

1. Transcript No. 19, dated 29th January, 1976.

- (a) the great bulk of this transcript is devoted to (i) taxation and royalties (and the question as to when the latter are the former), and (ii) comparative prices of phosphates throughout the world, (though actual prices are not cited in most cases). As I cannot believe that we shall be asked questions on either point, I have made very, if any, notes on these points.
- (b) "Makatea phosphates - he seems to think Makatea is in North Africa". Ha! Ha! Ha!
- (c) Mowbray notes that there is a note on Colony revenue from the BPC in Melbourne, and the Vice Chancellor adds "Yes, and he says that 'There is, in fact, no world price for phosphate' and so on".
- (d) the Vice-Chancellor "what is now being done is that the greatly increased royalty and the 6/- (royalty) are all being treated as a commuted payment for tax".
Mowbray "That is certainly right, that is the way it is put in the Ordinance and it was the way it was put in the previous Ordinance, that the dead rent and the royalty were the conditions for release from all kinds of taxes".
Vinelott - "If my friend would look at, it does seem to indicate that the Colonial Office regarded the fixed sum and the royalty earned as taxes".
- (e) Mr. Mowbray "We are now getting more remote in time now from 1947 and I am referring to these minutes of the Colonial Office and the Treasury largely to show that they are still considering the same points about the commercial value of the phosphate which were not disclosed to the Banabans in 1947".
- (f) Mowbray "At p. 131 is a letter from the CS of Fiji, now Mr. Macdonald and he is writing to the General Manager of the BPC in Melbourne asking for some more money for the Banabans".
The Vice-Chancellor "...It was an advance made by the BPC, not a grant - an advance on account of future phosphate royalties I assume".
Mowbray - "Yes. In paragraph 5 he says that if all that is right the Banabans have been less generously treated than the Nauruans and then he goes on 'in this connection, the Banabans argue, not without force, that, had they decided to return to Ocean Island, they would have been much more generously treated'".
- (g) ...a minute from Mr. Moffatt (of the CO) dated December 14th 1964
..."Although there will be pressure from the Banabans our actions may reasonably be defended politically"...."relying on the transfer of the ownership of the minerals to the Crown on Ocean becoming part of the Gilbert and Ellice Protectorate".
The Vice Chancellor "...of course from time to time there has been mention of the minerals being vested in the Crown, but has that been on the basis of Ocean 'becoming part of the Gilbert and Ellice Protectorate' ?
Mowbray - "NO".
The Vice Chancellor "That seems to be a new statement, Crown ownership is one thing, Crown ownership because Ocean became part of the Gilbert & Ellice Protectorate is another".
Mowbray "well, I suppose the theory he is referring to is the theory that all land belongs to the Crown when the place becomes a Colony.
The Vice Chancellor "That goes back to the original annexation".
Mowbray "Perhaps he did not realize that".
The Vice Chancellor "I can understand it being contended that the moment Ocean Island became British automatically all minerals vested in the Crown, but this seems to be a new line that it was becoming part of the Gilbert & Ellice Protectorate that made the minerals vest in the Crown".

2. Transcript No. 20, dated 30th January, 1976.

- (a) the Banabans addressed a letter to the FCO on 5th November, 1965, which, in Mowbray's view, shows that at that date there was no inkling in the Banabans' minds that the phosphate was being sold at an undervalue....."
- The Vice Chancellor "No Banaban has ever had the chance to discuss or negotiate" (quoting the letter); that is a very remarkable statement, is it not?"
- Mowbray "Yes, it is",
- The Vice Chancellor "It is nonsense".
- Mr. Mowbray reading further from the letter 'Our Banaban advisers have never helped us'. "That was a letter of complaint, and it certainly makes some complaints which it would be hard to support".
- The Vice Chancellor "Yes, in other words you are saying, when you are having a letter of complaint, including some complaints which really have got no foundation at all, the writer of the letter is likely to include everything that he can regard as any sort of complaint".
- Mowbray "Yes".
- (b) In re the fact that the BPC was a non-profit making organization, the Vice Chancellor comments "One has got to keep firmly in mind the difference between non-profit making on the one hand, and less than world-market prices on the other".
- (c) at a meeting in the CO on the 14th January 1966 it was provided that of an increase of 3/-, 1/- was to go to the Banabans, and 2/- to the GEIC plus the abolition of exemption from taxation.
- (d) Mowbray "We are not claiming any of the payments made under the later arrangements (post 1966 I think) as Crown royalties held on trust for the Banabans".
- (e) in the agreement of 23rd May 1973, the proceeds were changed from 15% for the Banabans and 85% for the GEIC to 50% each.
- (f) Mowbray cited a letter from the CO which recited some of the parts of the Statement of Intentions and said that the Banaban community might count on the full support of HMG. (This makes further nonsense of Ratan's claim that Rabi would be sold over their heads).
- (g) at a later (undated) meeting between Mrs Hart and the Banabans, an agreed minute stated that HMG would, subject to Parliamentary approval, make to the Banabans an ex gratia special payment of £80,000 sterling in consideration of the effects of phosphate mining upon Ocean Island since 1900. The Banabans alleged that the last 13 words had been added and were not agreed upon. Nevertheless it was an "agreed minute". The offer was rejected and the Banabans turned to the subject of the restoration of the land.
- (h) later the Banabans sent another letter to the SS stating that "We have made no secret of the sense of outrage we feel....".
- (i) Mowbray speaking of the preference in price given to Ocean Island phosphate over Nauru...the Vice Chancellor adds "on the footing that the Ocean Island had 85% or more tribasic phosphate and that was better than Nauru".
- (j) much of this transcript related to lengthy discussions at the FCO regarding taxation and prices of phosphates, which there seems no need to record as we should not be affected.

3. Transcript No. 21, dated 2nd February, 1976.

- (a) commenting on the attitude of landlords towards royalties, the Vice Chancellor says "The landlord may get a larger rent if he is leasing something which he knows has minerals there, than if he is leasing something which he thinks is no good at all. But a royalty simply stems from what is actually produced, and does it matter whether something is known to be there or not known to be there?".
The Vice-Chancellor continued "Many psychological considerations may come into this. A lessee may cheerfully sign a lease agreeing to pay a large royalty if he discovers something if he does not know it is there, but if he knows it is there, he is likely to want to keep the royalty down".
- (b) most of the rest of this transcript is devoted to three subjects (except as in (c) hereunder), viz. prices of Christmas Island phosphate, and marketing thereof; subsidization of superphosphate in Australia; and a report by one Helen Hughes on Nauru phosphate;
- (c) at the commencement of page 26 (out of 31 pages), Mowbray states - "I can now turn to our legal submissions. I gave your Lordship at an earlier stage some provisional outline heads of arguments for the plaintiffs." "Yes," says the Vice Chancellor "that was on Day 2". The next six pages are devoted to a most complex argument relating to whether and when a Colony was established, and the application of English law, native customary law (sic) and native customs. I do not think I could hope to precis this, so I am having these 6 pages photocopied for you, since this is obviously I think a matter which you will wish to ask Vinelott to clarify when we meet him - so that we can understand, if need be what is expected of us.

4. Transcript 22 (Volume 1), dated 3rd February, 1976.

- (a) Mowbray again refers to the fact that the P&T deeds recognize individual ownership of the minerals beneath the surface.
- (b) on no occasions, nor at meetings, were there any protests that the minerals were communally owned.
- (c) Mowbray argues that the 1913 agreement also recognized individual ownership of the minerals.
- (d) the Vice Chancellor draws attention to the RC's remark "The second recommendation is ...that the company should never refuse to purchase phosphate rock from the natives obtained from their own ground (Dickson ?).
- (e) finally, I have having photocopies made of pages 3 - 5, & 17- 22 of this transcript since they deal with ownership of the phosphates, bangabangas, etc.; it would be impossible to condense these pages.

5. Transcript No. 22 (Volume 2), dated 3rd February, 1976.

- (a) the whole of this volume of the transcript deals with Mowbray's argument as to the status of the Crown becoming a trustee.
- (b) the Vice-Chancellor "A mere promise to refund by itself is not enough; the mere putting of money into a separate bank account is not enough; but where you have a promise to refund coupled with a promise to put into a separate bank account, those two together will suffice to make a trust".
- (c) the Vice Chancellor cited another case thus "As for the requisite certainty of words, it is well settled that a trust can be created without using the word 'trust' or 'confidence' or the like; the question is whether in substance a sufficient intention to create a trust has been manifested".
- (d) he further cites another "One case will say there is nothing to show a trust and in another case the Court will find an indication of a trust, but they do not really explain very much what it is that does or does not indicate a trust".

- (e) two judgments by Lords of Appeal are cited by Mowbray saying that "There is nothing so far as I know, to prevent the Crown acting as agent or trustee if it chooses deliberately to do so".
- (f) the Vice Chancellor "In the case of the Crown, the Crown has certain obligations, certain duties, certain responsibilities collected under the heading 'governmental', (which a subject does not have). The obligation of the Crown to some subject may be described as in a governmental capacity or it may be as trustee, but there is another explanation. In the case of a subject it could not be a governmental responsibility....."
- (g) the Vice Chancellor again "The Crown may have a duty or responsibility in its governmental capacity or it may have a duty or responsibility in its fiduciary capacity as trustee. I am simply saying, if you say the Crown, or the Government, have a responsibility you have still got to find out what kind of responsibility it is, whether it is governmental or whether it is fiduciary"
- (h) Mowbray "So there is a clear indication on the part of the RC (Dickson) who had to conduct the negotiations on behalf of the Crown, to create a trust fund".
- (i) Mowbray "So our proposition 13.2, based on the history which I have just dealt very briefly with, is that having declared a trust the Crown became a trustee."

5. Transcript No. 23, dated 4th February, 1976.

- (a) Mowbray introduces as one of his 'propositions' - "that the 1913 trust was not introduced on any argument that the community owned the phosphates; it was introduced for fear that the individual owners would squander the royalties. That was Captain Dickenson's (sic) idea and from on the idea behind it was that it would ~~not~~ prevent the landowners from squandering the royalties, not that the community had any rights".
- (b) Mowbray further argues "There is a similar kind of point about the 1931 lease and the 1937 Ordinance, which both made or tried to make, trusts for the community. They were not really based on a view that the community owned the phosphates so much as on a view that it was right and proper that the community should have the money"
- (c) Mowbray then argues that the Crown acknowledged itself to be a trustee after the 1913 arrangements, and further that it acted like a trustee too.
- (d) the next ten pages deal with the doctrines of perpetuities and inalienability (which I will pass over in silence!).
- (e) the Vice Chancellor "You are saying really all you need is to show that the Crown held on some trusts for the Banaban landowners. The exact details of the trusts do not concern us. It is the Crown with the character of trustee for the Banaban landowners, and that is really the central core of your objective on this part of the case". (Mowbray agrees).
- (f) the remaining 17 pages of this transcript deal with Grimble's position vis a vis his actions in connexion with the 1931 settlement - his position as a trustee, his fiduciary position, his obligations to both parties.
- (f) Mowbray argues "It is enough for our purpose if, for instance, as a result of the 1937 Ordinance backdated to 1928, there was a statutory duty very like a trusteeship, a common law duty very like a trusteeship....We would even say that it is enough for our purpose if there was a Governmental duty like a trusteeship".

1. TRANSCRIPT No. 14, dated 22nd January, 1976.

- (a) this contains a lengthy and very interesting discussion on Grimble's statutory duty in having to fix a rate of royalty under the Ordinance. The question arises as to how far trusteeship invades the performance of the statutory duty. If someone has a judicial or quasi-judicial duty to perform and he is also tied to one of the parties by a fiduciary duty then he might decline to act. But this does not concern us;
- (b) perhaps Mr. Grimble had this statutory duty imposed on him which obliged him to be independent and discharge the duty the statute imposed upon him irrespective of the commands of his superiors, instead of his having to act solely as an officer of the Crown. Mowbray's argument may be summed up thus 'We say that the RC did not have an independent function in fixing the royalty; he was part of the Crown machine';
- (c) there is again emphasis throughout that all decisions were taken by the SS in London;
- (d) Mowbray "We are not claiming the Crown royalty from 1928. Much more general words were introduced in 1937 and we do rely upon that. We would say it is tolerably clear on the 1928 Ordinance that the royalty referred to in Section 6(2) was a royalty payable to the owner and the Crown royalty was payable to the Crown which no one now suggests was the owner. So for that reason we say that the 1928 Ordinance did not apply to the Crown royalty, but the words were expanded considerably in 1937;
- (e) the proclamation anent the royalties states "Eight and one half pence per ton to be held in trust on behalf of the Banaban community generally to be held or used or expended in such manner as the SS for the Colonies may from time to time direct";
- (f) Mowbray "Yes, Your Lordship sees that they (the 1913 landowners) did complain. Megarry "I was not so much concerned with whether they complained as with what in fact happened and the answer was that the reduced original Banaban Fund then continued to distribute the interest among the individual landowners. Individual landowners still got some payment from the fund". Mowbray "Yes, they still got some payment, but it was reduced by the payment of £20,000 into the Provident Fund";
- (g) Mowbray "Your Lordship sees that he (Grimble) says that the trees belong to the land. Later Your Lordship will see separate ownership of trees and land being relied on, but that is not what Mr. Grimble says and, if there was separate ownership, it would have been the exception. ..It is our case about the ownership of the phosphates exactly, that the phosphate was individually owned, and there was no native custom affording any ground for the suggestion that the owners of the phosphate are the community";
- (h) puzzled at the different methods of treatment of various groups, Megarry says "So X who sold some while ago has spent the money; Y who is now going to get payment for the surface which is going to be held in a bank account is going to draw interest on it; and Z will have nothing taken from him at all and he has got all the coconuts and so on; and each of them now will get exactly the same (annuities);
- (i) Neill "In customary law ownership was communal but individual rights were recognized; by evolution land came to be considered as individually owned Mowbray "If by that he means that in the Pacific generally ownership was communal but individual rights were recognized, we would not quarrel with that, but we would say that at any rate by 1900 the position was different on Ocean Island: OWNERSHIP OF LAND WITH LIMITED RIGHTS OF ALIENATION WAS THE POSITION ON OCEAN ISLAND FROM THE EARLIEST TIME YOUR LORDSHIP IS CONCERNED WITH. Neill says "By evolution land came to be considered as individually owned" but if there was such evolution it happened before any time that Your Lordship is concerned with";
Neill further says "The life tenant alienated land, and I suppose he means perhaps in practice". Neill continues "Despite this fact it is clear that a full ownership did not exist as an owner could not alienate out of his group or beyond recognized limits". Mowbray "We agree about that. What we say is that the owner is called a tenant in tail in some places, but that is a misleading way of putting it; he is an owner all right, but he has limited rights of alienation and his rights of alienation are restricted to his family with certain exceptions. We say that that applies up to the sky and down to the middle of the earth";

- (j) Mowbray "The Mining Ordinance is silent on the ownership of minerals" says Neill. "Agreed" says Mowbray, "it is clearly not vested in the Banabans, although it recognizes their right to receive royalty". "We do not agree that it is not vested in them and we do not know where Neill gets that from, but we agree that the Mining Ordinance recognizes or at any rate gives them the right to receive royalty";
- (k) Neill says, argues Mowbray, that money paid by way of royalty can be used in such a way as the SS may direct. We do not agree about that. It is only the method of use, not the ownership. It is only the method of application not the ownership over which the SS has any say; and,
- (l) notes of a discussion between RC and HC on 28/7/31. HC noted "Native custom, codify law of inheritance; there must be a code; RC says native usage won't stand the strain, so he recommended code. RC says native custom affords no ground whatever for interpreting the words "former owners" to mean the whole community, and it says that, Mowbray adds, in relation to royalty.

2. TRANSCRIPT No. 15, dated 23rd January, 1976.

- (a) "This, says Mowbray, "is a letter from Mr. Maude enclosing his report on the Native Lands Commission and then follows...the account of Banaban land conveyances recognized and those not recognized. Nothing much turns on the customs recognized or not recognized in this case. The only thing that turns on it, is that the individual plaintiffs own the title". Megarry "do not assume that I have immediate familiarity with the circumstances under which a land-owners land might validly be conveyed.". Mowbray "It is not really the conveyances, it is more a question of descent";
- (b) Mowbray commenting on an auditor's report "It is now clear that the owner's interest in the land was a life interest only"; and,
- (c) Megarry commenting on payments from the old Banaban Fund of interest is answered by Mowbray "The document says that the annually increasing interest from the fund is distributed every sixth month among the landowners whose land was alienated in 1913".

3. TRANSCRIPT No. 16, dated 26th January, 1976.

- (a) Some extremely complimentary remarks by Megarry on a memorandum written by a Mr. Macdonald in 1937 on the whole Banaban problem. Megarry "Who is this Mr. Macdonald ? Mowbray "It was thought to be someone with some knowledge of the Banabans. Vinelott "I think he was senior political officer". HIP!HIP!HOORAY!
- (b) Mowbray "I turn back for a moment to Maude's reported views on the ownership of the phosphate, i.e. the Banabans definitely have individual tenure of surface rights; they had no conception of the surface owner owning the subterranean rights. In fact they have caves there which are owned by people who do not own the surface. These caves are used for water purposes!" Mowbray "That is what our submission will be, the fact of communal of family ownership of caves does not prove there is no ownership of anything under the surface. Then Maude goes on and argues that even if the Banabans mineral rights "this would not be generally held to include 'new' minerals as phosphate or radium. Well, actually it cuts the other way because they did not know that a mineral had any use at all until 1900. (Note - I seriously doubt this argument). So there cannot have been any ancient custom about minerals separating them from the surface, and we say it puts the whole thing upside down to say there is a custom separating what is under the surface from what is on the surface";

- (c) manuscript note written in the CO by either one Arundell or Duncan - "It has always been recognized that the Banabans' rights extend to full ownership of land and minerals";
 - (d) at meeting with HC (Fletcher), Mowbray cites the Banaban spokesmen as saying "that the Banaban landowners whose lands were alienated in 1913 and 1931 are ready to waive any rights to phosphate royalties in favour of the Banaban community" and points out that HC said that "the SS had decided that the benefits from the phosphate industry should go to the community and not to the landowners";
 - (e) Mowbray states that the rules defining full and half Banabans in relation to the payment of annuities were not agreed to by the Banabans, citing Macdonald as having handled the matter. I strongly dispute this; It is unthinkable that Government or I should have made such rules without reference to the Native Government or Old Men;
 - (f) with regard to the two royalty funds in 1931, Mowbray says "There are two royalty trust funds; one was from the 1913 6d royalty and we would say that the capital of that was held on different trusts from the capital of the 1931 8½d royalty fund, because we say that the landowners rights exhausted the whole of the beneficial interest in the 1913 royalty whereas the 1931 royalties were held after 1937 on trust for the community as a whole. (They were amalgamated in 1947)."
4. TRANSCRIPT No. 17, dated 27th January, 1976. *
- (a) the 1913 and 1931 funds were amalgamated in 1939 (not 1947), and with the coming into force of the 1937 annuities agreement, the special payments to landowners under the 1913 agreement were abolished, and also the payments to Banaban elders and drought relief;
 - (b) emphasis is again laid, this time in connexion with the taxation agreement with the BPC, on the fact that it is the SS who is arranging the settlement of the terms; "royalty" is also mentioned;
 - (c) I never received the documents mentioned (on page 6) (a letter addressed to Barley and myself, etc., having by then long left Ocean Island); (it was a letter from Motan);
 - (d) then there is a reference to a petition by the Banabans to HC (which I have not seen). It contains a reference to trusteeship. Mowbray notes that there is a reference to a "Royalty Trust Fund" which he regards as important as it recognizes the existence of a trust after the 1937 Ordinance. In re this petition, there is a minute stating:-

"Maintenance of Banaban Funds. It is difficult to see how this petition can be entertained in view of the fact that all royalties and other moneys derived from the exploitation of phosphate deposits at Ocean Island are vested in trust in the Resident Commissioner for the benefit of the Banaban community" (The name of the officer writing the minute is not given).

Mowbray comments "so there we have another reference to the post-1937 position and a recognition that the revised arrangement whereby these funds are held for the Banaban community is a trust";
 - (e) the above-quoted minute of the Government officer continues:-

"This is obviously a deliberate attempt to break away from Government control in the management and disposal of Banaban funds. Apart from all other considerations, both legal and otherwise, the petition is definitely opposed to the policy of trusteeship which HMG has undertaken in safeguarding the interests of all natives whose welfare they have assumed responsibility for".

Mowbray comments "well, I am bound to concede that "trusteeship" there has a different sense";Megarry comments "if you have an ordinary trust you do not talk about the "policy" of the trust. You have the obligation and duties and so on, but not the "policy";

- (f) continued emphasis is laid by Mowbray throughout, in connexion with the documents he produces, at the use of such words as "trust", "trustee", "trust fund", and "royalty trust fund";
- (g) Mowbray "we are coming on now to considerations of, among other things, tax commutation, and it is part of our case that what was not paid by the BPC by way of tax or payment in lieu of tax would have fallen on the UK Treasury. So that this helps our case on the jurisdiction of this court and the case against the Crown in right of the UK". (A long argument ensued between Megarry and Mowbray, the latter having to admit this was only a moral obligation on the UK Government, after Megarry insisted that there was no legal obligation);
- (h) in a despatch of 1939 (it is not clear whether it is RC/HC or HC/SS), it is stated, says Mowbray "Quite apart from questions of principle, it is the case that if the phosphate industry was conducted as a commercial concern the price would be considerably higher than it is at present";
- (i) Mowbray also frequently draws attention in documents to the fact that there was a continuing trust after the 1937 Ordinance;
- (j) two more petitions by Rotan and others are mentioned, one to SS and one to BPC (though no dates or contents are shown);
- (k) in a memorandum cited by Mowbray, he says that Vaskess stated a direction of the SS as being that the moneys should be held in trust for the community and states that "this was rectified".
"If rectified," Mowbray says "you would end up with a trust for the community - a trust and not merely a governmental obligation towards the community. The 1937 Ordinance does not distinguish between one fund and another, it simply declares a trust of all sums for the community as a whole".
Megarry "was that accepted by the Secretary of State from time to time?"
Mowbray "No, what the SS said was "You must not admit that the minerals belong to the individuals as opposed to the community as a whole"
Vinelott "what we say is that Vaskess was neither authorized to say it, nor is it what was subsequently accepted".
Megarry "...here is Mr. Vaskess quite plainly asserting that the view was accepted by the SS from time to time, & that is not so"
- (l) Mowbray draws attention to another minute of Mr. Vaskess, where the latter stated: "it has been laid down that Banaban land-owners hold only the surface rights" and "he then suggests that some difficulties might be met by asserting the right of the Crown to the minerals under the surface";
- (m) dealing with the Provident Fund, Megarry remarks "These particular funds do not, in any sense, belong to the natives of Ocean Island but are purely Government funds earmarked for a particular purpose." Mowbray replied "That is the first clear statement that the 2d fund was not a trust fund";
- (n) Megarry then replies "So, on that footing if the Government tomorrow wanted to earmark it for something else they could just do so?". Mowbray replied "Yes, My. Lord, that is what is being said, and I understand that is the Crown's case". But Mowbray disputes this; and,
- (o) there is another unidentifiable reference to a statement by a GEIC officer on the RC "This Government in April 1942 purchased for them, with their own capital, the island of Rabi in the Fiji Group". Mowbray comments "That is the money which Vaskess said was merely a Government fund earmarked to the Banabans - their own money".

5. TRANSCRIPT No. 18, dated 28th January, 1976.

- (a) Mowbray... "A short guide to the Crown royalties. There are just three of them: the original 6d; the additional 6d that was paid under the 1938 agreement and the 1938 EPC tax ordinance; and then there is the additional 1/3 which Your Lordship has just seen mentioned under the 1946 agreement and the 1947 EPC tax ordinance. Then there are the quasi-royalties and there are three annual sums: there is one of £20,000 under the 1938 agreement and ordinance; £24,000 which is the one Your Lordship has just seen, under the 1946 agreement and 1947 ordinance; and there is a £40,000 annual sum under the 1951 agreement and 1952 ordinance";
- (b) Mowbray speaking of the "quasi-royalty" tonnage payments says "and then the last is 24/- and that ran for quite a short time down to the 1966 settlement after which we do not claim Crown royalties";
- (c) the only reason Mowbray said he read certain documents about what happened to the Banabans in the war and just after, and so forth, "was to help show that they had not settled down and they were not even as capable as they ordinarily have been of dealing with important commercial matters at the time of the 1947 settlement. We get another reference to that in Mr. Maude's memorandum (1946 ?)";
- (d) Mowbray, in discussing one of the lump sum contributions in (a) above, says "The Government did not own the minerals. But what we shall be submitting is that at any rate the Crown considered these per ton payments (see (b) above) to be compensation for the removal of the mineral";
- (e) the next few paragraphs deal with the Maude memorandum of 1946 - quotations, etc. Mowbray read out paragraphs 8 - 21, and then said: "Your Lordship sees he says the bangabangas were held by groups who did not necessarily own the surface rights, he is not saying it was the whole community".

The final words of paragraph 27 of the report (he read out paragraph 24 - 27) are "who have the same rights of inheritance as natural born issue". Megarry commented on this as follows:-

"That is not really complete, is it, because there are certain circumstances under which a Landowner may have some of his land taken from him, such as in the case of an engaged couple and the engagement is broken off and some of the man's land is taken to compensate the lady". The effect of that of course is to take that land altogether out of the man's hands and give it to the woman. So that is an alienation".

Mowbray "it is not a voluntary alienation.

Megarry "No: but the members of the man's family, his children, and so on, who have an expectation of succeeding to the land are disappointed because that land has now gone out of their family by way of compensation to the woman. So that was a short statement but not comprehensive";

- (f) Mowbray reads gist of Banaban complaints (in 1946) from paragraph 45 of Maude report (1945), mentioning 27 deaths; Mowbray said that he had previously informed Megarry that there were 40 deaths;
- (g) Megarry draws attention to the fact that Maude, in citing the 1913 agreement in paragraph 52 of his report, errs in that the important words were not "wherever possible" but "whenever possible";
- (g) in their negotiations with the EPC, the Treasury recognized the importance of profits made, said Mowbray. "This shows the importance of the free market price to the Banabans. The non-disclosure that phosphates were being sold at under that price is one of our main complaints";
- (h) Mowbray cites a memorandum on Colonial Mining Policy which states: "The economic value of a royalty is the value of the mineral as it lies under the ground, i.e. it is equivalent to the market value of the mineral less the cost of extraction and marketing (the last term including a reasonable return on capital". That is a sum which we will do for your Lordship";

- (i) page 19 of the transcript deals factually with Maynard's negotiations of April, 1947, without any material comment;
- (j) page 20 of the transcript deals similarly with the meeting we held in Rabi in May, 1947, on the Statement of Intentions - Megarry noting that whilst representative of the Fiji and GEIC Governments were present, there was no UK representation; and,
- (k) page 21 of the transcript deals similarly with Maynard's meeting with the Banabans in August, 1947, to tie up several loose ends.