/Mr Maude/

/On Banaban Lands/

I consider that I can claim to have special knowledge concerning the Banaban customary law governing land tenure and inheritance because, as Native Lands Commissioner, I conducted a lands settlement of Ocean Island during 1931 and 1932. I was qualified for this work by reason of having taken an Honours Degree in Anthropology at Cambridge University - specialising in the Pacific Islands region. I possessed a working knowledge of the Gilbertese language.

In the work, I had the benefit of Mr Arthur Grimble's advice and instruction on Gilbertese land customs.

I believe that, prior to my undertaking this work, no government officer had a knowledge of Banaban customary law relating to lands - because such knowledge can only be obtained by conducting lands settlement work and no officer had possessed the necessary time, inclination, training or opportunity to conduct such work.

In explanation as to why settlement of a number of cases is a pre-requisite to acquiring a knowledge of customary law, it should be explained that Gilbertese (or Banabans) did not, in 1931, have the necessary analytical aptitude to answer questions on customary tenure and inheritance in the abstract, although they were well equipped to ajudicate on specific cases. The task of the Lands Commissioner was to listen carefully to the geneaological and other evidence adduced by the parties to each dispute and the decision reached and, by comparing a number of cases on each custom and questioning the Banaban members on any apparent discrepancies or inconsistencies, to draw up a provisional code. This is modified when necessary as the settlement proceeds and by the end of the last case it should be possible to draw up a final code (provided there have been sufficient cases heard) which can be put to the members and discussed in detail, reference being made as necessary to the individual cases on which the codification of each custom has been based.

In pursuance of this approach, I drew up a lands code for Banaban lands. This was discussed by the 16 members (4 chosen by each of the 4 villages on Ocean Island) and fully approved as a correct statement of Banaban custom.

The advantages such a code lay in ensuring that every Banaban would in future be fully aware of his own customary laws governing inheritance and conveyance of his lands and in enabling the native lands courts to be consistent in their application. Its disadvantages lay in the danger that, by codification, one might ossify customs which should essentially change to meet changes in the social, economic or political development of the community. It was for this reason that I drafted the Native Lands Codes Ordinance which provided that any customary law could be changed by a two-thirds majority as shown by a referendum held at the request of 50 or more members of the community concerned.

I do not consider that Mr Grimble possessed any detailed knowledge of Banaban customary law until after the codification had been completed. He possessed a knowledge of Gilbertese custom, however, for the northern and central islands from Makin (pronounced "Muggin") / to Tarawa and this was of the greatest help to me in my own work. The danger lay in the fact that Gilbertese custom, although broadly similar to Banaban, differed in some important details, such as those governing adoptions.

In view of references by Mr Mowbray, I ought to refer to Mr Telfer Campbell (a Resident Commissioner in the early years of this century). Mr Campbell acquire a knowledge of Gilbertese etiquette but not of Gilbertese land customs. He had no opportunity of acquiring a knowledge of Banaban custom, as is evidenced by his sanctioning the custom of Te Bobai/(i.e. land sale) which the Banaban members of te Kaboaba
my Commission urged unanimously was not, and never had been, a Banaban custom. Indeed, it was only a Gilbertese custom on Abemama and its tributary islands, where it had been introduced by the High Chief Binoka in recent years (i.e. the second half of the 19th century).

Just as Campbell's sanctioning of te Kaboaboa was an indication of his lack of knowledge of Banaban custom and not of his having discovered the existence of such a custom on Banaba, so also his apparent sanctioning of under-surface rights by individual landowners by registering the P & T agreements was merely a similar indication of ignorance.

The Banaban elders told me that, when approached by Ellis, they were under the impression that they were selling the rights to take the rocks lying on the surface and such of the top soil as they could dig down to with the implements then available. As expressed to Mr Eliot in 1913 this was approximately 3 ft. It was only when extractive machinery was introduced that they began to comprehend that the Company considered that they had bought their lands ian tano (under the soil) as well as iaon tano (on the soil) - or, as one man phrased it "to the very bottom of Banaba".

Once this was realised, it raised the question as to who owned these under-surface rights. Lands in the Gilberts, that is buakonikai lands (plantation lands) as opposed to kainga lands (clan homesites), were owned strictly by individuals except in the 2 High Chieftainships of Butaritari-Makin and Abemama-Kuria-Aranuka. But most other forms of tangible and intangible property, including patent rights, were considered as not easily divisible or too valuable for individual ownership.

In the Gilberts, this general principle applied to such property as fishponds, lagoon and reef fishing rights, flotsam and jetsam, and patent rights in designs and compositions such as canoe patterns, canoe crests, house types, kite patterns, mat patterns, and song and dance routines; and on Ocean Island to the Banabans 2 most precious possessions: water for drinking and stalactites for making fishhooks for cathing fish. It should be observed here that the Banabans could live without the fruits of the land, and in the 1870-74 drought and again in 1883 they did so; but they could not live without water to drink and fish to eat.

This property, of which in the Gilberts fishponds, fishing rights and stranded logs of redwood from the north-west coast of America, stranded porpoises or whales, were the most important were usually owned by boti (or clans), and on Banaba by the

hamlets which, for historical reasons connected with the conquest of the island by Nei Angi-ni-maeao and her companions from Beru, had taken the place of the Gilbertese clans.

The ownership of under-surface bangabanga was not officially investigated by the Commission, because the High Commission in Fiji considered that all under-surface rights belonged to the Crown, but it was investigated by me personally by questioning members of the Lands Commission and the results recorded in a paper published in 1932 which is readily available. It is also recorded in my note (attached) on "The Ownership of Under-Surface Rights". I have consistently argued since 1932 with Resident Commissioners - and, later, the High Commission - that under-surface rights on Banaba do not belong to the Crown because the Banabans possessed a custom which recognised such rights and defined their ownership. I had precisely the same argument with Colony and High Commission headquarters over the clan ownership of reef rights between high and low Spring tides, these being finally recognised as clan and not Crown property by an Ordinance passed when I became Resident Commissioner after the war.

It will be appreciated, however, that the social, economic and political structure of a society is not static, but constantly changing - in my own lifetime, for example, the Banabans have progressed from a subsistence to a predominantly monetary economy. The customs governing the inter-personal relations within that society must similarly change, and, in particular, those governing land tenure and inheritance, if they are not to get out of kilter, and thus become an incubus on development.

Prior to 1900 I suggest that the appropriate units of ownership of phosphate would have been the hamlet (the local equivalent of the Gilbertese clan). By 1931, when I discussed the ownership of under-surface rights with members of the Lands Commission, the hamlets had been absorbed into 4 village groups, which were not land-owning units, and the general view was:

(i) That the under-surface phosphate, like the surface phosphate, belonged exclusively to the Banabans, as opposed to anyone else, and I did not discover a single opinion to the contrary;

(ii) That it was considered that the surface deposits belong exclusively to the owner of the land;

(iii) That it was considered that the under-surface deposits came within the customary category of valuable property not readily divisible (such as water rights or stalactite ownership or offshore fishing rights) which were owned by larger groups than the individual; and

(iv) That, owing to the variable extent of the deposits, it seemed most appropriate that they should be regarded as being owned by the community as a whole, this also being in accord with the egalitarian structure of Banaban (and of Gilbertese) society. A good Gilbertese analogy to such ownership exists, for example, in island rights over the large pond or lagoon, Nein Rikki, on Nikunau, investigated by me in 1930 and recorded in a monograph published in 1963 (available on request).

The only opinions which (during the period in which I was working on the Lands Commission) which I heard expressed contrary to (iii) and (iv) above emanated from Mr Rotan or the members of his family who contended that all under-surface rights should be vested in the above-surface landowner. As this family owned several hundred lands as against an average per capita ownership of about 10 (I speak from a recollection of the Lands Register) this strongly expressed view was entirely understandable and was possibly shared by a few others among the larger landowners, although I never heard it expressed by any others.

What was considered as appropriate in 1931 is not, however, necessarily appropriate in 1976. With the change to a money economy on Rabi and the consequential changes in the economic and social organisation of the Banaban community it is, in my submission, time for the Banabans to decide, by referendum, how the under-surface rights should be divided today.

If a LC is to be of any use he must identify himself with the interests of the islanders rather than that of the Government he tells : that he uses to know for sure about what is going on in an island than the District Officer or any other expatriate official LCs should himself to a resident.