Special Reference as to the Ownership of the Unalienated Land in Southern Rhodesia.

REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH JULY, 1918.

Present at the hearing:

EARL LOREBURN.
LORD DUNEDIN.
LORD ATKINSON.
LORD SUMNER.
LORD SCOTT DICKSON.

[*Delivered by* LORD SUMNER.]

In view of the unusual character and general importance of the questions involved in this reference, their Lordships will state, publicly and fully, their reasons for the report, which they propose humbly to lay before His Majesty. It will be convenient to give some account of the history of the matter before coming to the particular points in controversy.

Under ordinances and regulations having the force of law and with the approval and assent of the Crown, the company—the British South Africa Company to give it once for all its full title—has for many years past granted land and interests in land in Southern Rhodesia to numerous alienees. In a few cases it has purported to make grants to itself, but these may be disregarded. It is conceded, on the one hand, that by so doing it acquires and enjoys no further or better title than it had before, and, on the other hand, that under the Company's grants in their favour other parties acquire and enjoy a full and indefeasible title. There still remains unalienated a vast area of land, which consists partly of native reserves, partly of land in the Company's own occupation for ranching or other purposes, partly of country altogether waste and unsettled. It is to this area, known as "the unalienated lands," as to which the Company has never granted to others estates or interests therein, and so long as it does not so grant them, that the present case refers.

The Company was incorporated by Royal Charter on the 29th October, 1889, and, in accordance with clause 25, a deed of settlement was subsequently executed, which further defined

the objects and purposes of the Company. It was a commercial enterprise, but among its objects were the following:—

> "To undertake and carry on the government or administration of any territories, districts, or places in Africa, and generally to exercise all rights and powers granted by or exercisable under the charter, and particularly to improve, develop, and cultivate any lands included within the territories of the Company, to settle any such territories and lands, and to aid and promote immigration, to grant lands for terms of years or in perpetuity, and either absolutely or by way of mortgage or otherwise."

It was provided further:—

> "Article 101 (2) the directors shall, as far as practicable, cause the accounts of the Company in relation to its African territories and property to be so kept that the cost of administration and police and the revenue, if any, derived therefrom shall appear separately from receipts in respect of commercial operations."

There is no doubt that, from the first, of all the lands included within the territories of the Company, none were of more importance or of more immediate interest than what is now called Southern Rhodesia.

Before 1898 this country consisted of two regions, not very clearly distinguished from one another, called Matabeleland and Mashonaland, and of these countries in and before 1893 Lobengula was the paramount chief, as his father Umsiligas or Moselikatse had been before him. Both were chiefs or kings not so much of a determinate territory as of their peoples or tribes. Thus, in his treaty of friendship and alliance in 1836 with the then Governor of the Cape Colony, Umsiligas is described as "King of the Abaqua Zooloo or Qua Machoban," and the treaty of 1888 describes his son, Lobengula, as "ruler of the tribe known as Amandabele together with the Mashona and the Makalaka, tributaries of the same." As a matter of right, the relation of the Mashonas to the Matabele was perhaps ambiguous; as a matter of fact it was mere sufferance and subjection, but questions of this kind are now immaterial, for about 1888 Her Majesty Queen Victoria recognised Lobengula as Sovereign of both peoples. The British Government stated to the Portuguese Government that he was "an independent King," "undisputed ruler over Matabeleland and Mashonaland," who had not parted with his sovereignty, though his territory was under British influence, and in 1889 the Colonial Secretary wrote to Lobengula himself saying that he, Lobengula, "is King of the country" (*i.e.*, of Matabeleland), "and no one can exercise jurisdiction in it without his permission." Lobengula's sovereignty over what is now Southern Rhodesia is therefore the starting-point of the history of the land question there.

After a fashion Lobengula's was a regular Government in

which the actual rule was his. He assigned to individua "gardens" for their personal cultivation. Under a system short tillage and long fallows no occupation lasted long, excep perhaps that of the kraals themselves, which he apparentl respected. The community was tribally organised. It ha passed beyond the purely nomad stage though still remainin fluid. It practised a rude agriculture chiefly of mealies. I wealth was mainly in cattle, and of that wealth the great bul belonged to the King. What individual rights his subjects ha is very doubtful.

No principle of legitimacy attached to the dynasty Lobengula. Though he succeeded his father and left son behind him, there was neither successor nor pretender to h throne. He had under him a kind of senate and a kind popular assembly. He was expected to consult the council indunas or chiefs in matters of moment. The assent of th assembled people added authority to his public acts and to the resentment or superstition he sacrificed his indunas as ev counsellors or ministers.

Among all the peoples belonging to the Bantu stock, wh at different times have inhabited various regions of Sout Africa, there have no doubt been similar institutions and simil ideas and practices on the subject among others of their trib lands. Contact with white men and still more residence und their rule have enlarged those ideas and doubtless even Lobengula's time there were races in South Africa, such as th Basutos for example, who had made considerable progress bo in the idea of transferable property in tribal land and in usag for ensuring the assent of the tribe to alienation of it, but does not appear that this was so with the Matabele, probab because of the isolation in which they lived :—

> "When they were governed by their own custon and laws the notion of separate ownership in land or the alienation of land by a chief or anyone else was forei to their ideas" (1906 T.S. 135).

It cannot be said of the Matabele and the Mashonas Lobengula's day that they had progressed towards a settl policy further than this, that they acknowledged a sovereign the person of a tyrant.

The present case, accordingly, raises no question of whi settlement among aborigines, destitute of any recognisable for of sovereignty. Equally little is there question of the righ attaching to civilised nations, who claim title by origin discovery or in virtue of their occupation of coastal regio backed by an unexplored interior. On the other hand it wou be idle to ignore the fact that, between the subjects of H Majesty Queen Victoria and those of this native monarc whose sovereignty she was pleased to recognise, there was in juridical conceptions a great gulf fixed, which it woul perhaps, be only fanciful to try to span.

Matabeleland and Mashonaland chiefly lay on the high interior plateau of South Africa. The latter at any rate was well watered, but both were cut off from the sea and from white settlements by belts of unhealthy coast lands or by great tracts of arid and almost waterless country. They had been visited and explored for years by missionaries and by hunters and by traders, but they were served by no navigable highway and communication with them by oxwaggon was tedious, hazardous, and slow. They had been to some extent prospected for minerals, and even before 1889 it had become manifest that the savage solitude, in which the Matabele people lived, could not long endure. As early as 1880 and 1882, to pass over previous concessions which came to nothing, Lobengula had granted mining concessions between the Ramaquaban and Shashi rivers to predecessors in interest of the Tati Company. In 1888 the assistant commissioner stationed in Matabeleland reports, " there is quite a crowd of Europeans here at present and the chief does not know which way to turn," and on the 5th December the High Commissioner, transmitting to the Colonial Secretary a copy of a mining concession granted by Lobengula to Mr. C. D. Rudd, observes :—

> "The rush of concession hunters to Matabeleland has . . . . produced a condition of affairs dangerous to the peace of the country. I trust, therefore, that the effect of this concession to a gentleman of character and financial standing will be to check the inroad of adventurers as well as to secure the cautious development of the country with a proper consideration for the feelings and prejudices of the natives."

It was under these circumstances that the company commenced operations. The Imperial Government desired to avoid the scandal and disorder, to which a scramble for the natural resources of the country would lead, unless the white immigrants were placed under effective control, and to secure the aboriginal inhabitants in the conditions necessary to their tribal mode of life, until they should have become adapted to take their place in a civilised community. If this could be done without undertaking direct administrative responsibility, so much the better. On the other hand, those who had petitioned for the grant of the charter to the company were influenced by patriotism as much as by profit, and desired to further the development of British South Africa consistently with Imperial policy and progress. Lobengula for his part was perturbed by the solicitations of the white suitors, who crowded round him, bearing gifts, to the value of which he was keenly alive, and pressing him for concessions, the nature of which he but dimly understood. As for his people they were uncomprehending but apprehensive spectators.

The charter was granted in terms carefully adapted to meet

this situation. The Colonial Secretary was influenced by the consideration that—

> "if such a Company is incorporated by Royal Charter, its constitution, objects, and operations will become more directly subject to control by Her Majesty's Government than if it were left to these gentlemen to incorporate themselves under the Joint Stock Companies Acts, as they are entitled to do. In the latter case Her Majesty's Government would not be able effectually to prevent the Company from taking its own line of policy, which might possibly result in complications with native chiefs and others, necessitating military expenditure and perhaps even military operations."

Accordingly the field of the Company's operations was so defined that, while the existing protectorate south of 22° south latitude remained unaffected, beyond that boundary the Company was empowered to acquire from the lawful rulers (subject to the approval of the Secretary of State) certain powers of government or administration, and by clause 33 a "novel principle" was introduced, by which the administrative and public portion of the charter was made terminable at the end of twenty-five years, with provisions for shorter renewals, a provision which "precludes any objection, which might otherwise be made, that the grant of a charter locks up indefinitely a large portion of South Africa in the hands of a commercial association." Approval was given to the Company's acquisition of the Rudd Concession, a concession from Lobengula of the exclusive right to minerals throughout his entire territory, but warning was expressly given that—

> "whenever the Company thinks it necessary that there should be an armed police force in Lobengula's country, or elsewhere beyond the Protectorate, it will be proper that it should organise its own police . . . . but it will, of course, be very important before introducing such a force into Matabeleland, whether in order to maintain the rights conferred by the concession granted to Mr. Rudd and others or for any other lawful purpose, to ascertain clearly that its presence there will be acceptable to Lobengula. . . . The Company no doubt understands that the concession above referred to does not confer such powers of government or administration as are mentioned in clauses 3 and 4 of the charter. These powers will have to be obtained whenever a proper and favourable time for approaching Lobengula on the subject arrives."

About two years afterwards Lobengula granted another concession, which recited as follows:—

> "Whereas I have granted a concession in respect of mineral rights and the rights incidental to mining only . . . .

> and whereas large numbers of white people are coming into my territories, and it is desirable I should assign land to them, and whereas it is desirable that I should once and for all appoint some persons to act for me in these respects,"

and then proceeded to grant to Edward Amandus Lippert the exclusive right "to lay out, grant, or lease, for such period or periods as he may think fit, farms, townships, building plots, or grazing areas." Now Herr Lippert was a German financier from Johannesburg, and he did not represent the group which was principally interested in the Company. This concession was assignable, a feature which probably constituted its chief value in Herr Lippert's eyes. At any rate it was not long before the Company bought it—at what price does not now matter.

Meantime, in the middle of 1890, and with the consent of the High Commissioner for South Africa, the Company sent a pioneer force to occupy Mashonaland. Their goal was some 1,700 miles from the southern coasts. They marched on foot for 1,000 miles, of which 400 were through dense forest, where their road had to be cut day by day. They arrived at their destination to find that, when the rains fell and the rivers rose and the drifts were closed, they were prisoners in the promised land, and such was the cost of transport that food rose to 70*l.* a ton. Thus it was plain from the outset that if Mashonaland was to be developed for white settlement, a great mileage of communications of all kinds, roads, bridges, telegraphs, and ultimately railways, would be necessary, and that only after this had been proceeded with could any considerable number of white settlers be found or any land revenues worth mention be gathered in. Land grants were, however, promised to the pioneers, and in many cases were applied for. Power was given to the High Commissioner by Order in Council, dated the 9th May, 1891, to exercise in Mashonaland among other regions—

> "all powers and jurisdiction which Her Majesty, at any time before or after the date of this order, had or may have within the limits of this order, and particularly from time to time by proclamation to provide for the administration of justice, the raising of revenue, and generally for the peace, order, and good government of all persons within the limits of this order."

The proclamation, under which the High Commissioner exercised these powers generally, was dated the 10th June, 1891. Three articles in this proclamation need particular mention :—

> "Art. 43. No occupation or ownership . . . . by any person of European birth or descent in respect of any land within the limits of the said order, and no concession or grant of any right, title or privilege to deal with or authorise the occupation or ownership of any such land

shall be recognised as valid or legal until approved in such mode as the High Commissioner shall appoint.

"Art. 45. No concession or grant heretofore or hereafter made by any Native Chief . . . . and no . . . . document of procuration heretofore or hereafter granted by any such chief coupled with an interest in favour of some other person . . . . shall be recognised by any Court of Law unless and until sanctioned and approved by Her Majesty's Secretary of State.

"Art. 46. Nothing in this Proclamation contained shall be deemed in any wise to abridge or impair the powers, privileges, authorities or jurisdiction of the High Commissioner or of the British South Africa Company."

By a separate proclamation, dated the 27th June, 1891, magistrates were appointed to exercise jurisdiction respectively at Fort Victoria, Fort Salisbury, Hartley Hill, and Umtali, and in due course the Secretary of State signified his approval of both the Rudd and the Lippert Concessions. The Company under its powers made Regulations as to arms and liquor, police, and weights and measures, appropriate to a nascent settlement.

It was not long before the Administration thus established, resting on the assumption of jurisdiction by the Crown within the territorial sovereignty of a native ruler, and yet subject to the recognition of his rights as such, was no longer suitable to the condition of the country. The Matabele natives were wont to attack and massacre their neighbours from time to time and impis, or bodies of warriors, more or less disciplined and sometimes numbering thousands, were sent out by the King for this purpose. They raided Lomagunda early in the year 1892, and later sundry kraals in the direction of Tuli. In 1893, although 6,000 Matabele were absent on the warpath in the Barotse country, an impi was despatched against the Mashonas; it surrounded and penetrated the Company's settlement at Victoria, murdered many Mashonas and threatened the white settlers. A collision followed and operations against Buluwayo were undertaken. The Company raised a force, and when it approached Buluwayo, Lobengula, with a large body of Matabele, withdrew north-westward toward the Bubye River in November. If any settlement was to be effected his capture, or his expulsion from the country, was necessary, for the Matabele people would not come in till they knew that there was no chance of his return to punish them for their surrender. Negotiations were useless. For some time his intentions and even his whereabouts were unknown. According to the evidence of his brother-in-law, Ingubugubu, he attempted to settle on the Shangani River and then fled again. At last, in February 1894, trustworthy news came in that he had died in January of fever or smallpox, and this is the last that ever was heard of him. King Lobengula's kingdom perished with him. Probably he and his power were unregretted by the Matabele: it is certain that, as a result of

his defeat and flight, where he had formerly reigned an undisputed monarch, there was now no longer any sovereign left. It has been suggested that, these operations were not really war nor was their result a conquest; that, truly speaking, the Company simply restored order, which for the moment he had disturbed, stepped into his vacant place, as the leading inhabitant of all those regions, and discharged the royal functions, which he had abandoned, in the interest of peace, order, and good government. This argument is fanciful. Before Lobengula fled the white forces had fought three battles, one against an impi of 5,000 and the others against impis of 7,000 or 8,000 men. To those who recalled Isandula, fought not many years before, or the history of the earlier wars, which had driven Lobengula's father out of the Transvaal, the Matabele warriors were no mean foes. Not only were the Company's arms engaged but also Crown forces, namely the Bechuanaland Border Police. Those who knew the facts at the time did not hesitate to speak, and rightly so, of conquest, and if there was a conquest by the Company's arms then, by well settled constitutional practice, that conquest was on behalf of the Crown. It rested with Her Majesty's advisers to say what should be done with it.

Comparing 1891 with 1894 a great change had occurred. In 1891 the Company, deriving from its charter capacity to administer and govern, and from the Crown permission to do so, subject to the Crown's directions, could only seek the source of its actual administration in the governing Sovereign of the country, King Lobengula. In 1894 there was no native sovereignty under which it could exercise administration. Yet there was no change in the predominant objects either of the Crown or of the Company. The Crown was more than ever anxious to assure to the natives, now left without any political headship, security and prosperity under new conditions and new influences. In respect of the external relations of the country its policy was unaltered. The Company had made a beginning of white settlement under Lobengula's régime and was loyally anxious to continue it under whatever new régime the Crown might be advised to establish. In law the difference was crucial, and everybody saw that a new chapter had opened for Matabeland and Mashonaland. As the Colonial Office wrote to the Company on the 4th November, 1893:—

> "Correspondence has hitherto proceeded upon the supposition that at the close of hostilities it would be practicable to open negotiations with Lobengula in his capacity of King, and to come to a settlement with him as representing the Matabele people. But the circumstances have now, to all appearances materially altered, owing to the success achieved by the forces of the British South Africa Company, which has apparently resulted in the defeat of Lobengula and the destruction of his power. It seems

> therefore probable that, when the hostilities come to an end, there will be no responsible chief left on the Matabele side with whom negotiations for a durable settlement could be entered upon with advantage; and it remains for Her Majesty's Government to consider in what manner the pacification and future government of the country can be best brought about."

A period intervened in the early part of 1894 when all arrangements were provisional pending discussion of the new settlement. Mr. Rhodes, addressing the Volunteers at Buluwayo on the 19th December, 1893, said:—

> "It is agreed that the High Commissioner and myself should discuss the whole of the future mode of settlement to be hereafter decided upon. There will probably be reserves for natives, and the remainder will be what I might call public land, so that you will be the first entitled to select land. . . . . There will be thus native reserves, free grants to yourselves, and the balance of Crown land, not to be sold under 3*s.* per morgen. . . . . All these arrangements with regard to the settlement are subject to approval of the High Commissioner, and that is one of the principal reasons why I am hurrying down to Cape Town to confer with him."

On the 29th December the High Commissioner telegraphed to the Marquess of Ripon:—

> "No Government is established in Matabeleland beyond what may be necessary to maintain order. There is no present extension of the Government of Mashonaland to Matabeleland. There is no appropriation of land. These questions are all dependent on future arrangements to be discussed between myself and Mr. Rhodes, and approved by Her Majesty's Government."

The conversations between the High Commissioner and Mr. Rhodes, who, since the 4th May, 1890, had held the Company's power of attorney in South Africa, were reported to the Colonial Office. In the result an agreement was entered into between Her Majesty's Government and the Company, dated the 23rd May, 1894, signed by the High Commissioner and sealed with the Company's seal, and effect was given to its provisions in the Matabeleland Order in Council of the 18th July, 1894. The first twenty-three clauses of the agreement applied to Mashonaland as well as to Matabeleland. Provision was made for the conduct of the administration by the Company under an Administrator and a Council of Four; for a Judge and Resident Magistrates; for legislation by ordinances, including ordinances for taxation, direct and indirect. The Administrator, the Judge, and the Members of Council were to be appointed by the Company with the approval of the Secretary

of State, and the salaries of the Administrator and the Judge were to be paid by the Company. Then followed provisions relating to Matabeleland only. A "Land Commission" was to be appointed to deal with all questions as to native settlements, which was to "assign to the natives now inhabiting the said portion (*i.e.*, Matabeleland) land sufficient and suitable for their agricultural and grazing requirements and cattle sufficient for their needs," the Company retaining "the mineral rights in, over, and under all land so assigned to natives." The Matabeleland Order in Council, 1894, gave effect to these provisions, and particularly paragraph 7 ran: "The Company shall have and may exercise the general administration of affairs within the limits of this Order" (which included both Matabeleland and Mashonaland); and by paragraph 26 it was provided that "there shall be a Court of Record, styled the High Court of Matabeleland, with full jurisdiction, civil and criminal, over all persons and over all matters within the limits of this Order," which was to administer the law of the Cape Colony in general. Where natives were in litigation with one another native law was to apply, so far as it was not repugnant to natural justice or to morality or to any Order in Council, Proclamation, or Ordinance.

A despatch from the Marquess of Ripon to the Acting High Commissioner, dated the day after this agreement was signed, states its nature and effect and the view of Her Majesty's Government so exactly that it is well to quote it in full. It referred first to a speech in the House of Commons by the Under-Secretary for the Colonies, in which, expressing "the general views of Her Majesty's Government," he had said:—

> "In the charter no distinction is made between Matabeleland and Mashonaland, the latter being already practically occupied and governed by the Company. Nor can the point be ignored that the mining and land concessions held by the Company are applicable to Matabeleland as well as to Mashonaland, *i.e.*, to the whole territory claimed by Lobengula. We must also bear in mind that the greater part of the operations now proceeding have been undertaken on the responsibility and at the expense of the Company."

The Colonial Secretary proceeded to say that Her Majesty's Government—

> "came to the conclusion that under the existing circumstances there were serious objections to the creation of a Crown Colony in that region, or to placing Matabeleland under the direct administration of the High Commissioner. They determined, therefore, to avail themselves of the machinery at work in Mashonaland under the charter of the British South Africa Company and Her Majesty's Order in Council of the 9th May, 1891, and to extend the

existing system with such modifications, as might be considered necessary, to that part of the country known as Matabeleland. They considered it essential, however, with a view to securities for good government, that the powers of guidance and control vested in the Imperial Government by the provisions of the Charter and under the Order in Council should be exercised somewhat more fully than heretofore over the actions of the Company throughout their administrative area, especially in regard to the rights of and protection over the natives. . . . . Her Majesty's Government. . . . . have finally decided on a scheme for the future administration of Mashonaland and Matabeleland, of which a copy is enclosed." (This was the above-mentioned Agreement.) "This scheme, in which the substance of Sir H. Loch's proposal is embodied, has been agreed to by the British South Africa Company. . . . . The new scheme of administration does not purport to supersede Her Majesty's Order in Council of the 9th May, 1891, or the British South Africa Company's Charter of the 29th October, 1889, but should be read in connection with those instruments as containing a development and reform of the existing scheme of administration."

The settlement of 1894 is of capital importance, because the rights and the system under which Southern Rhodesia has been since administered were in all essentials settled then. The Administrator published Survey Regulations in April 1894, and a Registry of Deeds was established in May. The first paragraph of the Survey Regulations provided that any person entitled to receive a grant of land (which referred *inter alia* to pioneer and police grants, and to the rights of the Matabeleland Volunteers) might obtain a provisional title-deed on making application to the Company. In connection with surveying and delimiting lands there were provisions for the service of notices on adjoining "owners," and for other proceedings by or in relation to them, and paragraph 27 provided that "for the purposes of these regulations the Administrator shall be deemed and taken to be an owner with regard to vacant or unallotted lands, and also with regard to native reserves." Next year the High Commissioner approved certain amending regulations, introduced "to remove all doubts alleged to have arisen with respect to the validity of acts done under and by virtue of the Survey Regulations of 1894," which provided that judicial notice should be taken of the said Survey Regulations . . . . . and all acts done . . . . . thereunder should be deemed and be taken to have been lawfully done, and that all unsurveyed land, held under grant from the company, should be deemed to be held subject to the terms and conditions in those regulations. Further amended regulations were approved in 1898, and in adapting to Southern Rhodesia

survey regulations in force in the Cape Colony, it was provided that for "Crown Lands," the expression therein employed in antithesis to private property, there should be read in Southern Rhodesia "British South Africa Company's Land." In other Regulations and documents similar expressions were used. On several occasions the attention of the Colonial Office was drawn to the subject of the ownership of unoccupied land in these parts of South Africa. Thus, in 1894, the Tati Concession Mining and Exploration Company (Limited) claimed to own all the land in its territory, and, in reporting to the High Commissioner, the Land Commission, constituted under the Matabeleland Order in Council of 1894, observes :—

> "The Commission presumes from the terms of the Order in Council that all lands assigned by it for the occupation of natives are to be considered as 'Crown Lands,' but for the sake of removing any doubt which may exist it is of opinion that the ownership therein should be declared to be vested in the British South Africa Company."

It does not appear, however, that, except in so far as the amended Survey Regulations of 1895 may deal with the subject, anything was done to declare definitely how this matter stood. In November of that year correspondence took place between the Company and the Colonial Office as to the strip of land along the eastern border of the Bechuanaland Protectorate, called the "railway strip," which was given up by the Chiefs Bathoen, Khama, and Sebele, for the construction of a railway to Buluwayo. As to this the Secretary of State instructed the High Commissioner that the Company "can consider itself owner of so much of the strip as has hitherto belonged to the three chiefs," and that the settlement with the Company "will include acquisition by them of title of land given up by Khama, Sebele, and Bathoen," but, when the Company itself wrote that it understood this land was to be "vested" in the Company, Mr. Chamberlain's reply was that, as the three chiefs had verbally abandoned their lands in the railway strip to the Government, he authorised the Company to take possession of them, and considered that "a transfer of any part of them by the Company would confer a good title," and there it was left.

The administration of Southern Rhodesia involved heavy cost. As must have been foreseen all along, the construction of roads, bridges, telegraphs, and railways was highly necessary and could not but be expensive, while no adequate return for this outlay could be expected for a considerable time. It is not contested that there has been all along a deficit on administrative account in Southern Rhodesia, which the Company has had to meet from its own resources, and that the accumulation of annual debit balances now amounts to a large sum. How this sum is made up is not material to the present inquiry.

For several years the published accounts of the Company did not distinguish between sums received as consideration for, or in connection with, the alienation of lands and other revenue, such as telegraph receipts, auction duty, and judicial fines collected in the course of administration. In 1896 the Secretary of State drew attention to the terms of article 17 of the Charter, which required the Company to furnish before the commencement of each financial year an estimate for the ensuing year of its expenditure for administrative purposes and of its public revenue, and added :—

> "The Company is not itself engaged in mining operations nor does it engage in trade in any larger sense than Colonial Governments ordinarily do, which sell State property and produce, work railways and steamboats, or render services to the community, such as those of posts and telegraphs, which cannot properly be regarded as commercial undertakings. Mr. Chamberlain considers that in these altered circumstances all the receipts of the Company would properly appear on the revenue side of their estimates and accounts."

The Company did not challenge this, and after considerable delay, largely unavoidable, rendered accounts in purported compliance with this request, to which the Colonial Office took no exception. More has been made of this point and of the Company's conduct in regard to the form of its accounts at different times than they really deserve. What was done cannot be regarded either as an abandonment of its rights in the matter, if any, or as the foundation of a new right, if none theretofore existed. Mere erroneous acquiescence by the first party in the view of his rights asserted by the second neither extinguishes title in the one nor creates it in the other.

After the suppression of the Mashona rising of 1896, Her Majesty's Government took up the question of rendering more effective the machinery for the control of the Company's administration by the Crown and eventually, in October 1898, "The Southern Rhodesia Order in Council, 1898," was passed. This Order applied both to Matabeleland and to Mashonaland. It provided for the creation of a Legislative Council consisting of nominated members and elected members. One limitation on the powers of the Council should be quoted :—

> "No fiscal vote or resolution shall be proposed in the said Council except by the Administrator acting on the instructions of the Company, or by his authority in writing previously obtained."

This Order superseded the Matabeleland Order in Council of 1894 but, apart from the creation of a Legislative Council, it generally followed the same lines with various extensions and supplementary provisions. It required the annual publication of detailed statements of the revenue and expenditure of

Southern Rhodesia, and an annual audit of the accounts of the Company relating to all sums received and moneys expended by the Company, in connection with the administration of Southern Rhodesia. From the supplementary Southern Rhodesia Order in Council, 1911, there need only be quoted two articles:—

> "6. The Legislative Council shall not consider any vote, resolution, or ordinance for the appropriation of any part of the public revenue or for any tax or impost that has not been first recommended to the Council by the Administrator during the same Session.
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> "7. Ordinances interfering with the land and other rights of the Company shall not be proceeded with except with the consent of the administrator."

The Legislative Council was duly brought into existence and soon showed an active interest in the country's affairs. In 1902 the contention was raised in the course of its debates that the Company, "admitting for the moment for the sake of argument, but not otherwise, that it was the owner of the land in this country and the minerals under the ground," ought, as an administrative body, to tax itself as a commercial body "in proportion to the property and interests which the said Company has in this territory." Here began the present controversy. In the face of doubts and contentions thus raised the Company proceeded to remodel its annual estimates and accounts by excluding proceeds of land sales and other such receipts from its estimate of its administrative revenue. Presumably it regarded them as being in the same position as consideration received for the grant of mining rights, and carried them to its private commercial account. Eventually on the 17th April, 1914, the Legislative Council of Southern Rhodesia passed a resolution as follows:—

> "(1.) That the ownership of the unalienated land in Southern Rhodesia is not vested in, and has never been acquired by, the British South Africa Company as their commercial or private property, and that such powers of taking possession of, dealing with or disposing of land in Southern Rhodesia as have been or are possessed by the British South Africa Company have been created by virtue of authority conferred by Her Majesty the Queen in Council and her successors upon the Company, as the governing body charged for the time being by Her Majesty in Council and her successors with the general administration of affairs within the said territory and responsible for the maintenance of law, order, and good government therein:
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> "(2.) That if by the exercise of the said powers and the taking possession of, dealing with and disposing of the said land or by any other means, the British South Africa Company have acquired an ownership of the said land, such

ownership is so vested in them as an administrative and public asset only, and the Company in their capacity other than a Government and Administration have no dominium or estate in or title to the said lands or to any moneys or revenues derived therefrom.

"(3.) That on the said Company ceasing to be the Government of the said territory, and ceasing to exercise the administration of affairs therein, all such lands as may be unalienated at such time shall be and remain the property of the Government of the said territory which shall take the place of the said Company, and the possession and administration of such land shall pass to such Government as public domain."

These contentions were disputed by the British South Africa Company, and by Order in Council, dated the 16th July, 1914, His Majesty was graciously pleased to refer to this Board for hearing and consideration the *Question* "whether the contentions put forward in the said Resolution of the 17th April, 1914, are well founded?" Their Lordships' jurisdiction in such matters arises under section 4 of "The Judicial Committee Act, 1833."

Counsel have been heard on behalf of the Company, of the elected members of the Legislative Council and of the natives respectively of Southern Rhodesia, and, finally, of the Crown. The Company is in possession of the unalienated lands, but as this is not an action of ejectment or a controversy depending upon the onus of proof, possession alone does not avail. The case raises positive questions as to ownership, and if their Lordships are not satisfied that the unalienated lands are the property of the Company, it is their duty to say so. They have to ascertain what the Company's rights are in order to decide whether or not they amount to ownership.

The rights of the Crown again, on behalf of whom the Attorney-General asked for a positive declaration of right, are equally matters of proof. Theoretically it is possible to say that the unalienated lands do not belong to anybody, but this conclusion would be unreal, for the whole administrative policy and legislative system of rights in Southern Rhodesia rests on grants from the Company entered on a public register by way of solemn recognition and record of title of ownership. In a sense the Crown's position is residuary, for if these lands are not shown to belong to any private owner, the practical conclusion would seem to be that they are the Crown's, but here, too, unless it can be made to appear how and why they are the Crown's, the question of ownership cannot properly be answered in the Crown's favour.

The case of the elected members is in great measure identical with that of the Crown. In so far as they traverse the Company's case and dispute its rights, their contentions differ from those of the Crown in immaterial respects. In one

point they are at issue with the Crown. They contend that the unalienated lands are the property of the Crown and not of the Company, but that even the Crown's power of dealing with them is now limited. With far-sighted care for the interests of unborn generations they urge that these lands are really an endowment for the future of Southern Rhodesia, and that, if and when the Company's administration comes to an end, the possession and disposition of the lands will not revert to the Crown, but that the Company's successors in the administration will *ipso facto* be entitled to the lands then remaining unalienated as administrative assets for the country's benefit. This involves the proposition that, by some action or course of events which binds the Crown, these lands have already been disposed of, prospectively but definitively, so that the Company's successor in the administration, though newly appointed by direct commission from the Crown at its pleasure, would receive the lands not directly from the Crown but by succession to the Company. Such a case would be singular, for in general an administrator, when he resigns his commission to the Crown, surrenders with it the property which he has been commissioned to administer. No such action or event was indicated, and this part of the case was only faintly urged. Their Lordships think it sufficient to say that, except in so far, if at all, as the rights of the Crown are subject to those of the natives and the Company, nothing has been shown to have happened or to have been done, that would prevent the Crown, if and when the Company's tenure of the administration of Southern Rhodesia determines, from disposing of the lands then remaining unalienated by any lawful means and in favour of any persons or purposes, as it may duly be advised.

By the disinterested liberality of persons in this country, their Lordships had the advantage of hearing the case for the natives, who were themselves incapable of urging and perhaps unconscious of possessing any case at all. Undoubtedly this enquiry has thereby been rendered more complete. Although negative in form, since their case in answer to the questions mentioned in the order of reference was primarily that the unalienated lands were the property neither of the Crown nor of the Company, in substance their case was that they were the owners of the unalienated lands long before either the Company or the Crown became concerned with them and from time immemorial, that their title could not be divested without legislation, which had never been passed, or their own consent, which had never been given, and that the unalienated lands belong to them still. Hence, if the Company had any title at all, which was denied, it was only the title of a trustee, the beneficial interest remaining in the natives and the legal title and right to possession reverting to them whenever the Company ceases to govern the country.

The evidence, by which this case was supported, was respectable but slender. The exigencies of the war had curtailed

the collection of further materials in South Africa, but it is by no means certain that in any event any such could have been found. Their Lordships were invited to undertake or to direct some further inquiry, at a future date and under happier circumstances, but what power they were supposed to have for that purpose or how this reference could be adjourned or provisionally disposed of pending such inquiry did not appear. As the argument stood it was really matter of conjecture to say what the rights of the original "natives" were and who the present "natives" are, who claim to be their successors in those rights.

Between 1893 and 1914 there has undoubtedly been much migration, emigration, and immigration of natives in Southern Rhodesia, and the aborigines of Lobengula's time have both changed and been scattered. It was said that the rights of the Matabele did not extend beyond a radius of 60 miles from Buluwayo, and that beyond that the Mashonas were the race entitled. Whether the Matabele or the Mashonas of to-day are, in any sense consistent with the transmission or descent of rights of property, identical with the Matabele or the Mashonas of more than twenty years ago is far from clear, and the fate of the Makalakas and the Maholies, once the slaves of Lobengula, is as obscure as their original rights. Lobengula was called a trustee of the lands for his people, an expression convenient and often used, but in this connection altogether lacking in precision, and his right to alienate them was denied without the consent of his people in *pitso* assembled. It seems to be common ground that the ownership of the lands was "tribal" or "communal," but what precisely that means remains to be ascertained. In any case it was necessary that the argument should go the length of showing that the rights, whatever they exactly were, belonged to the category of rights of private property, such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them.

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law, and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor "richer than all his tribe." On the other hand there are indigenous peoples, whose legal conceptions though differently developed are hardly less precise than our own. When once they have been studied and understood, they are no less enforceable than rights arising under English law. Between the two there is a wide tract of

much ethnological interest, but the position of the natives of Southern Rhodesia within it is very uncertain; clearly they approximate rather to the lower than to the higher limit. Lobengula's duties, if describable as those of a trustee, were duties of imperfect obligation. Except by fear or force he could not be made amenable. He was the father of his people, but his people may have had no more definite rights than if they had been the natural offspring of their chieftain. According to the argument the natives before 1893 were owners of the whole of these vast regions in such a sense that, without their permission or that of their King and trustee, no traveller, still less a settler, could so much as enter without committing a trespass. If so, the maintenance of their rights was fatally inconsistent with white settlement of the country, and yet white settlement was the object of the whole forward movement, pioneered by the Company and controlled by the Crown, and that object was successfully accomplished, with the result that the aboriginal system gave place to another prescribed by the Order in Council.

This fact makes further inquiry into the nature of the native rights unnecessary. If they were not in the nature of private rights, they were at the disposal of the Crown when Lobengula fled and his dominions were conquered—if they were, any actual disposition of them by the Crown upon a conquest, whether immediately in 1894 or four years later, would suffice to extinguish them as manifesting an intention expressly to exercise the right to do so. The Matabeleland Order in Council of 1894 and the Southern Rhodesia Order in Council of 1898 provided for Native Reserves, within which the tribal life of the natives might be continued under protection and control, and to the rest of the country the Company's officers and white men were admitted independently of any consent of the natives. The Company's alienations by grant are unquestionably valid, yet the natives have no share in them. The ownership of the reserves was, at least administratively, vested in the Company under the Southern Rhodesian Native Regulations promulgated by the High Commissioner in 1898, and with the consent of the Crown other dispositions of those reserves can be made by the Company from time to time. By the will of the Crown and in exercise of its rights, the old state of things whatever its exact nature, as it was before 1893, has passed away and another and, as their Lordships do not doubt, a better has been established in lieu of it. Whoever now owns the unalienated lands, the natives do not.

Like the natives the Company desired to find a title, which would ante-date the conquest of Lobengula in 1893, and would confer such prior rights in property or rights equivalent to property in the unalienated lands, as would be classed among the private rights, which a conqueror is deemed to respect, unless by appropriate action or legislation he expressly affects them. For ten years after 1893 the Lippert Concession is little

heard of, but it was a grant from Lobengula, while he was still sovereign of the country, and it referred to the lands generally. Accordingly it formed a part, and not an unimportant part, of the Company's case.

The Lippert concession was not one of those public acts by which one independent sovereign, however humble, enters into political relations with the agents of another. Instruments of that character have been common enough in the history of the British Empire. They derive their juridical character from their recognition and adoption by the Crown, and in interpreting them it must be borne in mind that they are State documents. The Lippert concession is not of this character. Like the Rudd concession, it received the approval of the High Commissioner on behalf of the Crown, but it is essentially a private contract though entered into by the concessionnaire with the paramount chief, and, like other legal documents, its effect must depend upon the construction of its terms according to ordinary legal rules. It is, indeed, of importance to the Company's case largely because it confers private rights, and is not in any sense a mere public act or act of State. Private concessions of large extent and of ambitious character, when obtained by white financiers from untutored aborigines, are generally and justly objects of close scrutiny, but their Lordships are relieved from the duty of inquiring into the circumstances under which this grant was made by the fact that competent officials reported to the High Commissioner, after making full inquiry under his direction, that the concession had been properly obtained and that its terms correctly expressed Lobengula's intentions and exactly reflected his understanding of the matter. This is a testimony to his enlightenment and acumen, which perhaps goes beyond what might have been supposed. It is still right not to leave out of account the known character of the King and his subjects, but there need be no hesitation about examining the language used in limiting the area and nature of the rights granted by the terms of the instrument, read in their substantial if not in their technical meaning. The Company did indeed contend for a canon of construction, alike novel and singular. Lobengula, it was said, had granted to Herr Lippert the right to allot the land to others and to take money in return; to dispose of the surface for one hundred years without being called to account; to do all that an owner could do and make out of it all that an owner could make. Thus he granted to him all the right of dealing with land of which he had any knowledge, and his ignorance of the nature of an estate in fee ought not to derogate from the amplitude of a grant, which was as wide as he knew how to make it. He reserved at any rate nothing but money considerations for himself, and, when the Lippert and the Rudd concessions fell into the same hands, the King had, in substance, sold his country out and out to the Company. Their Lordships cannot accept this argument. As well might it be said that a

savage who sold ten bullocks, being the highest number up to which he knew how to count, had thereby sold his whole herd, numbering, in fact, many hundreds. In the questions referred to the Board ownership and property mean ownership and property as civilised people understand these words. They cannot be satisfied by any such general right of disposal as is here suggested. Their Lordships think that the real question is, what does the Lippert concession say?

Thus read, it is plain that the concession did not give the concessionnaire the right to use the land or to take the usufruct. It did not make any land his nor did it enable him to make it his own. What land he appropriated to others was to be appropriated in Lobengula's name. There were no words of conveyance—no estate or interest in land was vested in Herr Lippert. The concession was at most a personal contract. If it bound Lobengula's successors, they were such successors only as came to his throne under his title, and not successors to his sovereignty who came to it by right of the sword. If Lobengula broke the contract or revoked the concession, Herr Lippert's claim was a personal one, and was not supported by any right in or to the land. The Company, indeed, never acted under the concession. Its grants were not made in Lobengula's name nor did it pay the annual douceur, upon which the rights under it were conditional. The consequences of the construction which the Company puts on the document would indeed be extreme. It would follow that Herr Lippert was, or could become at pleasure, owner of the entire kingdom—for nothing is reserved in favour of the inhabitants—from the kraals of the King's wives to his father's grave or the scene of assembly of his indumas and his pitso. Thenceforward the entire tribe were sojourners on sufferance where they had ranged in arms, dependent on the good nature of this stranger from Johannesburg even for gardens, in which to grow their mealies, and pastures, on which to graze their cattle. The Lippert concession may have some value as helping to explain how and why the Crown came to confer the administration of Southern Rhodesia upon the Company, but as a title deed to the unalienated lands it is valueless. Accordingly it becomes unnecessary to consider either the powers of Lobengula to dispose of tribal lands or the effect of the approval and recognition of the concession by the Crown, and of the occupation which it is suggested that the Company enjoyed under it. The Crown recognised the concession for what it might be worth on its true interpretation, and the Company's occupation, whatever it rested on, did not rest on the Lippert concession. Recognition could give no title where none existed already. It is true that sundry speeches to shareholders, wise and otherwise, were quoted, in which the Company claimed to own the whole country, though the Lippert concession was but little relied on and but rarely mentioned; but though these were sent to the Colonial Office, it is not shown that they were or ought to have been read there, or that, if they

were read, the Crown was bound to take any notice of these domestic matters.

In default of the Lippert concession the Company places great reliance on occupation, long-standing and undisturbed. It is true that the period required for a title by prescription under Roman-Dutch law, which has been applied to Southern Rhodesia, has not yet elapsed, and that the Company's possession has not been held adversely to the Crown. Laying aside the language of directors' speeches and the form of the Company's accounts, because of their ambiguity, no one can say that its possession is not at least as referable to the administrative position, which it held under the Crown, as to an enjoyment independent of the Crown, or that it is inconsistent with the recognition of the Crown's overriding title. The fact of occupation is, however, relied on in various ways. It commenced, at any rate in Mashonaland before 1893. The Company does not (nor could it do so) assert a conquest for its own benefit, but it says that, enjoying certain rights under its charter, it occupied extensive tracts of country without objection from Lobengula during his reign, and then, after his flight and on a still larger scale, it took to itself the disposal of a masterless land, now left vacant for the first comer who should prove strong enough to hold what he took. Thenceforward, with the recognition of the Crown or at least without its dissent, the Company claims that it did openly all that an owner could do, and enjoyed every advantage that ownership could have given, conveying land in its own name to grantees of its own choice, fixing the price and applying the purchase-money as it saw fit, and consistently doing what only an owner ought to do, under the very eyes of the Crown, and in a manner which cannot be reconciled with any title outstanding in the Crown. Thus, if the Crown did not give the land into the Company's hands, yet it was content to leave in the Company's hands all that it found there. The word "estoppel" was not indeed used, but the Company did not scruple to suggest that, if after all its expenditure in Southern Rhodesia, incurred in the belief that it was undisputed owner of the unalienated lands, the Crown succeeds in asserting a competing title, then it has not been fairly dealt with.

The questions in this reference refer to property and not to mere occupation. This must never be lost sight of. The charter simply gave capacity to own and to grant land, but in itself it granted none. It used, indeed, the expression "the Company's territories," but this referred to the area, within which those capacities might be exercised, and did not amount to an anticipatory grant by the Crown of land, which in 1889 was not the Crown's to bestow. The fact of occupation and especially the circumstances, under which it was taken and enjoyed, are significant and helpful in estimating what the rights of the Crown were and how far, if at all, the Crown conferred rights over the land on the Company, but in itself and by itself occupation is not title.

The Crown does not claim to have annexed Matabeleland and Mashonaland. No proclamation of annexation has ever been issued. Accordingly the Company contends that for want of it these regions have never belonged to the Crown, but that it has deliberately disinterested itself in regard to their ownership, and the conclusion suggested is that, if no one has now a better title than the Company, the inchoate title consisting of occupation is for present purposes property enough.

No doubt a proclamation annexing a conquered territory is a well understood mode in which a conquering power announces its will *urbi et orbi*. It has all the advantages (and the disadvantages) of publicity and precision. But it is only declaratory of a state of fact. In itself it is no more indispensable than is a declaration of war at the commencement of hostilities. As between State and State special authority may attach to this formal manner of announcing the exercise of sovereign rights, but the present question does not arise between State and State. It is one between sovereign and subject. The Crown has not assented to any legislative act, by which the declaration of its will has been restricted to one definite form or confined within particular limits of ceremonial or occasion. The Crown has not bound itself towards its subjects to determine its choice upon a conquest either out of hand or once and for all. If Her Majesty Queen Victoria was pleased to exercise her rights, when Lobengula was defeated by her and her subjects, as to one part of the dominions in 1894 and as to another part not until 1898, if she was pleased to do so by public acts of State, which indicate the same election and confer the same supreme rights of disposition over his conquered realm as annexation would have done, it is not for one of her subjects to challenge her policy or to dispute her manner of giving effect to it. The fact being established that a conquest of Lobengula and his dominions had occurred, the question is what Her Majesty's Government thereupon elected and intended to do in Her Majesty's name. It cannot be said that not to annex forthwith was a renunciation of all right to annex at any time, or that a disposition of the public lands in the conquered territories, as ample as if formal annexation had taken place, is less operative than if that form had been employed. The true view seems to be that if, when the Protecting Power of 1891 became the conquering power in 1893, and under the Orders in Council of 1894 and 1898 set up by its own authority its own appointee as administrator, and sanctioned a land system of white settlement and of native reserves, it was intended that the Crown should assume and exercise the right to dispose of the whole of the land not then in private ownership, then it made itself owner of the land to all intents and purposes as completely as any sovereign can be the owner of lands, which are *publici juris*, and that the forms of an annexation to itself followed by a grant and conveyance to others for the purpose of grants over to settlers do not avail by their presence

or their absence to affect the substance of these acts of State.

It is true that strong expressions as to the importance and the significance of annexation in connection with land ownership are to be found in the official despatches. Thus in 1885 Lord Derby writes that before annexation titles cannot issue in the name of the Queen but of the chief, to whom the land originally belonged, and in 1895, Lord Ripon, also speaking of Bechuanaland, states that it is a protectorate and therefore Great Britain does not claim the land rights, but both of these statements are made in reference to a territory, in which the existing sovereignty of native chiefs continued and was respected, and neither dealt with regions in which the Crown had created the special administrative system established for Matabeleland and Mashonaland by the Orders in Council of 1894 and 1898.

It is therefore necessary to examine the circumstances and features of that system in order to determine, first of all, with what intention the Crown thus dealt with those countries; and, secondly, what is the true legal effect of those dealings as between the Crown and the Company. In 1894 the field was clear, for the native sovereignty was gone. There was relatively little in the nature of private ownership to encumber it. The Company's mineral rights under the Rudd concession, which were private rights, and have been continuously recognised by the Crown as valid, affected the surface in a very minor degree, and the white settlers, who held land by grant or occupation prior to 1894, and were recognised as private owners, fully entitled, affected the question even less. Beyond the Lippert concession, such as it was, the Company had acquired no general rights, administratively or otherwise, that presented any difficulty or are now material. Its powers had been created; its capital had been subscribed, and it was willing to raise more; its operations had begun and its staff was on the ground. The hands of Her Majesty's Government also were free. The existing Protectorate of 1891 did not preclude another form of administration, either concurrently with or in substitution for it. The exercise of the powers given by the Foreign Jurisdiction Act did not operate as a negation of the exercise of other powers in the present, still less as a renunciation of the right to resort to them in the future. No interference was immediately to be apprehended from outside, for the Banyai Trek of 1891 had been stopped, and there was no threat of a repetition of it, and whatever Her Majesty's foreign policy and relations might require or be, the position in South Africa was for the time being not one of embarrassment. White settlement and the consolidation of British influence were objects common to both Crown and Company. Both desired to encourage white settlers generally to select and acquire land, and, on compliance with the prescribed formalities, they were to become absolute owners of their holdings. Plainly, if white settlement was to take place, the administration must go to considerable expense in developing

the country, of which communications of all kinds were among the most pressing needs, while returns could not be looked for till some later period, possibly remote. It was also plain that the necessary effect of that expenditure, if judiciously made (as the growth of population and prosperity in Southern Rhodesia shows in the main that it was), must be to appreciate the unalienated lands, so that when sales had reimbursed outlays, the unsold residue would enrich its owners whoever they might be. In these conditions and with these facts before it the Crown elected not to incur the cost and responsibility of direct administration, but to entrust it to the Company, a commercial concern, which happened to be already administering part of the region, and the Company accepted the employment and undertook the burden of financing the administration.

One thing is most notable. Nowhere is there any express grant of the unalienated lands by the Crown to the Company. The hypothesis that the Crown settled the lands, by conveying to the Company in trust to sell them and apply the proceeds to the necessities of administration, need not be considered. Not only is there no declaration of any such trust no beneficiary named and no trust indicated, but there is no conveyance at all. The Crown never and the Company always executed the grants to the settlers. The deeds are under the Company's seal, attested, be it observed, by the administrator and not by the directors or secretary. Nor was any instrument given to the Company, such as would correspond to the commission, which it is the practice to confer on a colonial governor or administrator or to a power of attorney, authorising the Company to sell and convey lands on behalf of the Crown. Again these are matters of form. No law restricts the power of the Crown to confer the authority necessary for the above-mentioned purposes to one particular type of instrument. The ordinances and regulations, under which this system of making grants to settlers was carried on, had full legal effect. They are legislative acts under which, if the natives had enjoyed rights in the nature of private property, those rights would have been expropriated with sufficient clearness, and under which, as it was, the Company became empowered to grant in particular cases and in detail that of which the Crown was in this way disposing generally. In effect this code authorised the Company to dispose of lands owned by the Crown and to give title on its behalf. If one thing is more completely agreed in this matter than another it is that the grantees obtain an indisputable title and, as the Company is not shown to have any ownership of its own, then to make the title indisputable, it must have been given by the Company on behalf of the Crown, which had so acted as to warrant the conclusion that it had taken to itself the ownership and the right of disposal. It is not that there was an intermediate grant by the Crown to the Company followed by the Company's grant to the alienees. The implication of a universal grant of the unalienated lands

by the Crown to the Company without a word said or a paper signed is an impossible conclusion. The Company contends that the way in which it has in fact disposed of the unalienated lands and their profits and proceeds, indicates some sufficient form of ownership of the land and of title to the moneys. The elected members say the said moneys are applicable only to defray the current costs of administration and do not belong to the Company as a commercial concern. Presumably, if and when these revenues by themselves suffice to meet the expenditure of the current year, it is meant that the Company would under all circumstances be bound so to apply them and could not by otherwise disposing of them justify resort to its powers of taxation generally. It may be said at once that the use of the word ownership in this connection is a misuse of terms. The uncontested disposal of lands, as upon a grant for value, may be indicative of ownership in the grantor or it may not ; if, as is here the case, it is otherwise explained and is indicative of a particular authority from the Crown in that behalf as owner, no further or other inference arises from the practice of disposing of the lands direct. As to the revenue thence accruing other considerations arise.

If a landowner, desiring to develop his estates, for sale, loath or unable to meet immediate outlay or to take personal trouble, employs a commercial agent, natural or incorporate, to do this for him, obviously he would, if matters stopped there, come under definite legal obligations to his employee. English law in such a connection speaks of an implied contract : not that it supposes that the parties actually made a parol agreement but forgot to record it, or had identical intentions in mind but omitted to express them, but this is the accepted terminology, under which legal effect is given to such relations. In the present case, however, their Lordships do not propose to deal with the question referred to them under any terms of art peculiar to municipal law. They desire to take a broader view.

Alike by the common and by the civil law certain legal incidents attach *de jure* to the relationship, which is constituted by the grant of an authority on the one hand, to be exercised for the benefit of the grantor, and the exercise of that authority by the recipient of it on the other according to his mandate. It is not that this arises out of some unexpressed stipulation : it is annexed to the relationship. True is is, that by stipulation these incidents can be rebutted and negatived and the stipulation may be express or implied ; it may be established by words and writing or by circumstances and conduct. One of these incidents is this. If in the exercise of the authority conferred, the party authorised is obliged to expend his own moneys in the discharge of the authority conferred upon him, it is incident to the relationship, that he is entitled to look to his principal and employer for reimbursement. This may be so either absolutely or *sub modo* : it depends on the circumstances of the case. He may be entitled to claim repayment directly in

money or only to reimburse himself in a particular way or to have the opportunity of reimbursement secured to him from a particular source. This again depends on an inference from the whole circumstances of the case, to be collected, just as stipulations excluding such reimbursement altogether might be collected, by considering the intention of the parties. The material point is that the right to reimbursement presumptively exists. If it is to be negatived this has to be shown affirmatively by inference from what is said or done.

Since it was certainly necessary for the Company in the exercise of its authority as administrators of Southern Rhodesia under the Crown to expend its own moneys for the purposes of the administration—a thing clearly obvious from the first—the question is what, if anything, limits or excludes the right to reimbursement therefrom arising? Has it been excluded by an express agreement? In 1894, before the issue of the Matabeleland Order in Council, what was called an agreement was entered into between the Company and the Crown, but it did not purport to reduce into writing the entirety of their relations. In form it was unilateral. It did not deal with the general question of rights of property. It made no provision for the grant of powers by the Crown, and left to implication or to separate arrangement the nature and extent of the authority under which the Company was to act. It is correctly described by its authors on the part of the Crown as an arranged scheme for the outlines and general form of the administration to be established. This then will not suffice to exclude the right to reimbursement by express agreement. Nor do the general circumstances rebut the presumption of such a right. It is true that there is in private affairs a presumption that if a commercial agent is employed he is entitled to a reasonable remuneration for his work, and yet no one suggests that the Company has any claim to remuneration. This, however, finds its own explanation in circumstances which do not affect the right to reimbursement. The Company had extensive mineral interests, which might under a good administration of the country become highly valuable. Obviously it desired to keep in its hands after the fall of Lobengula the administration, which it was already carrying on for its own benefit as well as for that of settlers, and it is not unreasonable to suppose that in a public matter like administration its directors were not minded to drive a hard bargain with the Crown. There is nothing, however, to show that to gratuitous administration, as far as the services of its own officers were concerned, the Company either would or could propose to add the gratuitous endowment of that administration at the expense of the shareholders.

It is, moreover, to be collected from the communications which passed between Mr. Rhodes and Lord Ripon, and still more clearly from the course pursued, that the Company was not intended to have any right to call directly upon the Crown while its administration continued. It was to sell land, to fix prices,

to arrange terms of payment, to apply the revenue from the land and the proceeds of the sales, and if in process of time sales increased or prices went up year by year, then the advances to be made in the early years might be expected to diminish and eventually to cease, and the process of reducing the adverse balance on account of past development might begin and finally be carried to a successful issue. Once, in February 1898, the Company proposed a definite arrangement in the form of what they called a "principle," that "all future administrative expenditure not met by revenue, as also a fair proportion of past expenditure of the same nature should . . . . be regarded as a first charge upon the country, and eventually be constituted a public debt." This was a proposal to saddle a young community, not yet advanced to self-government, with a charge, first on the land alienated as well as unalienated, and then upon the personal liability of the taxpayers, a charge which must be satisfied whether the sales of the lands and the administration revenue prospered or not, and it is not surprising that it met with no support from the Crown. The reply in July was that Mr. Secretary "must decline to pledge Her Majesty's Government in advance to acknowledging anything in the nature of a public debt or of a charge on the administration, as distinguished from the Company itself, which has been placed in possession of all the assets of the country." In a word, the Queen's Government refused to relieve itself of an Imperial liability by transferring it to a local population still imperfectly organised. It is possible that this refusal was not intended to be final, for Mr. Attorney, in his argument before their Lordships on behalf the Crown, admitted that "these adverse balances, so far as legitimate, must, when the time comes, be converted into a public debt." Accordingly the matter remained one between the Company and the Crown, and the Company continued to be entitled to apply the proceeds of land sold in reduction of the proper cost of the administration, whether incurred in the current year or in the past.

Furthermore, the charter itself reserved to the Crown the right, at the end of twenty-five years from its date and thereafter at the end of every succeeding decade, to repeal so much of the charter as relates to administrative and public matters, and thereby to put an end to the Company's capacity to administer Southern Rhodesia, and this right is in addition to whatever right the Crown might have independently of this reservation to revoke its appointment of the Company as administrator and to repeal the Order in Council. The Company's right to reimbursement was therefore limited thus far at any rate, that it had not any perpetual or immutable right to continue to conduct the realisation of the unalienated lands for the purpose of accomplishing its own reimbursement. On the other hand, nothing confers on the Crown under the form or by the procedure of exercising this power, the right to take away

from the Company a right already accrued or a title already conferred upon it. Hence it follows that, in the event of the exercise of this power by the Crown, the Company must have the right to look to the Crown to secure to it, either out of the proceeds of further sales of the lands, by whomsoever made, or, if the Crown should grant away these lands or proceeds to others, then from public funds, the due reimbursement of any outstanding balance of aggregated advances made by it for necessary and proper expenditure upon the public administration of Southern Rhodesia. With items or details, with the amounts or the book-keeping of such expenditure, and with the terms of reimbursement their Lordships have nothing to do.

It may be a matter of regret that, on a subject so important, it should have been thought fit to leave the rights of the parties to be ascertained by a legal inquiry, whether, on a review of the whole circumstances and history of the transactions, there can be found any sufficient evidence of an intention to exclude a legal right, which arises, *primâ facie* by operation of law from the relation in which the Crown placed the Company towards itself, but so it is. In matters of business reticences and reserves sooner or later come home to roost. In 1894 a single sentence, either in an Order in Council or in a simple agreement, would have resolved the questions which have for so many years given rise to conflicting opinions in Southern Rhodesia, and all the more easily because at that time the value of the whole of the country was unproved and problematical. Matabeleland and Mashonaland were rich in promise; the right to enjoy the fruition might well have been determined before, and not after, the field was tilled and the harvest began to whiten. As it is, the conclusion is one of legal inference, but there is some satisfaction in reflecting that nothing has appeared upon the record to show that this conclusion differs substantially from that which would have commended itself to the negotiators on both sides, if they had thought it opportune to deal with the question.

Their Lordships will humbly report to His Majesty that they affirm the first paragraph of the resolution passed on the 17th April, 1914, and deny the third, and that as to the second they say that, so long as the British South Africa Company continues to administer Southern Rhodesia under the Crown, it is entitled to dispose of the unalienated lands in due course of administration, and to apply the moneys or revenues derived therefrom in duly reimbursing all proper outlays on administrative account in the current or in past years, and, if its administration of Southern Rhodesia should be determined by the Crown, then the right to look to the Crown to secure to it (either out of the proceeds of further sales of the lands by whomsoever made, or, if the Crown should grant away these lands or proceeds to others, from public funds), the due reim-

bursement of any outstanding balance of aggregated advances made by it for necessary and proper expenditure upon the administration of Southern Rhodesia. This, however, and the other rights hereinbefore mentioned, do not vest in it dominium or estate in or title to the said unalienated lands.

In the Privy Council.

SPECIAL REFERENCE AS TO THE OWNERSHIP OF THE UNALIENATED LAND IN SOUTHERN RHODESIA.

DELIVERED BY LORD SUMNER.

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