners? A. Mr. Vaskess told me that he understood that that was possibly the proposition. I certainly had to argue it out with virtually every Resident Commissioner when he first came to Ocean Island - not that they stressed the thing, but I just had to fight for the Banaban rights to the phosphate thing, just as I had to fight with each Resident Commissioner and the High Commission over the reef rights between high spring and low spring tides which they again had an idea belonged to the Crown.

(Continued on next page)

A THE VICE-CHANCELLOR: What you are being asked is whether any other High Commissioner than Sir Murchison Fletcher ever expressed the view so far as you know that the minerals belonged to the Crown. A. Not to me, my Lord.

Q Did you ever hear of any suggestion by any High Commissioner except Sir Murchison Fletcher? A. No. I am trying to think of all the High Commissioners and their views, but no, not ----

B MR VINELOTT: You told my Lord that you argued it out with various Resident Commissioners. As a result, what was the view of the Resident Commissioners, in your time? A. They seemed perfectly happy on the subject.

Q Did they accept your view? A. Certainly Mr Grimble did, but he said it was not worth arguing with Sir Murchison Fletcher on.

C Q And subsequently? A. Barley accepted my view. Mr Garvey accepted it. Yes, I think they all would have accepted it. But they were not perfectly sure in their own minds as to what the Secretary of State's attitude would be if the matter was brought up.

D Q If you had been asked in 1931, or if it had been suggested in 1931, that there should be a clause in the lease - a lease of mineral rights entered into voluntarily by the Banabans with a provision for variation which might make the royalty go up or down, do you think you could have explained that and that it would have been fully understood by the Banabans? A. About the lease going --- ?

E Q Do you think they would have understood the conception of a royalty on the minerals which might go up or might go down? A. It would have been very hard to explain to them, I think, because we had the same difficulty in the Gilbert Islands continually where the price of copra went up and down and on Onatoa and other islands they were continually withholding their copra because they said, "If we hold the copra then the price will have to go up." They were quite unaware of the fact that it is just a drop in the bucket, the Onatoa copra, and this was a very difficult thing to bring about and that is why, in the Gilbert Islands, we had to form a copra stabilisation fund which enabled one to cushion the ups and downs in the price of copra each year so that they got a stable price for their copra. I think it is a fairly difficult proposition to put to any native peoples, the market factor in London and other places. But that is only what I have found personally in trying to do it over copra. I have never tried to do it over phosphate.

F Q What about 1947? Do you think you would have been better able to explain it to them then? A. I think in 1947 they would have been able to understand that money did not buy as much as it did in 1940 or 1930, but I do not think they would have understood how market prices were fixed for phosphate.

G THE VICE-CHANCELLOR: The question is not whether they would understand how the market prices are fixed for phosphate; the question is whether you think it would have been possible to explain to them that the royalty would go up and down according to the way phosphate prices varied. Do you think that was an idea that in 1947 they could have understood? H A. I really know very little about it, but I do not think they would have been receptive to the proposition. I doubt if they could have really -- I think they would have thought it was some form of trick. I do not know whether I could convince them. It is hardly within my province.

A MR VINELOTT: Now I want to ask you a question or two about 1947. Will you take bundle 39 and turn to page 14, a telegram to the Secretary of the Western Pacific High Commissioner from Major Holland on Rabi dated 4th February, 1947. Starting at the second line he says: "I urge that no officer may visit Rabi for the purposes intended. There is a danger that such visits may revive former issues and that considerable ground gained in recent months may be lost. Please compare in this connection present attitude of Banabans as expressed in my letter of 2nd December," etc. (reading to the words at the end).

B Now, from your knowledge of the circumstances of the time on Ocean Island, do you think it was a sensible idea that Mr Maynard should negotiate with the Banabans alone on the acquisition of further land?

A. Certainly in view of the 1931 negotiations I would agree and this telegram was forwarded to me on Ocean Island and I replied to that effect. I do not know if it is in the bundle.

Q I do not think it is. I will look again.

C MR MOWBRAY: Is my friend waiving privilege for that document?

MR VINELOTT: No. My friend reminds me it was in the privileged bundle and was seen by Mr Justice Walton who said that in his judgment he thought it was not a matter which would be of any assistance to the plaintiffs.

D THE VICE-CHANCELLOR: What has happened is that a witness called by you has referred to this communication.

MR VINELOTT: Yes. It is not a matter on which any specific application has been made. What he said was that he had seen a copy of the telegram on page 14 and that he had replied to it. There is nothing in that which affects the privileged nature of the document.

E THE WITNESS: I could be wrong on this point. I thought somewhere in the bundle I had seen it.

MR VINELOTT: Do you think that the suggestion of Major Holland that Mr Maynard should negotiate direct with the Banabans was a sensible one?
A. Yes, certainly I did.

F Q Why is that? A. Because when the Government had interfered in the negotiations the Government had taken the whole blame for the negotiations themselves. In the 1930 resumption I regarded it therefore as a very poor exercise in public relations on the part of the Government and I was most anxious that on this occasion the willing buyer and the willing seller should come together and in particular the fact that the 1947 negotiations were not ab initio negotiations between the Banabans and the Phosphate Commissioners. That had taken place in 1940 and they had reached agreement on the subject and this was only bringing up to date the negotiations to which they had already agreed. It was a much easier matter.

G Q When you say "bring up to date" what do you mean by that? A. By bringing up to date the 1940 negotiations. I meant that there had been certain differences in the value of money between 1940 and 1947 and that I considered that those should be taken into account. I had mentioned that to Sir Albert Ellis myself, that I thought these negotiations should be taken into account.

H Q Did you make any enquiries or do you know if enquiries were made about changes in the value of money? A. It was a very difficult proposition. I understood that the Phosphate Commissioners had enquired from the Reserve Bank of Australia and had received a rather ambiguous and unsatisfactory reply, and if they could not do it I could not do it.

A But you will remember that in my printed memorandum I did express the
opinion that if the negotiations between the BPC and the Banabans should
unfortunately break down and the Government have to intervene at a later
stage they should base it on the 1931 resumption but up-date it by the
B difference in the value of money between 1931 and 1947. That is on record
here definitely in the bundle.

C Q Do you think the Banabans at that time were able to look after themselves
in negotiations?

A. Yes, I think they were certainly able to look after the negotiations
D and in particular, as they were not starting new negotiations but they
were dealing with negotiations to which they had already agreed and the
matter at issue was the addition which should be made to allow for any
E changes in monetary values in the interim seven years. I have no idea
what that figure would be. It was possibly not a figure that a legal
expert could have helped them on. Possibly some accountant might have
F been able to do it, but such people were not available.

Q The Banabans at this time were not within your jurisdiction, were they?

G A. No, they were not within my jurisdiction.

(Adjourned for a short time).

A2

EVIDENCE

24
(P.M.)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
GROUP B.

1971 R. No.3670

Royal Courts of Justice,
Wednesday, 31st March, 1976.

Before:

THE VICE-CHANCELLOR

ROTAN TITO

and

THE COUNCIL OF LEADERS

v.

HER MAJESTY'S ATTORNEY GENERAL

A IN THE HIGH COURT OF JUSTICE
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D THE COUNCIL OF LEADERS

v.

HER MAJESTY'S ATTORNEY GENERAL

E (Transcript of the Shorthand Notes of The Association of Official
Shorthandwriters 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 and Co.)
appeared on behalf of the Plaintiffs.

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.

G -----

EVIDENCE

DAY TWENTY-FOUR

H -----

A MR VINELOTT: Before the short adjournment you explained to my Lord your reasons for saying that you thought it was better in 1947 that the Crown should stand aside in the negotiations for the acquisition of the further land. Do you remember that? A. Yes, I do.

B Q In the course of those negotiations was there anyone to whom the Banabans could look for advice? A. Well, yes, they could have looked for advice from their own Welfare Officer, I suppose.

Q Who was that? A. During the 1947 negotiations that would have been Major Holland.

C Q Do you think Major Holland, from what you know of him, would have been willing to assist them in clarifying the offer or finding information they might want? A. I think he did in the earlier stages, but I think in the later stages he was prohibited from doing so by the High Commissioner. That is my recollection of the sequence of events.

Q I thought you accepted that Major Holland would be available to the Banabans; is that right? A. He would have been available at the time of the negotiations, no.

D Q You mean not while they were actually going on. A. Not while they were actually going on, but he was available before that when the negotiations were commencing, that is when the Banabans were discussing the negotiations but before Mr Maynard arrived on the island.

E Q Which visit are you referring to of Mr Maynard? A. The 1947 visit.

Q Up to that moment when Mr Maynard arrived for the second time, would Major Holland have been available to give advice to the Banabans? A. Up to the time when he was told not to, to keep himself away from the negotiations. I really do not remember the exact date on which he was told that, but my recollection is that he was told to keep out of it.

F Q From your knowledge of the circumstances, do you think any objection would have been raised to the Banabans employing a solicitor if they had wished to, or a lawyer from Suva? A. I think none whatsoever, because originally Major Kennedy had suggested, even before the war, that they should come down to Suva and they would be able to get a solicitor there. Major Kennedy had been in charge of them at the earlier period when they came down to Rabi; they could have no doubt asked him for a solicitor at that time. At a later stage they did ask for a solicitor, but the telegram which you showed me this morning indicated that they wanted to do the negotiations on their own. But there was no objection that I have ever heard to a solicitor being employed by the Banabans at that stage.

G H Q Would there have been any objection if they had wished to employ any other kind of advice? A. No, they could have employed any advice that they wished. They had the funds to employ the advice and they could employ the advice.

- A Q Was your attitude to the proposal that the Crown should not take part in the negotiations affected in any way by your knowledge of Mr Maynard ? A. To a certain extent, yes.
- B Q In what way ? A. By my knowledge of Mr Maynard over a number of years and the fact that he was very friendly towards the Banabans and the Banaban outlook on things. I had known him for some time before and I knew him until the time of his death.
- C Q When did he die ? A. About three years ago in Victoria.
- Q Was he, in your opinion, a reliable and trustworthy man ? A. By the Banaban people ?
- Q No, himself. A. I think he was, yes. They did not trust all the BPC people, but I would say that they trusted Sir Albert Ellis and Mr Maynard.
- THE VICE-CHANCELLOR: There are two different things. One is whether Mr Maynard was in fact, in your view, a reliable trustworthy man ? A, Yes.
- D Q And the other whether, so far as you know, the Banabans trusted him ? A. They trusted him more than most Europeans, my Lord. I cannot go further than that.
- MR VINELOTT: That was the Banabans attitude, but in your view was he a reliable and trustworthy man ? Do you think the Banaban trust was well placed ? A. I consider that they would be well placed in trusting Mr Maynard, but I would not go further than to say that he would not do something which was completely contrary to the policy of the British Phosphate Commissioners.
- E Q What about Sir Albert Ellis, do you think he was a trustworthy man in his dealings with the Banabans ? A. Very much indeed. He had a tremendous soft spot for the Banabans all his life. I knew him very well. He was a very religious man and he really did have a great love for the Banaban people.
- F Q Did your knowledge of Sir Albert Ellis influence your attitude to the proposal that the Crown should stand aside in these negotiations ? A. I would have recommended that the Crown should stand aside from the negotiations in any case. I feel that if the negotiations broke down the Crown could then come in, but they should not in the first instance.
- G Q Did you discuss the proposals for the acquisition of further land with Sir Albert Ellis at all ? A. Between 1940 and 1947, yes, I did, when I was in Auckland. I discussed it unofficially with him on many occasions when my wife and I used to go and visit his wife and himself.
- H Q From your knowledge, can you say who was the largest individual landowner on Banaba ? A. In 1931 ? My recollection of writing up the lands register of approximately 2,500 lands, Mr Rotan Tito would have been the largest single land holder.

A Q In 1931 ? A. In 1931-32.

Q Was the position different in later years, do you know ?
A. I had no idea after I finished the lands commission, I am afraid.

Q That was an answer based on your experience with the lands commission ? A. Yes, in 1931, writing up the lands register.

B Q When you first went to Ocean Island, that would be in 1930-31, what was the relationship between the Banabans and the company ? A. In 1931 they were very unhappy about the 1931 resumption. This had come as a psychological shock to the Banaban people. I do not believe that they believed that their lands could be taken away from them. They did not have any adverse feelings towards individual Europeans like myself, I am very glad to say, they did not consider that I had anything to do with it, and my relations with them were extremely friendly.

C Q What about 1939-40, was the attitude of the Banabans any different ? A. I do not think I can answer that question. I do not really know enough about them in 1939-40 as to whether they had changed to any great extent from the feeling which they had. I think possibly they were recovering from that feeling gradually, but I would not be willing to swear on oath.

D Q What about 1947, can you give any indication as to whether their attitude had changed ? A. In 1947 they seemed very willing indeed to get the whole question of their land settled on a free seller free buyer basis, and they seemed confident that they would be able to handle this particular situation. They were quite friendly towards Mr Maynard certainly. He always told me that this was one of the best meetings that he had ever had with them.

E Q Looking back, with your Colonial Government experience, do you think that decision to stand aside in 1947 was right, or not ? A. Yes; I favoured it at the time, I would still favour it.

F MR VINELOTT: Before I conclude my examination, there is the point which arose this morning about the passage in the examination of Mr Rotan Tito which I put to this witness which was objected to on the ground he had not been cross-examined on it. Professor Maude has come from Australia quite recently and he was not available at the time when Mr Rotan Tito was giving evidence. But I understand Mr Rotan is still in this country.

G THE VICE-CHANCELLOR: He is in court, yes.

H MR VINELOTT: And there is somebody with him who is, I will not say a qualified interpreter, but capable of interpreting, and in the circumstances I would like to ask Professor Maude a very few questions and then give my friend an opportunity to recall Mr Rotan Tito if he wishes.

A MR MOWBRAY: My Lord, I see some practical difficulties. I have in principle no objection, but I see some practical difficulties about it.

THE VICE-CHANCELLOR: The practical difficulties being what, an interpreter ?

B MR MOWBRAY: Yes, my Lord. I think we could possibly get over those.

THE VICE-CHANCELLOR: You have concluded your examination in chief subject to this point, Mr Vinelott ?

MR VINELOTT: Yes, my Lord.

C THE VICE-CHANCELLOR: I think the most sensible thing for me to do is to rise for two or three minutes and you can have a word together and either agree something or at least you can agree on what you disagree on.

(A short adjournment was taken)

2.30

D MR VINELOTT: We have agreed that I can ask Professor Maude to comment on this passage and if my friend feels that Mr Rotan Tito should have an opportunity to be recalled we can make arrangements for that. (To the witness): Professor, would you take Day 7 of the evidence, page 6, just below D: "Now I want to ask you about the water caves. According to the Banaban custom who owns the water caves ? (A) There are two customs about water caves. There are two water caves which belong to the community, and anyone - any female that is, not anybody else - may draw water from these two water caves. Each day, every day of the year, these two caves are open for the public to draw water from. Besides these two water caves there are water caves also that belong to and are owned by certain families. The openings of these water caves are not usually left open, they are closed. When the members of the families decide to open such water caves they have to meet, and after agreeing that this is to be done then they would approach the one who has been appointed to be the keeper of the water cave owner. Those are the customary ways about the water caves that I know of.

E

F

"(Q) Would you tell us where the two first caves you mentioned are: that is, the ones which are communally owned ?

(A) One is near Buakonkei and one is further to the centre, somewhere between the villages of Tapwewa and Buakonikei".

Do you agree with that account of the water caves ?

G A. In general, yes. I do not remember these two public water caves, but I would not deny that they exist at all if Mr Rotan Tito says that they exist, that there were two public caves.

H Q Those two public caves are open to anybody ? Or, rather, to any female ? A. To every female, yes, because only females could enter the water caves. In the old days any male who was seen even near to a water cave would have been killed.

Q Now to deal with the rest of the statement, that other water caves are owned by certain families. A. That would be true

- A insomuch as the hamlet groups were descended from an original ancestor and they were all theoretically at least descended from the same ancestor, and therefore they would be known as being kindred. That would be true.
- Q So if you substitute hamlet for family group ? A. Yes, but the hamlet group is, in a sense, an extended family group, extended perhaps 20 generations, but they would be kindred.
- B Q In that sense you would agree with the statement ? A. Yes, I would agree with it.
- Q You told my Lord yesterday the hamlet system had broken down by 1930. A. That is so.
- C Q I will read you what you said about that. My Lord asked: "The people of Banaba as a whole, and not simply any hamlet ? (A) No, not simply any hamlets at all, because this was 1931, and the hamlet system had broken down by 1931. The people had been brought together, really, by the Government, into four villages and these 87 hamlets were no longer functioning units for ownership. Nor were the new villages at all". Do you remember that ? A. Yes, I remember it.
- D Q After the hamlet system had broken down what happened to the water cave owners ? A. They ceased to have, really, any function in Banaban society. As soon as the British Phosphate Commissioners brought means of distilling water on the island they became as worthless, say, as the phosphate had been previous to the British Phosphate Commissioners coming on to the island. Therefore, the water caves, in my time in 1931, were of no importance within the economy of Banaba.
- E Q But before then ? A. Before 1900 ?
- Q Yes, before 1900 when that was the only supply of water, then they belonged to the hamlet or to the extended family. A. To the hamlet clan. Mr Rotan would be correct in saying, in my opinion, that certain families would be the equivalent of a hamlet, except that the hamlet is a geographical locality but the extended families still remained.
- F Q The hamlets had broken down. A. Yes, and the extended families still remained.
- Q The population of the hamlets. A. Yes.
- G THE VICE-CHANCELLOR: The hamlet, you say, has got a sense of locality. A. Yes.
- Q A family we think of in English as a fairly small unit. Would family group convey the idea; an extended family group governed by relationship rather than place. A. Governed by common ancestor, my Lord.
- H Q That is relationship; governed by relationship rather than place ? A. Than by place, yes.

- A Q It does not matter where the individual members live. If they are descended from a common ancestor they are a member of that family group; is that it? A. Yes, my Lord. In the old days the members of every hamlet traced their descent from a common ancestor, but when the hamlets broke down people were scattered but they still regarded themselves as members of a kindred if they were descended from a common ancestor.
- B Q But in the old hamlet days if you were descended from a common ancestor you would live in the same district, in the same part of the island, the same hamlet? A. Not in latter times, my Lord, only in the very early days. I suppose that is how hamlets started, but when a woman married outside a hamlet she would go and live where her husband was and so the hamlets were not perfect geographical unit.
- C Q At the time we are concerned with, from 1900 on, had the hamlets any geographical significance? A. From 1900 onwards, no.
- Q The hamlets had no geographical significance then, only blood relationships? A. Blood relationships maintained the sort of hamlet but without the geographical locality. That is why Mr Rotan has referred to certain "families", in my opinion correctly.
- D MR VINELOTT:
 Q If these extended families trace descent from a common ancestor, how far back do you go? A. It is 30 generations. It would be a poor Gilbertese who could not trace his genealogy back 25 to 30 generations. On Ocean Island certainly it would be exactly the same. But nowadays, again, a lot of people would not be able to go back five or six generations. I may be corrected on this point by modern Banabans, but my conception is that it has not got the same significance.
- E Q 25 generations would take you back quite a long time? A. It takes you back a long, long time. In the Gilberts it would take one back normally to the coming from Samoa. At the time of the breaking down of the great tree of Samoa when the people came from Samoa up to the Gilbert Islands. They would like to trace their ancestry, if they could, to that, or anybody who wished to be socially acceptable would try to do so.
- F Q Were they the autochthonous Gilbertese? A. Were they autochthonous Gilbertese? No, there were Gilbertese on the island before the coming from Samoa but they were helped, you might say, by the people who came up from Samoa.
- G Q So if you take hamlets as the extended clan descended from a common ancestor you would agree with Mr Rotan? A. Yes, if he is referring to the far kindred; not people who only go back to the great, great grandfather on Banaba or one further stage in the Gilberts.

Cross-examined by MR MOWBRAY:

- H Q Professor Maude, you told us yesterday that you discussed the position about the phosphate with the Banabans when you were sorting out their land problems in 1931 and 1932? A. Yes.

- A Q This is right, is it not, that you had to deal with legal matters during your service ? A. With the English law ?
- A Q Well, you told us you helped draw up a code of laws for Pitcairn. A. Oh yes, I am sorry, I thought you meant in the Gilbert Islands. In Pitcairn Island, yes, which is very many thousand miles away, I certainly dealt with legal matters. But there again, my idea was to find out what laws the Pitcairn Islanders wished to have to govern themselves.
- B Q You drew up a constitution for them as well ? A. Yes, I did; that has been published.
- B Q You wrote in your printed memorandum of 1946, you remember --- A. I remember the memorandum, yes.
- C Q And you remember writing it, I except. You wrote about the Banaban Funds ? A. Yes, I did indeed.
- C Q Could Professor Maude have Bundle 31, page 52. I will try to tell you where this comes in so that you see where you are before you look at it. I do not know how much of a study you have had to make of these old documents ? I see you indicate not much. Perhaps you remember from your days in 1934 - or perhaps you did not know at the time - that a question arose about the arbitration award that had been made in 1931 about the lands. A. The resumption ?
- D Q You remember there was an arbitration following the resumption? A. By Mr Neil , yes.
- E Q And that subsequently a question arose whether the sums awarded were in Australian money or in English money ? A. I do not remember that, but I think it probably occurred because our own salaries were changed from English money to Australian money. at that time.
- F Q At the same time, we can tell from these documents, the same thing arose over the Banaban money under the award. And the question arose about whether the Secretary of State should decide whether the Banaban money was to be in English money or Australian. Can I read you now two or three pages of Colonial Office minutes starting on page 52 of this Bundle.
- THE VICE-CHANCELLOR: These are Colonial Office minutes in June, 1934. A. Thank you, my lord.
- G MR MOWBRAY: I will start at the top of page 52: "I agree with Mr Jones in thinking that the Government, being in the position of Trustees for the Banabans, cannot determine this matter by giving the benefit of the doubt to the Commission against the natives. On the other hand, there seems some ground for the view that the Award even in terms of Australian currency would not be inequitable, and if the Arbitrators did agree that this was the intention it would seem the most satisfactory settlement. The remarks of Mr Neil, the Government Arbitrator, in paragraph 8 of his Report on the Arbitration Proceedings, rather indicate that he might come down on that side. As regards the other Arbitrator, Mr Lodge, who was then United Kingdom Phosphate Commissioner, said 'that there is no doubt in my mind as to
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what our Arbitrator would say" - obviously meaning he would plump for Australian currency.

"If the Arbitrators, on being referred to, disagree it would seem desirable to avoid further Proceedings, whether by reference to an umpire or by a new Arbitration; and in that event I think it would be proper to secure that the natives should share the benefit of the doubt and to offer to share the additional cost with the Commission, though in a last resort (if necessary to secure a settlement) the Government might perhaps pay the whole since as Mr Jones points out the surplus funds have been mainly derived from the Commission, who as a matter of fact in the recent taxation discussions criticised the Government on the ground of having built up too large a surplus instead of remitting taxation.

"To sum up, I think that reference to the Arbitrators should be pressed on the .." I cannot read it but it does not matter. "... subsequently on the Phosphate Commissioners that it would be fair (a) If the Arbitrators agree on sterling that the Commission should pay the additional amount due, (b) if they agree on Australian currency the Banabans should receive no further payment, and (c) if they disagree the Government and the Commission should share the additional cost.

"I therefore suggest modification of Mr Jones's proposals on these lines.

"I refrain from complicating this sufficiently involved matter by discussing the question of the royalty payments to Government and official salaries beyond observing that 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) and a totally different matter from the Government as Trustees for the natives giving away any case they may have".

Then I will not read the hand-written part on that page, I will go to page 54 where the new writing starts: "I think that as (a) The Secretary of State is practically in the position of a Trustee for the Banabans; (b) the United Kingdom Government is an interested party as a partner in The Phosphate Commission. The Secretary of State is precluded from deciding the matter off his own bat against the Banabans and in favour of the Phosphate Commission. I therefore agree that we should press for a reference back to the Arbitrators. I would not decide beforehand what we are to do if they disagree".

Would you just look back at (a) on that page "The Secretary of State is practically in the position of a Trustee for the Banabans". Does it accord with your understanding that the Secretary of State was in the position of a Trustee of the Banaban Funds for the Banabans? A. I should like to help you, but really this is rather out of my depth as a Lands Commissioner. I do not know what I should answer to the question. If it was a question concerned with native custom I would be able to help, but matters of trusts or these high matters which are dealt with did not come to me as a lowly official in the

PROF. H.E MAUDE
Cross-examined:

A Colonial Service, certainly not at that time. You mentioned that I wrote a memorandum on this question. I did that because I knew nothing on earth about the subject and I collected all the files I could from the High Commission office, I took them home and I sat on my bed for three days and I wrote out that memorandum to try to understand myself what was the position regarding the Banaban Funds, and because I found very few other people seemed to understand very much about it at the time.
B But having written that memorandum I really went on to write the other memoranda on funds. I am rather lost.

Q All right, we will not press that point. A. I would like to help you.

Q Let us go back to your land investigations on Ocean Island in 1931 and 1932. You told us yesterday that you did not place much reliance on asking people what they thought?
C A. In abstract, no.

Q You would see how they dealt with particular cases. A. That is so .

Q Is that still the way you would go about discovering the customary law of people who were today in the same stage of development as the Banabans? A. Well, today yes at that stage. I would not for the modern type Gilbertese; many of them are as capable as I am of understanding these things.
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Q Is that the method you would have used if you had been doing your work at an earlier time than 1932? (No reply) How early do you think the idea of communal interest in phosphate rights sprang up? A. My conception of these land customs is that they are in a constant state of evolution, as it were, of development, and if I had asked them in, say, 1899 what would be the proper ownership of under-surface phosphate rights I concede that their answer would have been "by hamlet groups". But the hamlets have broken down and as at 1931 there was no group within Banaba that seemed to be proper to the Banaban people, as I understood it, to own the under-surface phosphate rights. That was only in 1931. Today the position may be very different indeed, because they were then a subsistence, or a mainly subsistence, economy and now they are a mainly monetary economy. But my only contention I was trying to make was that it is for the Banaban people themselves to decide how the phosphate ownership should be divided up among themselves by a two-thirds majority of the people expressed in a referendum.
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Q When you say that, are you thinking of the Ordinance of 1940? A. It is expressed in the Ordinance of 1940, but it has always been my idea that indigenous people should decide their own customary laws to govern their economic affairs and their division of property.

H THE VICE-CHANCELLOR: Your concept of "custom" then is not something that always goes on being the same? A. It is not a static thing, no, my Lord.

- A Q It is not static, which is the sense in which custom is normally used in this country. Your concept of custom in relation to the Banabans is something that has changed from time to time by universal assent, or what? How is it changed? A. It should be changed by the will of the people, and my conception of how the will of the people is expressed is by a referendum in which the people can express their will. This is only a person/conviction that it should not be just a simple majority but a two-thirds majority.
- B Q On that footing the custom would go on as it always had done until there is a referendum changing it. A. Yes, my Lord.
- C Q And, therefore, it is not a custom that will vary from year to year by general beliefs, it is a custom that goes on always being the same until changed by referendum. Is that it? A. Once codified. There are some islands where the customs have never been codified. For instance, on Beru we had a report from the Lands Commissioner saying that the customs had changed very materially in ten years; they just seemed to change of their own accord as the economic and the social conditions of the people change.
- D Q On Ocean Island are the customs codified? A. I codified it in 1932.
- Q Up to 1932, then, on Ocean Island the custom is something that will vary from time to time? A. It was fluid.
- Q It was varied by general acceptance? A. By general acceptance, yes.
- E Q From 1932 onwards it remained always the same until varied by referendum. Is that it, is that your concept? A. Yes, as I said it was ossified until it was changed. That was my conception.
- F MR MOWBRAY: Let us just clear up one point before we go on to something else. We have got a copy now of the Native Land Codes Ordinance of 1940, which I do not think has been before the court up to now. Is that the Ordinance you were speaking of yesterday? (Same handed to the witness) A. Yes, indeed.
- G Q You see it says, in section 3: "Subject to the provisions of any ordinance or regulation now or hereafter in force in the Colony and to section 4 hereof, the ownership, possession, user, alienation and inheritance of native land or any interest therein shall be governed by native custom". Then section 4 saves mining operations. Section 5 provides for the drawing up of customs in a draft code in the local language. Is that right? A. Yes, that was done.
- H Q Then there are some other machinery provisions, and sub-section (4) says "If a majority of the native government considers that the native custom relating to land is truly and fully set out in the draft code, the magistrate, the scribe and the chief of kaubure shall thereupon certify the draft code as approved on behalf of the native government. 6. The Resident Commissioner shall cause the draft code, with such amendments thereto (if any) as the native government considers to be

A necessary, to be published in such manner as the Resident
 Commissioner shall prescribe in the island, islands or part of
 an island ... to which such draft code relates", and then there
 is a provision for objections to be heard. Then in 7: "At
 any time after the expiry of the said period of three months or
 the decision of the native government ... the High Commissioner
 may, by proclamation published in the Gazette, declare a draft
 code, with such amendments thereto (if any) as aforesaid, to
 B be the code of laws governing native land in the district to
 which it relates; and as from the date of publication thereof
 in the Gazette such code shall be conclusive as to the native
 custom governing the ownership, possession, user, alienation
 and inheritance of native land in such district. A copy of the
 code in English and in the language of the district shall be
 annexed to the proclamation". Then there is a provision about
 amendment in section 8 which you referred to as being important
 to prevent osification. A. Section 8? That was the one
 C I was thinking of, yes.

Q Let us just read that now: "The Resident Commissioner, on
 receiving a petition signed by not less than fifty male natives
 of the age of sixteen years and upwards of any district requesting
 that the code applicable to such district be amended, shall cause
 the wishes of the natives of such district to be ascertained;
 D and if he is satisfied that the amendment is desired by at
 least two-thirds of the male natives of or over the age of
 sixteen years of the district, he shall, after obtaining a
 certificate signed by the magistrate, the chief of kaubure
 and the scribe that a majority of the native government of the
 district approves of the proposed amendment, represent the
 matter to the High Commissioner, who may by proclamation amend
 the code accordingly". Can you tell us, was that the first
 E enactment of that kind? A. So far as I am aware, yes.

Q So between 1932, when you prepared the code on Banaba, and
 1940 it took effect just as a very careful summary of the
 existing law? A. Yes. But I was acting under the Native
 Lands 1922 Ordinance at that time.

Q Was that a similar thing? A. It did not have this provision
 F for changing codes. This is what I was trying to bring out,
 that I consider the osification of native customs is a very
 dilatorious thing. The Banabans should be able to change
 their customs according to how they consider it suited them
 today.

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Q I see. So it was you who pressed for this section 8 to be put
 G into the new ordinance; is that it? A. Yes.

THE VICE-CHANCELLOR: Did the 1922 ordinance simply provide for
 the ascertainment but not for the change? A. But not for
 the change.

Q Was that the position? A. That is my recollection, my Lord,
 H a very strong recollection.

MR MOWBRAY: That seems to accord with your recollection.

A THE VICE-CHANCELLOR: That is not in, is it ?

MR MOWBRAY: It is not in, my Lord..

THE VICE-CHANCELLOR: What are we going to do about this 1940 ordinance ?

B MR MOWBRAY: At the back of the PD Bundle with the collection of ordinances, my Lord.

THE VICE-CHANCELLOR: The last page of the PD Bundle is 128, so this will become PD.129.

(Ordinance put in and added to Bundle PD, page 129)

C THE VICE-CHANCELLOR: Can you give me the reference to the 1922 document ?

MR MOWBRAY: Bundle 29, page 16, my learned friend says.

(Continued on next page)

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THE VICE-CHANCELLOR: I have that.

- A MR. MOWBRAY: The draft Ordinance is on page 26. There is a report by Mr. Grimble on page 60 enclosing a copy of Mr. Maude's report and I think an amended draft ordinance follows at page 64.
- Q Will you look at bundle 39, page 89. There we have a letter from you to the Acting High Commissioner of the Western Pacific. Have you got that?
A. Yes.
- B Q Should I call it a despatch? A. If it was from the Resident to a High Commissioner, it is a despatch.
- Q I would like to read you a little bit from paragraph 15 on page 92. It was written in July, 1947, you see, and it was the despatch in which you sent forward a copy of the final statement of intentions of the Government. You say at paragraph 15: "The following details of the final action required before the management of Banabans' affairs can be handed to the Fiji Government may be of assistance to the Western Pacific High Commission staff. (1) A complete tabular summary of all revenue and expenditure" etc. - I need not read the rest of that - "(2) A complete statement, which would presumably be based on (1), showing the position of each Banaban fund as at the 31st September, 1947. (3) Any necessary action to amend the Gilbert and Ellice Islands Colony Legislation in the event of your Excellency approving the recommendation contained in paragraph 11. Speaking without the records, it appears to me that no action is, in fact, required, since the Ocean Island lands code has never been gazetted in accordance with the provisions of the Native Land Codes Ordinance 1940." Is that right? A. As far as I know, yes.
- D Q Does it follow that that lands code of yours has never had statutory force?
A. If it had never been gazetted, and at 1940 it had not been gazetted. After that stage we had a Chief Lands Commissioner appointed and four other Land Commissioners and many other lands codes and certainly they should all have been gazetted then, including the Ocean Island one.
- E Q After 1947, you mean? A. After 194- well, after 1947, yes, but I think they were not - I have never seen it.
- Q I am not casting any aspersions on your code. A. I did my best!
- F Q But that is the position of your code then, is it, that it is the conclusions which you and the Commission reached, though it has not actually got statutory force? A. Legal statutory force, no, I would think not. Not if it had not been gazetted, no.
- G Q It helps us if we look at section 3 of the Native Land Code of 1940. It says, "That the ownership, possession, user, alienation, inheritance of native land shall be governed by native custom". It helps us to know what the custom is. A. Yes.
- Q You said that native custom can change and I suppose, even after your code, as it had not become law, the custom could have changed. A. It could have changed and it can change.
- H Q Just so that I can understand what you are saying about the change of custom, you remember that there was another ordinance in 1937 that changed the terms of the 1928 Ordinance. A. I doubt if it came on my plate, but if you say so, and if I could look at it ---

A Q Let us look at it. It is in the P.D. bundle. There is a separate copy and I will refer you to your own memorandum. It is a separate document. You have found your memorandum? A. Yes.

THE VICE-CHANCELLOR: Where is it to be found?

MR. MOWBRAY: It is Miscellaneous 6.

B Q Would you look at paragraph 13? I will read it. This may bring it back to mind. It says: "The proposal that annuities should be paid to all Banabans from their invested funds was first made by the then Resident Commissioner, Mr. A. F. (now Sir Arthur) Grimble, in 1931. Long-protracted discussions and negotiations between the Government and the Banabans followed, and it was not until 1937 that an agreement (see Appendix I) was reached by which the following payments were to be made from the Banaban funds: (a) Annuities of £8 each to all adult Banabans and £4 to all Banaban children; (b) Similar annuities to all half-Banabans actually resident on the island; (c) Annuities to all owners of land in the 1913 and 1931 areas at the following rates" - and then the rates are set out - "The annuities were to be reduced should sufficient funds not be available in any one year. (14) Although the Secretary of State had directed that monies derived from royalties should be held in trust for the community, and not the landowners affected, Section 6(2) of the Mining Ordinance, No.2 of 1928, had provided, owing to an error, that they should be held in trust 'on behalf of the former owner or owners'. Before annuities could be paid, therefore, it was necessary to rectify the mistake by the enactment of the Mining (Amendment) Ordinance No.9 of 1937, which provided that, while payment for surface rights should be held on behalf of the individual landowners, money received as royalty should be paid or applied 'to or for the benefit of the natives of the island'. (15) The 1937 Annuities Agreement was approved by all landowners in the 1913 and 1931 areas with the exception of Rotan and his immediate family, who owned the most land. With its coming into force the following former payments were abolished: (a) The special payment to landowners under the 1913 Agreement (vide paragraph 8); and (b) The payments to Banaban Elders, and for Drought Relief (paragraph 8); thus enabling the merging of the old and new Banaban Royalty Trust Funds into the Banaban Royalty Trust Fund or, as it is usually called, the Banaban or Common Fund. In accordance with the terms of the agreement the cost of the services performed by the Government for the Banabans was to be met from this fund."

F Now, the 1937 Ordinance I was meaning was that one which changed the destination of the royalty payments from the landowners to the benefit of the natives of the island. A. Yes, it did, apparently.

G Q I was wondering whether what you were saying about changes in custom was that when the landowners agreed to that they were agreeing to a change of custom so that the money for the phosphate went to the community instead of to them. I am only trying to clear my mind on what you are saying.
A. I suppose it was a change in custom, yes. I had nothing to do with this particular thing, but it seems to be in a sense a change in custom in so much as a change in the distribution of a particular substitution for land, as it were - land had become substituted by the monetary capital sum of which the interest was to be divided out in a specific way - in so much as that specific way can be changed, that is a change in the custom, is it not?

H Q Yes. A. But in this case I do not know to what extent the people of Banaba had been consulted in that matter. I was not on the island at the time.

A Q All the landowners except Mr. Rotan and his immediate family agreed.
A. Well, then, there was a two thirds majority.

Q More than that!

B THE VICE-CHANCELLOR: I am trying to see in what sense you are using the word "custom". Here for this 1937 Ordinance there seems to have been a general agreement, with the exception of Rotan and his family, that a change should be made in the statute law of the island. Is an agreement that the statute law of the island should be changed something you regard as a change in custom? A. No, I would not have thought so. It is rather beyond me as an expert on native custom. But when monetary capital sums took the place of the actual physical land, I suppose that any changes in the interest paid from that sum would be in a sense a change, possibly not in custom.

C Q Well, that is the point. If you have a custom and there is general agreement among the inhabitants that the custom which used to be X shall in future be Y and there is no change on the statute book, I can well understand that being regarded as a change in custom. But when the general agreement is that some new statute should be enacted I wonder whether the inhabitants are really agreeing to a change of a custom or whether they are doing what they appear to be doing, namely, agreeing with a statute which can override any custom but a statute to be enacted in certain terms. A. I certainly do not think that the inhabitants of Banaba thought that they were changing the native custom at the time, no.

D MR. MOWBRAY: Let us just look at the agreement which the landowners signed. It is appendix 1 at the back of your report. It says: "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: royalty monies shall be paid into the fund which is called the Common Fund, and from this fund there shall be paid: (a) The cost of services performed by the Government for the Banabans," and then it sets out the annuities, and it says that the payment of annuities to the Banaban elders and for drought relief shall cease and then there is the provision for reduction that you referred to in your memorandum and then there is something about it not affecting the provident fund or the surface payments. Was it your understanding that the Banabans would expect the proceeds of the phosphate to go according to the ownership of the land? A. It seems to be agreed here that an annuity to the landowners should be paid according to this scale laid down. I am not quite sure how this question of native custom arises in it. I am a bit obtuse I am afraid on this matter.

E F Q No, if you tell us native/does not come into it, that is fine. A. It is not the way I have dealt with native customs.

G THE VICE-CHANCELLOR: Mr. Mowbray, I can understand there may be some argument on this, but at the moment it looks to me as if you have this 1928 statute which is going to override any native custom and then that statute has got to be altered to give effect to the new arrangement and you cannot have a custom overriding the statute.

MR. MOWBRAY: So be it, my Lord. I will not pursue that with the witness.

H Q You told us custom could change and you said earlier that no one knew that the phosphate in the land had any value before 1900. A. Except for the stalactites which were made from phosphate of lime and carbonate of lime, but there was no value in the phosphate.

PROF. H.E. MAUDE:
Examined.

A THE VICE-CHANCELLOR: The stalactites were for fishhooks, is that it? A. That was for the fishhooks. They were a form of phosphate, but

MR. MOWBRAY: They were formed in the caves. A. In the Bongabongas.

Q And I suppose the Bongabonga was in the limestone, was it? A. Fairly deep down in the limestone, yes. It had an entrance and it went down into long passages. In those passages you might go for hundreds of yards and you would come to a stalactite or a stalagnite - I do not know which is which.

B Q And you say they are made of phosphate because the phosphate salts had dripped down, I suppose, from the phosphate above. A. Yes. I understand that stalactites and stalagnites are made from carbonate of lime and phosphate of lime.

Q They would have come from the limestone then, you think? A. From the phosphatised limestone, yes.

C Q Is it your view that the special custom about phosphate arose when the value of the phosphate was first known? A. There are no customs for things which have no function or value and when it became of value a custom had to be devised to suit the circumstances, yes.

D Q Do you say it is the community as a whole that is entitled to the phosphate? A. The whole Banaban community as a whole. This was a generally expressed opinion in 1931 and 1932.

Q We know that every Banaban family has a landowner in it. A. Yes.

E Q Would you say that this community as a whole was all the landowners or did it include the children of living parents? A. Children of living parents would be about to become landowners. They themselves would not be consulted on a matter like this. But as soon as a man or a woman makes his katautau, his division of land, then the children come into it to become landowners.

F Q I was really trying to get at who the owners were. Are you saying it was really the landowners who were the owners of the phosphate and they could deal with it without asking their children? A. The landowners have the right to deal with any question concerning land during the period when that land would belong to them, but they could not alienate land beyond their lifetime. They are the life tenants of that land, the people themselves, and their children inherit after them.

THE VICE-CHANCELLOR: Where we are trying to get to is this. You say that the ownership of the phosphate at any rate more than 3 ft down is vested in somebody, not vested in the landowner but the Banaban community as a whole as I understand it? A. Yes.

G Q Just suppose that at any given point of time there are 500 human beings who are Banabans living on Ocean Island. Some of those will be babies recently born, others will be children growing up, and so on. One possibility is that the ownership of all this phosphate will be in the entire 500, whether they are landowners or not, whether they are tiny babies, whatever they are. Another possibility is to say that the ownership of this phosphate will be in the landowners of the community which will be the 300 or so adults who own land, the grownups male or female. I think what Counsel is trying to discover is which it is you are saying, whether it is all of them irrespective of age, irrespective of landownership, that they own the phosphate; or whether you are saying it is all the landowners combined who own the phosphate; or

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whether you are saying something different. Do you follow the question?
A. I think so. The phosphate is owned by the entire community.

A

Q All 500? A. No, but the actual owners I suppose of the land of Ocean Island. But the children will be potential owners in the years to come.

Q When they become landowners then they will become part-owners of the phosphate?
A. Of the phosphate.

B

Q But until they become landowners they do not own any of the phosphate, is that it? A. Because the division of the land has not been made in their favour. Some children of course own from a very early age because the partition has been made by their fathers and mothers at an early stage.

Q When you say the ownership of the phosphate in the ground is in the Banaban community, do you mean by that that it is in the Banaban landowners as a whole? A. As a whole, yes.

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Q But not in those who are not yet landowners. A. Yes, I think so. The question that arose in the discussions in 1931/32 was rather a different point, that there were a few people, very few people, who actually did not own land which contained phosphate and they did used to argue on this point as to whether those people should have any say in the disposition of the phosphate, but they were so few that they dismissed them and said that they considered they should have a fair go.

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Q So if it was perhaps arguable whether somebody who owned land with no phosphate in it had any say in the disposition of the phosphate --- A. Yes, indeed.

Q - then somebody who did not own any land at all because he was too young and there had been no division of the land would seem to have even less of a chance of being regarded as having a right to say something about the phosphate?
A. At that point of time.

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THE VICE-CHANCELLOR: Mr. Mowbray, I am afraid I have asked rather a lot of questions, but I wanted to try to understand.

MR. MOWBRAY: I am very much obliged to your Lordship.

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Q I suppose it is right if you just look at the surface of the land - just thinking about the surface of the land that there is no doubt about - that every Banaban or very nearly every Banaban was either a landowner or he was going to be a landowner one day. A. Indeed.

THE VICE-CHANCELLOR: If he lived long enough.

MR. MOWBRAY: If he survived his parents? A. Yes. Everyone.

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Q Yes. A. There was nobody on Banaba who was a Banaban who did not possess some land or would possess it in the future if he lived long enough.

Q So in that sense you could say about the surface land that it belonged to the Banabans as a whole? A. Yes, but in the case of the surface land it was all divided into small individual holdings.

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Q Let us go back to the beginning - not 1650 but just to 1900. You say at that stage a custom had to be developed or had to arise to deal with the new commercial situation? A. Yes, in 1900 a custom had to be devised.

PROF. H.E. MAUDE:
Cross-examined.

- A Q What really happened in 1900 was that people sold or soon after 1900 started to sell their land, as everyone thought, freehold. A. I doubt if the Banabans thought they were selling their land freehold.
- Q What do you suppose the Banabans thought? A. They thought that they were selling the surface deposits of phosphate to the Company.

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Q They thought they were selling just - I think you mentioned a figure of 3 ft?
A. This is what they mentioned to Mr Elliott in 1913, wasn't it?

A Q Yes, I think that is right. You explained that figure of 3 ft. as being what could be dug with pick and shovel? A. At 1900 or soon after, before the big extractive machinery started to come in.

Q You are saying between 1900 and the time when the big extractive machines arrived. Then there ^{were} some P & T deeds after that - some phosphate and tree deeds - were not there? A. Yes.

B Q I do not know whether you know about this, that they were for a time registered or noted under King's Regulations of 1908? A. I did not know 1908. They were registered by Mr Telfer Campbell, were not they?

C Q There was one that started in 1903. Could we take a quick look at that. I am sorry to show you these Ordinances, but let us have a quick look at Regulation 3 of 1903. It is in Bundle 2, page 90, I think. It is Section 18 I want you to look at. It deals with "Procedure on leasing land." Have you got that? A. Yes.

THE VICE-CHANCELLOR: It is page 88 in my copy.

D MR MOWBRAY: It is headed "To prevent the Sale of Native Lands" and in Section 17 it says: "The sale of land owned by natives to non-native persons shall be unlawful." 18 says: "If any non-native person enter into a lease of land owned by a native he shall forthwith submit such lease to the Resident Commissioner, who shall at a convenient opportunity make inquiry of the native lessor and of the native authorities of the island in which the land sought to be leased shall be situated. If it shall appear that the lease is for a period of more than twenty-one years, or that the land sought to be leased is not the property of the proposed lessor, or that the lease has been unfairly obtained, or that the terms are manifestly to the disadvantage of the native lessor, or that there will not be left sufficient land to support the family of the lessor, or if the lease is otherwise contrary to sound public policy, the Resident Commissioner shall refuse to confirm such lease; otherwise the Resident Commissioner shall cause a copy of such lease to be entered in a book to be kept for the purpose and shall make an indorsement on the lease to the effect that the lease has been confirmed and registered, and shall make a charge of one pound for every such registration of lease. The registration of the lease shall not be conclusive evidence of title as against a person not claiming through the lessor."

E Perhaps I had better read the next bit. That says: "(19) In the event of the refusal of the Resident Commissioner to confirm a lease it shall be unlawful for the intended lessee or any person claiming under him to deal or attempt to deal with the land intended to be leased otherwise than as a tenant at will."

G I think even the lawyers do not know what section 19 means!

THE VICE-CHANCELLOR: Especially the lawyers!

H MR MOWBRAY: But would 18 be the section under which Mr Telfer Campbell was registering or recording the phosphate and tree deeds? A. I have never seen this section before and I doubt myself whether the Banabans have seen it either, but that may be conjecture.

Q The deeds were recorded for five or six years, weren't they? A. The phosphate deeds?

Q And as far as you know no one expressed any dissatisfaction or objection until Capt. Quayle Dickson started to object. A. It could well be.

A Q You were not there. A. I was not there then.

B Q Will you look at Bundle 5, page 94. This is a letter from Sir Albert Ellis to the Resident Commissioner. Perhaps it should be called a memorandum. You see on page 94, paragraph 13, where he says: "The first seven phosphate and trees purchase deeds were sent to Tarawa for registration on 29th February, 1904, and from thence were apparently forwarded to Fiji where they were registered. The following are the numbers and dates of the various deeds which have been registered", and then he sets out the various numbers from 1 to 7 and so on down to 71 registered at Fiji and 72 to 146 were registered at the Resident Commissioner's Office. A. Yes, I see that.

C Q There were some more that were not registered. Then he says: "The total area of above phosphate and trees deeds is 214 acres, 3 roods, 36 perches." I must tell you that some of the numbers were not used, but on the other hand there are one or two "A" numbers, which gives an extra number - for instance 23 and 23A. At any rate, there was a very substantial number of those deeds, was there not? A. It looks like it, yes.

Q Covering 214 acres. A. Yes.

D 3.45 Q And a large number of landowners would have been involved. A. Yes.

Q Is there enough evidence there to show that there was a custom allowing the sale of phosphate under and P & T deed by the landowner? A. There is enough there to show that phosphate was sold under a P & T deed. I merely say that it would not be in accordance with native custom to sell individually the phosphate. But that was the opinion expressed to me in 1931, but they certainly probably had sold such things.

E Q To people who expressed the opinion? A. Yes. I suppose so - some of them.

F Q You see, you started off by telling us the best way of finding out a custom was to see what people did in particular cases. A. That was for the customs that we had to do under the 1922 Ordinance, but I also expressed the opinion that I never went officially into the question of this particular thing. I merely unofficially made enquiries as to the phosphate ownership as to what would be regarded as the proper ownership of phosphate, whether it should be individually owned - that is, under the surface. It originally arose in my mind because of the bongabonga, I wondered whether there was an analogy between that and I came to the conclusion that there really was not a particular analogy.

G Q You thought there was not an analogy here. A. Not to the extent that the fact that stalactites were made from carbonate of lime did not really bring them into the phosphate field.

Q Anyway, I suppose the main use of the caves was for water rather than for stalactites and stalagmites, was it? A. Of that particular bongabongas, the main use of that?

H Q Yes. A. Yes, I think for water would be more important than the stalactites. The stalactites were very important, of course, because they used them for their fish hooks and fish was their main support during times of drought, but nevertheless the water was even more important.

A THE VICE-CHANCELLOR: Can you help me on one thing. A long while ago I think I was told that there is a difference between a bangabanga and a bongabonga and that a bangabanga was a wet one where there was water and a bongabonga was apparently dry. Is there anything in that? I noticed you talked about a bongabonga, which is a mixture between the two.

A. I was not aware of any difference between them, my Lord.

MR MOWBRAY: That is a bit of the background I did not know!

B THE VICE-CHANCELLOR: I think it was in action No.1. As I have interrupted you, perhaps I could clear up one other matter. In answer to Mr Mowbray about 10 minutes ago, Professor, you said that when the Banabans sold their land immediately after 1900 you thought they were thinking that they were merely selling the surface deposits. A. So I was informed, yes.

C Q I can understand that in relation to the first one or two who sold their land, but once they saw the company in operation going down a good deal more than 3 ft., could the later Banabans who sold their land or entered into P & T deeds really think that they were simply selling their surface rights? A. No.

Q That could only have applied to the first few. A. This is why they brought the question up to Mr Elliott as a complaint.

D MR MOWBRAY: You have Bundle 2 there. Would you turn to page 75. This is a report on Mr R.H. Cogswell's visit apparently in December, 1903 - you see the date in the top right hand corner - and you can tell Mr Cogswell was the Acting Resident Commissioner because he signs the letter before this on page 74. Could I read you paragraph 13 on page 75 of the bundle: "John (someone) told us that one of the reasons why the natives objected so much to our working was that we went too deep, and that it would not be possible for them to plant in such deep holes as 12 and 15 ft. Mr Cogswell told him that if the company had more land to work on there would be no need for such deep digging, and that we did not like it as it meant so much extra labour, but we had no alternative. John Kekara (?) said they did not mind us going down 6 ft. but thought that was enough, Mr Arundel said that probably it might be, although he would not bind himself not to go down lower."

F Perhaps I had better read the rest: "Mr Cogswell pointed out that all these lands if not dug down too deep would grow coconuts and pandanus very well, and referred to a young coconut which was growing splendidly in the old workings adjoining the Manager's house a Ooma, and that it looks far healthier than the ones planted on the adjacent and original soil. He also stated that he proposed sending down some of the Government coconuts from Tarawa, in order that they might be tried in our worked out spaces, and which would of course revert when we had done with them to their original owners. Mr Cogswell also advised the company to go in for some planting on those spaces, as object lessons to the natives, and this Mr Arundel agreed to do."

G It looks from that as though people would have seen holes as deep as 12 and 15 ft by 1903? A. They were beginning to then and people were beginning to object to it.

H Q Now these P & T deeds that you were looking at on page 94 of Bundle 5: there were getting on for 400 all after 1903? A. Yes.

Q So the individual landowners who entered into those deeds knew what they were doing? A. I suppose they knew what they were doing, but they objected in 1913 to the land being dug so far down.

Q At least one of them did. A. Two.

A Q We have got some photographs. (I do not think your Lordship has them. We will deal with those tomorrow. We will get out the agreed photographs in the last action that are referred to in these bundles).
At any rate, there were a lot of landowners who, between 1904 and 1909, granted P & T deeds over the phosphate under their land. That is right, is it not? A. Yes.

B Q In bundle 5 there is an account of a meeting at page 30. It is a report by Mr Ellis. It is signed on page 32. It is a report of a meeting with the Ocean Islanders and the date is 1910. I think it must have been in February or March of that year. Mr Ellis says: "On the 28th inst. Captain Dickson asked me to attend a general meeting of the Ocean Islanders, which he had convened in order that he might ascertain their views as to the company's operations, and listen to any complaints against the company. About 200 Ocean Islanders were present; about 145 of them being landowners. Captain Dickson made some preliminary remarks comparing the previous semi-starving condition of the Ocean Islanders in drought times previous to the advent of the company, with their condition during the present drought. They are now able to buy provisions, and are well fed. He then told them to say anything they had in mind. Two of the leading men at once came forward, and stated that the Ocean Islanders in general think that the company have worked enough on their land, and they don't want to part with any more; That they have their children to consider, and in their opinion, the land when worked on will not grow sufficient food for them.

C
D "After some discussion, 7 young men and 2 women came forward and claimed the right to part with any of their lands to the company, if they wanted to. These 9 individuals, it was found, own 94 pieces of land between them. At any suggestion, the question was then put to the meeting: were they in favour of the company leaving the island within six months, and transferring their operations to Nauru? To this they all gave a very emphatic dissent. Capt. Dickson then asked them what they had in view as regards future workings for the company, to which they replied that the company hold a large lot of unworked land which will last them for a long time, and they, the Ocean Islanders, will work their own land and sell the phosphate at so much per ton."

E
F That was a reference, was it not, to the sale of loose phosphate or the phosphate they could dig from their own land? A. To the sale of phosphates, yes.

F Q They would work their own land -you see that paragraph about half way down: "Capt. Dickson then asked them what they had in view as regards the future" and they said "The Ocean Islanders will work their own land and sell the phosphate at so much per ton." That was the digging of the phosphate from their own land and putting it into wheelbarrows and taking it to the company was it not? A. I should say so, yes.

G Q It goes on: "It was found that 36 are desirous of working either alluvial rock at a rate per ton; and 100 will work only rock; 9, as stated previously, maintaining their right to dispose of their lands." Would you look at (b) just a little way down the page: "The following complaints were then brought forward . . . (b) Nemia, one of those willing to work rock at a rate per ton complained that the price paid, 4s. per ton, is too low, and that it should be (blank) per ton."

H THE VICE-CHANCELLOR: It looks like either £1 or £4. I am looking at the original on page 27 and there you can make certain deductions. There is certainly a £ sign there.

MR NOWBRAY: Yes. I have a retyped copy.

A THE VICE-CHANCELLOR: At any rate, it is obviously a substantially larger sum than 4s. a ton.

MR MOWBRAY: Yes.

B Q Would you look at the bottom of the page to sub-paragraph (e):
"Kabunteiti complained that 20 car loads of phosphate had been removed from a tramline cutting through his land. Capt. Dickson said that he would investigate this." It looks as if he was asking for payment for those carloads, does it not - the complainant was asking for payment?
A. He is complaining about 20 carloads of phosphate removed from a tramline, yes.

Q It looks as though he thought those should have been paid for?
A. Or he was objecting to the fact that they had been removed. I could not say what he was objecting to.

C (Adjourned till tomorrow morning at 10.30).

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