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: and post colonial administration by Germany and Australia.
: Customary land dealing practices are contrasted with the
: arrangements implemented by colonial administrators.
: and more recently the Naruan Lands Committee.
: The impact of non traditional influences such as
: judicial decisions on customary practices are discussed.
: The article had its origin as the basis for the Naruan
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LAND OWNERSHIP AND CONTROL IN NAURU

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INTRODUCTION

This paper has grown from a desire to explore aspects of the law which has, from time to time, been applied, or has been said to apply, to land ownership and control in Nauru. Much of the work here was done when the writer was Counsel for the Republic of Nauru before the Commission of Inquiry into the worked out Phosphate Lands of Nauru, hearings of which were held in Melbourne, New Zealand and Nauru during 1987. The results of the Inquiry are told in a most scholarly and readable manner in the book "Nauru, Environmental Damage under International Trusteeship" written by Christopher Weeramantry, the chairman of the Commission (and now a Judge of the International Court of Justice) which was published in 1992. A paper entitled "The Law of Land Holding In Nauru", the forerunner of this paper, was prepared by the writer for the then Nauruan Minister for Justice and presented by him to the Commission. Some recent decisions of the Supreme Court of Nauru which have relevance to the general subject of this paper provided an impetus to its preparation.

The information concerning the German law applicable to Nauru was first brought to attention at the Commission by Dr Peter Sack and later given expert explanation by way of written advice to the Commission by Professor Dr. G. Khne. This information, which was subsequently increased by copies of documents and correspondence from various archival sources, filled out general knowledge of a time in Nauru's past which has been patchy to say the least.

Nauruan law can be looked at in four broad periods which, as might be expected, have some overlap. These are: pre-German (pre-1888); German (1888-1919); Australian Administration (1919-1968); Independence (1968 to date). Not much can be said with any degree of confidence about any period prior to Independence for the simple reason that the records of what really happened are quite sparse. This does not mean that they are non-existent but merely that they are not at all easy to obtain (even in respect of the Australian Administration) or interpret - sometimes for the reason that the written record may not well describe what was really going on and tends to be self-serving. Even today, writers attempting to interpret Nauruan Custom sometimes appear blinded to probable reality by the desire to promote the interests of the Nauruans at all cost. Certainly the Nauruans have been poorly, if not shamefully, treated in the past and this, at times, leads to accepting without question, assertions of present-day Nauruans about the customs of old. Similarly an, at times obsessive, pre-occupation with custom can lead to absurd results - such as assuming that the practices of Nauruans in the late twentieth century can be equated to ancient custom, given legal recognition, frozen by the doctrine of stare decisis and yet remain custom or, alternatively, be denied recognition as custom because they are not proven to be as rigid or enforceable as statute law.

This paper proceeds to look at aspects of the Law in Nauru as it affects land ownership and control under the four broad periods previously described.

NAURUAN CUSTOMARY LAW

There appear to be no authoritative accounts of Nauruan custom in the

holding and dealing with land before the advent of colonialisation. The earliest account appears to be that of Jung[1] a German District Commissioner appointed in 1893, whose views were criticised sometime later by the anthropologist, Hambruch, in regard to several matters relating to land inheritance.[2] At best some early accounts of practices provide what we must assume to be accurate reflections of practices as they existed shortly after colonial powers began to make their presence felt. We can make this assumption with some degree of confidence even if only because the manner and form of the German Colonial system was such as not to interfere with native custom in a way which would affect the rights of natives inter se.[3]

From writings of anthropologists and missionaries we might say that all land on Nauru, that could be said to be owned, was owned in a sense more absolute than that of the fee simple tenure of English law. That is to say that an owner of land owed no duties to any higher "owner" and had an absolute right to deal with it - and did. This does not mean that custom did not affect his dealings nor is it affected by the fact that Nauruans did not sell land (indeed they are not known to have "sold" anything before the advent of European influences). There being no concept of a "higher" owner, such as the Crown, as there is under English Law Nauruan ownership was absolute. And so, when Lundsgaarde wrote that "there are no societies in Oceania that can be said to allow persons to hold a fee simple estate interest in land"[4] he was, to the extent that he was equating an estate in fee simple with absolute ownership, wrong insofar as Nauru was concerned.

There is, certainly, evidence that the ownership of land included such things as rights to grant life interests and profits a prendre. This extended to ownership of wells, the reef, fishing rights and lagoons. Ownership of intangibles such as songs, dances, legends and even the right to wear certain ornaments and designs has been asserted.[5]

It is said that here was a well developed and sophisticated system of ownership and devolution of property on intestacy and by will. While this may well be true it is important not to take it to far. It bears repeating that while what people do usually (that is, customarily), may look like some kind of rule, it does not follow that it is, or that if it is a rule, it is followed inflexibly. Thus to take an example, the custom of devolution of property where a man had not told his family or chief before he died what he wanted to do with his land cannot and should not be confused with, or considered analogous to, the rigid rules for devolution of property on intestacy which are found in European societies. This should hardly be surprising in a very small society of not much more than 1,000 people which was subject to periodic and severe reductions in its population through civil war and disease. In such places necessity, as it is said, often becomes the mother of invention.

Writing about ownership, Jung[6] wrote that "...the possession of land is the main concern. Almost every native on Nauru is the owner of land or palms....Just like every small piece of land and each palm, so the reef that surrounds the island and the sea washing the shore, all have their owner. For example, no native is allowed to let down his fishing basket outside the reef without first having obtained permission by the owner of that particular part of the sea....The 'sale' of land happens rarely, but the exchange of different lots happens frequently."

In somewhat similar vein, but many years later, Wedgwood wrote that "...in Nauru, both men and women own land and can give it while they are still alive or by will after death to both sons and daughters and even to unrelated friends. I was constantly assured that the clan as a group never owned any land; that individual ownership, not merely tenure, was fully recognised and carried with it full rights of disposal"[7].

While we must be careful of Wedgwood's writing done after a short time on Nauru, (and in 1936 some 52 years after German annexation,) nevertheless this account appears to be borne out by earlier accounts such as those of Hambruch[8] (1910), the Nauru Mission[9] (1910) and Dr Kretzschmar[10] (1913). Except for Hambruch these reports were from people who had spent considerable periods living on the Island. The Mission had been continuous since 1887 and Kretzschmar, a medical doctor, had lived on the Island for some years. As previously observed, there is some difference of opinion by later observers from the earlier writing of Jung (1897) who indicated that "Some clans and also some villages are collective owners of some large land areas, whose exploitation is only for the benefit of the clan or village members."[11]

Jung's successor, Senfft, expressed the view in 1895 that disputes between the Nauruans were always about trees because "...the actual ground, (as I deduce from several factors) to be res nullis...".[12] This has been criticised by Clark and Firth who assert that Jung's interpretation was "undoubtedly correct." They claim that "the demarcation of the individual tribal domains and the prohibition against new settlements and against the construction of buildings at will by the white traders and later by the missionaries wherever they wished on the island are evidence for the institution of regular land ownership as commonly found on other Pacific islands. The most compelling evidence supporting District Officer Jung's interpretation is furnished by the later negotiations between the phosphate mining companies and the native landowners."[13] But despite these assertions, there is little compelling reason to believe that one view is more correct than the other. While some land may well have been "owned" there is no reason for suggesting all was. There is no doubt of the pre-eminent place of the coconut tree in Nauruan life. It provided a staple source of food before the coming of the European and afterwards provided a valuable source of copra to be exchanged for money or equivalent to be exchanged for goods (and before German annexation arms and ammunition). Bearing in mind that in 1891, shortly after annexation, Nauru's population was only 1,294 (of which 720 - 56% were women) so that allowing for children and old people the number of families may have been as few as 150-200, it is difficult to understand why land would be of pre-eminent importance before the Nauruans were brought face to face with the market economy. One can certainly understand that the cutting down of coconut trees to build accommodation for traders, missionaries and phosphate miners, would be matters of considerable concern - perhaps considerably overriding any interest in the land itself. In any event it is undoubtedly the case that the coming of strong European influence, through the German administration, eventually affected the Nauruan's concept of land ownership and it is not unlikely that this may have started earlier still through the influence of early European traders and settlers who would have brought their concepts of ownership to the island people - particularly those who married into the society. Of course customs change as circumstances change and the influence of the Germans in the settlement of land disputes may well have meant that chiefs and others of influence eventually claimed ownership, and were recognised as owners,

of land which was previously in common ownership - certainly Jung thought this was the case.[14]

There is little doubt that Weeramantry pleaded the case of the wronged Nauruans too strongly when he asserted that "To the average Nauruan it was inconceivable that land should be the subject of sale like any physical chattel."[15] Or again, that the Nauruan legal system "...had worked out the question of ownership rights to a fine degree of detail. Land devolved in precisely calculated shares."[16] He asserts without clear evidence that "...every part of Topside was the subject of private ownership. The whole of Topside was divided into clearly defined blocks of land, each of which had individual owners."[17] While the basis for treating such statements with a degree of scepticism will become clear, it is sufficient to say that Nauruans clearly gave land away, even to non-Nauruans, and exchanged it, left it to whoever they wanted (not always to particular children), and considerable areas of Topside (although claimed) have, in all probability, never been "owned" by anyone - at least not for very many years.

The Nauru Mission's Ninth Annual Report in describing how the Nauruans dealt with their land said that "Children inherit from parents, uncles and aunts. People who have no children leave their property to nephews and nieces. Rich landowners give part of their land to poor relatives, even if they have children of their own...many fathers give their land to their sons before death if they take good care of them".[18]

As mentioned above by Hambruch, Jung was of the view that there was no inviolable application of inheritance law. He assumed that generally children shared equally but if there is but one son and several daughters, the son will receive the greatest share. Disinheritance was common where children had badly treated their parents. "Illegitimate children have no right to inherit either from father or mother; but step-children inherit the possessions of their mother".[19] It has recently been suggested that in the old days the various tribes had different customs regarding inheritance: some being more matrilineal than others.[20] If this is correct then the views of Jung appear less in error than Hambruch thought (at least his view is consistent with this later interpretation). Certainly these statements do not support Weeramantry's more rosy view.

Kretzschmar's understanding was that "Disputes about inheritances occurred only seldom. In most cases the parents divided up their property and their land amongst their children while they were still alive....If a marriage remained childless, testamentary dispositions were made, otherwise the brothers and sisters of the deceased inherited in equal parts."[21]

After the German occupation, which was partly excused by the continual warfare experienced by the Nauruans over a number of years previously, a system of land registration and of dispute settlement was introduced and Kretzschmar writes of this time that "An obligation was laid upon them [the Chiefs] to restore all land to the former owners which had been forcefully taken away from them during the last ten years....The main difficulty was that the Itsio relationship no longer existed. Now these slaves possessed a piece of land once left to them by their master for cultivation, but it always remained the property of their Chief or his heirs....In the course of the years the Itsio and their descendants regarded the land as their property."[22]

There is some inconsistency between the accounts of Delaporte and Kretzschmar on the one hand and Jung and Hambruch on the other. Hambruch believes that the strong ownership ties of the Nauruans was of comparatively recent occurrence. Thus he writes;[23]

"The property of the district is the common property of all free persons. These consist of large complexes of land in the interior of the island, where they grow Calophyllum trees, Pandanus trees, Morinda and hibiscus bushes, melons, etc. Only members of that particular district have the right to make use of them. Further, the places where frigate birds are caught are the joint possession of the district members. Each district has one or more such. That is the also the case with dance and meeting houses, which however do not exist any more."

But, more particularly;[24] "...regulations in regard to tenure, where the chief of the clan has to be consulted and where he obtains part of the rent, seem to point to the fact that in earlier times all land was owned by the clan and was administered by the chief as its overlord. That has changed today. The land has become the private property of the owners with which they can do as they please. The acquisition of land by the Europeans, their influence on views about property and ownership have had a changing and transforming effect. The old regulations probably are still known amongst the natives and in some cases one still acts according to them, *but they are not generally valid any more.*" [Emphasis added]

However Hambruch was quite definite about the existence and complexity of Nauruan custom and its "legal" effects in Nauruan society:[25]

"Their notion of justice and law arose out of their thinking and feeling. It led to basic laws of a public or private nature. They have been transmitted orally. They were adjusted to the continuing development and found their expression in a code of "customary law". These notions of law cover a wide spectrum: land, reef, ocean, tree, animal, house, tools, family, nation, etc. With the highly developed people of Nauru these ideas have taken on a definite legal character and many were found to be so well applicable, that one bases decisions in important legal matters on this law. They are gradually being incorporated and adjusted to our sense of justice and the Civil Code."

The general accuracy of the writings of anthropologists and others gains some support from the old land records of the German Administration dating back to 1899. Jung, as the District Commissioner, was personally involved in land disputes and wrote that

"When dealing with land disputes one has so far adhered to a principle which adjusts the decision as far as possible to the traditions and rules of the natives, and as far as our moral and written laws will allow it. In particular when evaluating cases one takes into consideration the laws of inheritance as it is traditionally applied by the natives."[26]

Whatever may have been the ancient way, there is no doubt that by the end of the nineteenth century there existed a complex and sophisticated land system where the owner was absolute owner. The owner did not hold of a higher owner and, qua owner, owed no incidents as we find in the numerous tenures of English and continental law. But he could and did create sub-tenures which carried incidents, usually to collect and deliver fruit from trees on the land.[27]

It appears not unreasonable having regard to the extensive nature of the ownership concept to form the opinion that had anyone considered the question of who owned the contents of the soil - a question of no little importance when the issue of ownership of phosphate deposits arose, that the answer would be the same as the answer to whom does the product of the soil belong - the owner of the land.

This is not fanciful. Wells for water are known to have been owned (and still are) by the owners of the land upon whose land the opening to the well was found. The water recovered from the well belonged to the land owner and he could allow others to use the well or not as he thought fit. The fact that the water in the well might percolate from below the land of another was not relevant (if it was even known). What mattered was access. And of course this approach is not different in principle from that applied in various more modern jurisdictions to fluids such as oil and gas. The excavation of areas at the base of the cliffs for the recovery of fossilised shells to be used as cutting implements (described by Ernest Stephen[28]) is, in a limited way not dissimilar to the excavation and recovery of phosphate. The phosphate below the surface, as much as the fossilised shell or water, was under the ownership and control of the landowner.

Indeed, just as a landowner might gift a tree on his land so, if the occasion had ever arisen, would it be likely that he would have granted the right to take minerals, shells or water, from his land.[29] However, whether any Nauruan would have allowed another to totally destroy his land for all time is, one must say, extremely unlikely, a view that finds support in old songs of Nauru from the time of the German administration which are permeated by a sense of great hopelessness:

"Turn your eyes, and behold
 Panorama of the land
 Nauru, your dear homeland, has changed;
 Search your mind, make your choice
 What is there for you to do
 Your home is slipping away from you"[30]

From the starting point of the ancient customs and practices such as they were, or might have been, we turn to some of the issues of land ownership since the German annexation in 1888.

THE APPLICATION OF GERMAN LAW

The Jaluit Gesellschaft was, on 21 January 1888 granted a concession[31] by the German government which would cover Pleasant Island (Nauru) "as soon as it has been placed under the protection of the Empire." This happened on 14 April 1888 when Nauru became a Schutzgebiete (Protectorate) of the German Reich (the official Proclamation was read on 14 May 1888 and the German flag was raised on 2 October 1888).

"...it was taken for granted at the time, that the annexation of a territory by Germany as a colony did have no effect on the private rights of the indigenous people, that the rights were protected; they were not wiped out by the annexation but they would survive".[32]

"The general principle underlying the German occupation and control of its

colonies was that German law had no application unless and until an Imperial Act was made to have specific application. Indeed the law went so far as to invalidate the alienation of land from native ownership thereby ensuring not only that it did not come under the control of foreigners but that native custom continued to apply to native transactions inter se."[33]

The coming of the Germans heralded Nauru's entry into European civilization an event which was experienced around the globe by many other peoples. Few, however, were to be as deeply affected as the Nauruans. Two things made it certain that the effects would be felt by them more deeply than most: that the population was very small and eventually would simply be assimilated into European culture, and that they occupied a place which held one of the world's richest deposits of phosphate rock. This latter was to make that certain that change would take place in a much shorter time than might have been the case.[34] As the German's approach to Nauruan custom has already been mentioned this part shifts to the German law which applied to Nauru and in particular how it applied to the ownership and the recovery of the phosphate.

At Common Law[35] minerals other than the Royal minerals were the property of the owner in fee simple who could separately deal with them. Blackstone wrote "...therefore if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows.[36] The law in Europe was more restrictive reflecting different historical, and social influences. Thus "Under French law, mines proper constituted a part of the domain of the state, and could only be worked by virtue of a governmental concession. But quarries it seems, could be privately owned and no state permit was required to operate them" and "In Spain... all mines on either public or private lands were regarded as belonging to the Crown"[37]. At the Commission of Inquiry as Sack described it, under the German system.[38] "...[minerals] can be separated and it was selective. First it started, as in England, with precious metals, gold and silver, and then other metals were added.... one of the crucial points is that as far as German mining law is concerned, and you must take into account that the Germany Reich was a federal state and mining law was a matter of the states rather than the commonwealth - so you had Prussian section mining law and they were all different mining laws - but you had a situation where certainly generally speaking phosphate in the German context was not excluded from the landowner's right of disposal." Indeed until 1906 the law applicable to mining and minerals was the Prussian General Mining law of 1865 which applied to all German Protectorates and under that law, phosphate was not a mineral to which it applied. In other words, phosphate was a mineral which landowners could deal with as they pleased and others could not obtain a licence from the State to go on land and remove it.

What the German law did was to deal with the *right to extract* named minerals which after extraction became the property of the person who won them. This form of "ownership" was known as *"Das Bergwerkseigentum"*. The consequence was that when the Jaluit Geschellschaft was on 21 November 1905 granted a new concession for the "exclusive right of exploiting the Guano (Phosphate) Deposits in the Marshall Islands Protectorate" the grant was, in all probability, without legal effect in German law. The difficulty was that if the mining law did not apply to a mineral, the mineral belonged to the landowner who could do with it what he wanted and the concession holder really only had an exclusive right to deal with the

landowners not an exclusive right to go onto land and take what they liked.

Later[39], on 12 December 1905 the Jaluit Geschellschaft received approval to transfer the exercise of its rights to The Pacific Phosphate Company Limited and by an agreement[40] dated 21 February 1906 the concession was so transferred. The effect of this agreement was to transfer such of the rights as the Jaluit Gesellschaft in fact possessed. But what were those rights?

The law relating to mining in German Protectorates which was applicable when Nauru was "colonised" was altered when a new law was made which had force in Germany's Protectorates in Africa and the South Seas.[41] There was some question whether this law which was made applicable to the Marshall Island Protectorate (including Nauru) on 27 February 1906 preceded the lawful grant of the Concession to the Jaluit Gesellschaft and the assignment to the Pacific Phosphate Company or whether the law came afterwards. Certainly the Concession was strangely worded. Rather than a new grant it said that it "continued" the exclusive rights of exploitation granted in 1888 after the agreement granting those rights came to an end on 31 March 1906 so that the new period of grant was to commence on 1 April 1906. Because of the doubts that the 1905 Concession was valid the German Colonial Office negotiated with the Jaluit Gesellschaft to make amendments to incorporate reference to the new mining law. The Jaluit sought various exemption including exemption from those provisions requiring payment of compensation in certain circumstances. This led eventually to the Concession being amended on 27 February 1907. Sack[42] put it that the Colonial Office had a strategic argument and used as a threat against the Jaluit Company "if you don't play our game according to our rules, you might be in trouble and find out that the whole Concession is invalid, and you really have good reason to play the game according to our rule because now the new Mining Ordinance says specifically that phosphate is excluded from the landowners' right of disposal in the Pacific Protectorates"[43]. The Colonial Office was forcing the Jaluit to make concessions and although negotiations dragged on the Jaluit Company eventually gave in and the Concession was amended in 1907, just a year after the Mining Ordinance came into effect.

The issue is of importance because of the effect upon the activities of the Pacific Phosphate Company. If those activities were subject to the Mining Ordinance there were implications for Nauruan landowners. While the Concession and the assignment of the rights thereunder became subject to the mining law, the amendment to the Concession in 1907 exempted the Jaluit's activities in the Marshall Islands Concession from various sections of the Ordinance by setting out the sections that were applicable. The principal sections of the Ordinance which were applied to the were those dealing with the legal relations between the mining operator and the owners of land - Section 76 to Section 85.

The principal change to the disadvantage of the Nauruans was that the landowners lost the ownership and control of their phosphate. While under the previous law it was theirs, under the new law it was a "free" mineral, licences could be given for its extraction and upon severance from the land it became the property of the miner.

On the other hand Section 78 referred to the duty of the mining operator to compensate the owner of the land for a reduction in value the land had

suffered as a result of mining operations which typically was the effect of open cast mining (as took place on Nauru), while section 84 applied to cases where the operation of the mining activity caused damage to buildings and other land and would have been applicable had homes had to be shifted to allow mining.

However the Mining Law was not the only law which had application to the effects of mining. Article 249 of the Civil Code required restoration of the surface of the land so that the surface was restored to its previous state and damages could be awarded to allow this to be done. However under Article 251 the miner could force a payment of damages where restoration was impossible or involved disproportionate costs. These Articles were relevant to the application of section 84 of the Mining law but not to section 78. The rationale for this appears to be that the compensatory provisions for the actual mining activity is section 78 which compensates for the loss in value and which is a different matter altogether to having to pay for the physical damage to buildings and the like consequent upon the mining activity but not the mining activity itself.

That the parties knew full well what was the situation is found in correspondence from the Jaluit to the Pacific Phosphate Company Limited on 7 January 1907 when they provided a translation of the applicable sections of the Mining Law. The Jaluit was particularly pleased with the provisions of section 76 which they translated to read "The party working a mine can insist upon the yielding of the right to use the landed property of third parties as far as it is necessary for the working of the mine and the accessory installation."

These aspects of the law which was applied to Nauru during the German occupation was clearly of great importance to the Nauruans. It was not known, apparently, to the later Administrators of the Island, although one would have thought that they could have discovered it for themselves had they had any interest in the rights of the Nauruans. Had the true position been known the future of the Nauruan people may well have been different than it was to be. But while responsible persons in Australia and the United Kingdom were to carry on without consideration of the position, they also, it must be added, carried on in some ignorance of what they did themselves.

POST GERMAN LAW.

In 1914 the German rule of Nauru was terminated by the surrender of the Administrator and the deportation of German and some other residents living on the Island, to Sydney. It has recently been suggested, quite wrongly, that "All the German rights of royalty and the right of transfer of the mining concession were to all intents abrogated by the war, and the Pacific Phosphate Company's rights to the phosphate were now based on the British conquest and occupation of the island".[44] On the contrary, when Australian forces occupied Nauru they did so upon specific instructions from the United Kingdom[45] that they not do so as an act of conquest. Furthermore the administration of the Island was handed, with the concurrence of Australia, to the Western High Commission in Fiji.[46] At no time did Australia, or for that matter, the United Kingdom, expressly or impliedly abrogate the laws of Germany as applied to Nauru until the first Laws Repeal and Adoption Ordinance in 1922.

Purportedly made pursuant to the League of Nations Mandate the agreement

of 1st July 1919, the "Nauru Island Agreement", did not deal with the legal infrastructure of Nauru nor did the amending agreement of 30th May 1923. What was done, however, was to set up a law making system for the future through the person of the Administrator. As wide as his powers were, "to make Ordinances for the peace order and good government of the Island", they were subject to the agreement which applied to him the restriction accepted by the partner governments: not to interfere in any way in the operations of the body set up to extract and sell the phosphate - the British Phosphate Commissioners.

The agreement between the United Kingdom, Commonwealth of Australia and New Zealand on the one side and Pacific Phosphate Company Limited on the other, on 25 June 1920 recited the history of the Guano (Phosphate) Concession and the assignment of the Concession and the Company agreed to

"sell and transfer and the Government[sic.] shall purchase and acquire as a going concern as from 1 July 1920...the whole of the undertaking and assets of the Company in the said Islands...and *all the right title and interest of the Company in the Guano phosphate deposits* in and upon the said islands...including (B)...the full benefit of the Marshall Islands Concession and the German Agreements so far only as the same relate to the Island of Nauru...*but subject to the covenants stipulations and conditions therein and in the said agreements contained* (C) the full benefit of all leases tenancies and other rights to or over lands in the said Islands...registered in the ...office of the Civil Administration of Nauru...subject to the payments and royalties thereby reserved and the covenants and conditions therein contained"[47] [emphasis added]

This agreement between the partner governments and the Company was followed by the formal Conveyance dated 31 December 1920 when the Company conveyed at the direction of the governments to the British Phosphate Commissioners "The whole of the undertaking and assets of the Company on Nauru" including "all the right title and interest of the Company in the Guano deposits" which further included "The full benefit of the Marshall Islands Concession and the German Agreements so far only as the same respectively relate to the said island [of Nauru]".[48]

It is interesting to note in passing that this action puts paid to assertions that rights acquired under the German administration had been abrogated by the war and Nauru's occupation. The assertion is clearly inconsistent with the tenor of the sale and subsequent conveyance where the parties all clearly recognise the existence of rights granted by German law. The consequences are of interest and importance in the ownership of Nauruan land.

First, until such time as the law was changed, German law applied to Nauru; second, the Pacific Phosphate Company Limited could transfer no more than it had at the time - thus it could not transfer any interest in the Guano (phosphate) deposits because it had not, and never had, any such interest with which it could deal. Third, it transferred its obligations under German law to compensate for the damage caused by mining, obligations which were conditions of the concession by virtue of the 1907 amendment.

The position appears to be, then, that the British Phosphate Commissioners, who were mere trustees for the governments upon the trusts set forth in the "Phosphate Deposits Agreement" of 2 July 1919, had no

ownership rights over the phosphate but had a right to mine which carried with it obligations to compensate.[49] Furthermore they undertook the obligation under the Concession to give notice to the Administration sufficient "to enable them to take the necessary measures required in the interests of the natives"[50] and furthermore if the Concession applied then by transposing the new parties the concession would read that if the BPC "should not satisfy any rightful claims of the natives, then the [partner governments through the Administrator as successor to the Jaluit Gesellschaft and the German Reich] shall be justified in settling the claims and to demand the payment of the amounts which it has rightfully thus paid, from the [BPC]."[51] In this latter regard, while the Governments did agree to indemnify the Company they did so only against claims against the Company itself, they did not agree to indemnify the BPC nor seek to abrogate any possible claims. It appears to be quite arguable that when BPC took over the assets of the Pacific Phosphate Company, it took over Civil Law obligations to compensate the Nauruans. As the BPC was a mere trustee the obligations of the trustee fell back upon the governments as the settlors and beneficiaries of the trust.

Some of the issues mentioned above were well known to the partner governments and were well brought out in a memorandum prepared for Winston Churchill which he sent to Prime Minister Hughes for comment on 20th June 1921. That memorandum stated, inter alia,

"...the concession, while conferring an exclusive right of mining phosphate, gave no right of property...[there were no leases]...the natives were merely told by the German Administration that certain phosphate lands were being taken...[and] the position is then that the land and phosphates have always been recognised as native property; that the lands which have been worked in the past have been handed over administratively without any clear legal sanction."

Subsequent to the conveyance to the BPC the first of many Lands Ordinances (the Lands Ordinance 1921) was made which permitted land to be leased to the BPC.[52] This Ordinance did not give any express power to mine the leased land[53] but in the next Lands Ordinance of 1927 the right was give to mine phosphate to any depth.[54] Furthermore, while the 1921 Ordinance empowered the Nauruans to lease to the BPC with the consent of the Administrator the 1927 Ordinance reversed this and provided that the BPC had the right to lease phosphate lands. This Ordinance of 1927 was, then, the second expropriation of Nauruan land.[55]

While the Germans may have "expropriated" the Nauruan's right to their phosphate they did recognised the rights of native land ownership, and Ellis was probably fairly accurate when he wrote (23 January 1920) that "...the natives were eager to have their land worked and as a matter of fact there was no 'land question' at Nauru under the German regime. In addition to the royalty the native land owners were paid for the various trees removed from the land..."

Certainly the Germans acted in a high-handed manner but, by and large, they acted in accordance with the mores of the times. The Mandatory which also acted high-handedly, could not plead that it acted like everyone else, for it had special duties to carry out as Weeramantry has well described and explained.[56]

Non-phosphate bearing land which under the 1921 Ordinance could be leased

to any person subject only to the approval of the Administrator and the Owner could under the 1927 Ordinance be taken under lease by the BPC for its purposes with the consent of the Administrator and the owner, but that approval could not be unreasonably withheld.[57]

Thus from 1920 when the BPC had no pre-emptive rights to take leases, but had a German right to mine, the situation shifts to one where the landowner may lease if he wishes and the Administrator approves (and there is real doubt that there is a right to mine) to a situation in 1927 where the BPC has the absolute right to determine, without the need to obtain Administration consent, or the consent of the landowners, to take phosphate bearing land and mine it.

In the meantime the Administrator had, on 23 September 1922, made the first "Laws Repeal and Adoption Ordinance" which abrogated all German law for the first time but this was expressly not to affect any rights already accrued. Section 7 of the Ordinance purported to shift the derivation of rights granted by the German Government or the British Administration, to the Administration. This appears to mean that as regards the Concession and the rights acquired by the BPC from the partner Governments the Administrator had unilaterally affected the terms and conditions of the Phosphate Deposits Agreement and the sale agreement and conveyance. As the Administrator had "subject to the terms of the Agreement" powers to make laws only for the peace order and good government of Nauru it is questionable how far his powers went to affect the fundamental basis of land law or rights granted under the Phosphate Deposits Agreement to which his legislative powers were subordinate.

Section 16 of the Laws Repeal and Adoption Ordinance introduced into the Law of Nauru the principles and rules of common law and equity for the time being in force in England. The effect of this may have been to effect a recognition of, or perhaps a common law vesting in the landowners of, the common law right to all minerals in their land (other than the "Royal" minerals). Alternatively it may have effected a repeal of the German mining law and a reversion to the pre-German law of the Nauruans. If this were the case the provisions of the Concession could no longer apply as a self-executing document, for under English common law there could be no right to mine without a grant from the owner of the minerals, and the BPC had no right to the minerals until that right was given by the 1927 Lands Ordinance. Unless there is an implied grant to the minerals in the leases granted under the 1921 Lands Ordinance (which is by no means certain), then it seems quite reasonable to assert that until 1927 BPC was a trespasser and unlawfully mined the phosphate. After then it became an expropriator. It may be argued, indeed it has been, that the Nauru Island Agreement vested native title to the phosphate deposits in the Commissioners. But the Agreement was not, and did not purport to be self-executing. No steps were taken to vest the title of the Nauruans in the Commissioners - it only vested the title of the Pacific Phosphate Company Limited - whatever that was. So even if it had been the intent of the parties to acquire title to native lands that intent was not carried out. That this intent even existed, however, must be questioned for the evidence is clear that although a general belief arose to the effect that the Pacific Phosphate Company had title to the phosphate, that belief was erroneous. Indeed the reports to the Mandates Commission in the 1920's state only that the BPC had "the exclusive right to work the phosphate deposits", not that it had title to the phosphate.

Part and parcel of the mining of Phosphate under German and Australian administration was the need to identify native ownership. The Germans had set about this task in a systematic manner commencing with their requirement that lands which had been stolen during the "civil wars" be returned to rightful ownership. The need to continue this work became obvious to the Australian administration as mining increased to meet the requirements of Australian farmers after the end of the war. Clearly Nauruan cooperation was necessary to do this properly and as Nauruan interest in the mining of their land became an issue which had to be faced, the Administrators sought the help and guidance of the Chiefs which led, eventually, to the creation of the Nauru Lands Committee.

THE NAURU LANDS COMMITTEE

Since the late 1920's the ownership of land in Nauru has been determined by a group known as the Nauru Lands Committee. First established by Administrator Newman in 1928[58] and constituted by the Deputy Head Chief and four of the older and experienced Chiefs the Committee was given legislative backing only in 1956 when it was established[59] as a body of between five and nine persons appointed by the Administrator from persons nominated by the Nauru Local Government Council

The determination of land ownership before the creation of the Committee was done by the Chiefs whose decision could be appealed to the Administrator under a system which followed closely the practice of the previous German administration. The establishment of land ownership had become important both in the non-phosphate bearing lands as well as the phosphate land. The former because of the needs of a growing administration for land and the growing phosphate industry's need for land for accommodation for workers, storage sites and the like. The growth of the phosphate industry also meant that the British Phosphate Commissioners needed to plan their mining well ahead.

When Administrator Newman established the Lands Committee he wrote[60] that "A Lands Committee has been appointed for the purpose of investigating matters relating to boundaries and ownership of lands, and of determining the owner of every block of land on the Island of Nauru" and that "The Committee will have access to the German Grundbuch and to the 22 volumes of land sketches made during German control and to any other land records, ordinances or decisions" He went on to warn the Committee that "members of the Committee must not take part in the deliberations or discussions relating to any land belonging to himself or to his family or to his near relations" and to announce that each landowner would "in due course, be issued with a document called a Land Title on which will be shown a plan of the land and a description of the boundaries" with the intention that in future all land transfers would have to be done using the title and recording the changes at the Government Lands Office. This plan does not appear to have seen the light of day so that even today the records of ownership leave much to be desired.

In 1931 a brief series of memoranda describe an interesting situation. The government surveyor, Mr C.D. Gabel had written a report[61] in which he described some aspects of the land ownership recording system. Among his various comments were the following:

"Even prior to the discovery and working of the phosphate deposits in

Nauru, the ownership of land by the individual was an all important matter. It was so regarded by the German authorities, and a considerable amount of work was carried out. Surveying blocks and determining ownership.

...various of the Chiefs, [have] asserted that the decisions of the German authorities in regard to land ownership were being disregarded by the present administration."

Administrator Newman was clearly stung by the implied rebuke and wrote two months later that Mr Gabel was not correct in asserting the all-important nature of land ownership to Nauruans, on the contrary, he wrote, "the fact is that the land upon which the phosphate field is now established was formerly regarded by the Nauruans as being valueless, and it is only in more recent years that the value of phosphate land has been recognized by the Nauruans." It does appear, however that the comments of Mr Gabel were not altogether off the mark as the Administrator had found it necessary to increase the Lands Committee to consist of all of the Chiefs with the Head Chief as Chairman and to include the Nauruan interpreter.

By 1957 things had not improved much. The Acting Administrator, Mr J.K. McCarthy wrote that there were still some 1000 acres of phosphate land and 750 acres of non-phosphate land still to have their ownership determined by the Lands Committee. He was concerned that seven of the nine members of the Committee were aged 60 years or more, that their historical knowledge was unique and there was nobody to replace them on their retirement or death.

It is therefore interesting to consider some aspects of land ownership in the light of what has been said about ownership and the importance of land to the Nauruans.

The best place to start is with the determination of land ownership. When it becomes necessary to determine who owns a block of land (usually to enable it to be leased for the extraction of phosphate) the phosphate corporation (previously the British Phosphate Commissioners, and now the Nauru Phosphate Corporation) advises the Government Survey Department of the area which it wishes to lease and the Survey Department searches its records to find out who the owners are. If there are no owners recorded the Lands Committee is notified and they search to see if their records show any owner and if not (as is usual) they then announce a day when the ownership of the land will be determined. On the day the Committee and any interested parties go to the area in question and anyone seeking to lay claim to the land asserts his claim. Often this will be done by a person asserting that his father took him to the area and showed him certain stones which were placed to mark the boundary. It is asserted that these stones were placed there many years ago by ancestors. Other claimants will dispute this and make similar assertions about their own ancestors. Eventually a decision is reached as to the owner and the determination is notified in the Government Gazette to give any aggrieved party time to appeal to the Supreme Court against the decision.

As might be imagined this process leads to considerable dissension and is open to abuse. A number of anomalous situations appear to have occurred over many years. Anecdotes abound that some persons who have been employed in the survey departments of the government and of the phosphate corporation as well as members of the Lands Committee appear to be

registered as the owners of extremely large areas of land even though in some cases they were not persons whose families were of sufficient importance to own land at all. However the most curious aspect of history is that despite the total disappearance of two tribes and the massive disruption of life through the virtual decimation of the population by influenza, tuberculosis and leprosy in the 1920's and 1930's and the killing of hundreds by the Japanese during the war there is no recorded case of any land not being determined by the Lands Committee as owned by someone. The odds against this, having regard to Nauru's history, seems remote indeed. It has been alleged, anecdotally, that such is the intense interest in the ownership of land, pages of the German *Grundbuch* have been destroyed in order to prevent the discovery of prior determinations which would upset claims accepted in recent years. The Lands Committee records are said to be poor and the general performance of the Committee questioned to such an extent that members of government have from time to time expressed the view to the writer that a special Commission might be established to give a final look at the situation and rectify any past wrongs that can be rectified.

That questions of ownership are contentions, and difficult are hardly surprising when one takes into account that the cash royalties paid to landowners have gone from one-halfd. a ton of phosphate removed from their land before 1920, to 2d in 1920, 9d in 1959, 65 cents in 1968, and $3.30 in 1989. On top of this payment other moneys paid by way of royalty are put away into a long term investment fund for landowners, for rehabilitation of the worked out land, for Nauruan housing, for economic development, and for the long term economic needs of the Island after mining ceases.

Litigation over land ownership is a common feature of the Supreme Court's calendar and though much is not successful it can, at times be of some interest. Unfortunately the most difficult areas are those that never get resolved because of the impossibility of proof. The late President Hammer DeRoburt told the writer of one of his Ministers, since deceased, who had been given land to hold as Chief for members of his District solely for the purpose of raising the apparent status of the Chief (and consequently the people of his District). There was never any intention of the transfer being absolute - the land was held on trust. Unfortunately no records were kept of the transaction so that when the Chief and the landowner died it was impossible to prove that the landowners family had any claim against the Chief's estate. President DeRoburt asserted that this circumstance was far from uncommon and that often when done the only people who knew the full story was a member of the Lands Committee who would either be dead at the time the issue arose or forgot the facts.

DEALING BY NAURUANS WITH LAND

As has been noted above, early writers of Nauruan customs assert that they gave away and exchanged their land. They also left it by will as they saw fit. However, despite assertions that custom established a rigid devolution on intestacy, this was not the case and was the source of frequent dispute.

Eventually, although not until 1938, the problem was addressed and an extraordinary regulation was made under the Natives Administration Ordinance. This regulation, the "Regulations governing intestate estates" promulgated by Administrator Garcia has caused interminable dispute

because of its apparently unsuccessful attempt to codify Nauruan custom on the matter and its appalling drafting. Furthermore as it appears in many respects contrary to Nauruan Custom it may not have been validly made, the Administrator having no authority to make regulations affecting Nauruan custom except where that custom was "repugnant" to the "general principles of humanity". While it may well be that such rules could have been made by Ordinance section 10 of the Laws Repeal and Adoption Ordinance would act to make such regulation ultra vires the powers of the Administrator. That section provides:-

"The institutions, customs and usages of the aboriginal native of the Island shall not be affected by this Ordinance, and shall, subject to the provisions of the Ordinance of the Island from time to time in force, be permitted to continue in existence in so far as the same are not repugnant to the general principles of humanity."

The considerable defects in the drafting of this Regulation have been the subject of judicial comment from time to time[62], however it is not clear that the validity of the Regulation has ever been challenged, nor that if it were the Supreme Court would be prepared to strike it down after so many years.

POST-INDEPENDENCE

Today the land law of Nauru is to be found primarily in the Lands Act 1976 and, by and large, continues the regime in force previously with the exception that if three quarters in number of the joint owners of a property agree to lease it for public purposes then the Minister may override the refusal of the minority.

In other words if all the landowners refuse to lease land for public purposes,
there is no provision for its compulsory acquisition. This Act preserves the right of Nauruans to devise property by will and because the Native Administration Ordinance remains in effect there is no apparent change to the status, whatever it may be of the Intestacy Regulations of 1938. Customary law
still has considerable sway (it is recognised by the Custom and Adopted Laws Act 1971-1976) and it may well be that section 3 of that Act has by necessary implication repealed the Intestacy Regulations for it is provided there that the customs of the Nauruans in intestacy have full force and effect save only as they are altered by any law enacted by Parliament.

It is to be noted that, whatever they are, the Nauruan customs concerning title to land (other than by lease), rights to transfer inter vivos or by will or other testamentary disposition and succession on intestacy are given statutory recognition and have full force and effect of law.

The ownership of the phosphate has been recognised, more by default and implication than by design. The constitution provides in Article 83.(1.) "Except as otherwise provided by law, the right to mine phosphate is vested in the Republic of Nauru." The Republic became, thereby, the successor to the BPC, but only in respect of the right to mine. The right has been given by law to the Nauru Phosphate Corporation which still mines the phosphate.

CUSTOMARY LAW TODAY

The recognition of the customs and practices of the Nauruan people was a policy of both German and Australian administration and is carried on by the Nauruans as a sovereign people. It is a matter of some interest that the Nauruans did not seek to make the recognition of custom a constitutional issue. While this has caused some problems[63], it seems in the light of the virtual impossibility of discovering what really is custom, to have been a wise decision.

The gravest danger to the customs and practices of the Nauruans is their being "cast in concrete" by decisions of the Courts. Once a particular practice becomes "recognised" then it is likely to cease to be custom and become part of the common law of Nauru: custom falls prey to the doctrine of stare decisis and its vitality and ability to change as the people change, indeed its very character as custom, is lost.

This approach was seen most clearly in the case of *Eideraneida Waidabu v. Susannah Capelle & Ors*[64], where the Supreme Court refused to make a finding as sought on the basis that the custom was not universal and subject to enforcement other than by social pressure. The notion that, for example, a custom is not a custom if there can be exceptions or if it is only enforceable by social pressure ignores two important things: first, if it is customary to act in a particular way it does not necessarily follow that some sanction must follows a failure to so act, secondly, in Nauruan society customs may well differ among tribes districts and families. Certainly the notion of small pockets of custom existing as enclave within the common law is well known in English legal history.

This paper has attempted to trace, briefly and somewhat superficially, some of the principles and practices involving Nauruan land as they have developed since earliest colonial times. In many respects custom has been overridden but it still exists as a vital force in land-holding.

It is possible that custom varies in different places in Nauru but that is part of the vitality of custom. What is important is that as the values of the community changes, as needs change, so custom can change. Rather than being seen as writ in stone it is alive, vibrant and growing.

Can anyone seriously contend that the customs and practices of a small subsistence community of some 1500 persons in a.d.1890 cannot and must not be different from those of a complex, industrialised community of 5000 or more a century later? The answer is clear. And the answer is clearly not to allow custom to ossify on the alter of stare decisis or become concretised in statute passed to meet short term political needs for tomorrow things may be different and change back well nigh impossible thereby ensuring that today's solutions become tomorrows problems.

Only a recognition of custom and its living, changing, quality will permit community needs and aspirations to be met satisfactorily in the Nauruan context. This does not mean that no laws can be passed which affect Nauruan land holding and dealing, on the contrary there is and will continue to be need to provide procedural rules to both prevent fraud and to provide the ability to facilitate and record the various dealings with land as well as to render possible those uses of land which will be required in the next several decades as Nauru faces a future without a phosphate industry.

And so the situation today has come almost a full circle. From the pre-European days when only customary law existed, that law (al least some of it) has been picked up by foreign intervention and grafted back onto the Nauruan culture to achieve the status of law properly-so-called. If in future there is to be change affecting customary law, then it will be the Nauruans themselves who do it. And after all that is what, in the long run, customary law is all about - the ability of a people over time to decide themselves to do things differently without having foreign ideas and practices forced upon them.

This paper has its genesis in a paper prepared by the writer for the then Minister for Justice for submission to the Commission of Inquiry into the Worked out Phosphate Lands of Nauru in 1987.

NOTES

[1] Jung, (1897) "Aufzeichnungen uber die Rechtsanschau-ungen der Eingeborenen von Nauru"; in, *Mitteilungen aus den deutsch. Schutzgebeiten*. X Bd. Berlin. The notes of Ernest Stephen, *Oceania* Vol. VII p 34 reflect the knowledge of a man whose life on Nauru started in the 1870's when he was 14, but he speaks little of land ownership.

[2] According to Jung, writes Hambruch, " A generally accepted principle according to which inheritance is regulated and which could be regarded as irrevocable does not exist". Hambruch disagrees with this view. "Generally there exist amongst the natives very strict, traditional formulas similar to a law; it would be strange if these were missing on Nauru" Hambruch, Paul *Nauru* L.Friederichsen & Co. Hamburg 1914, p310.

[3] See, generally, Firth, Stewart, *German Firms in the Western Pacific Islands 1857-1914*. Jour. of Pac Hist. 1973 Vol.8 p.10. Griffiths wrote in the "Report of the Administration of Nauru during the Military Occupation and until 17th December 1920" that: "...under the German rule, the people were left entirely to themselves, provided the poll tax was paid regularly..." But while this may be true, the German administration was, nevertheless, continually involved in adjudicating land disputes, making it difficult to accept that its influence on customary law was entirely without effect.

[4] Lunsgarde, Henry P. "Pacific Land Tenure in a Nutshell" in Land Tenure in Oceania University of Hawaii Press 1974, p265.

[5] Wedgwood, Camilla "Report on Research Work in Nauru Island, Central Pacific" Oceania 1936, Vol VI, p359 at 375.

[6] Jung, op cit p.67

[7] Wedgwood, op cit p374

[8] Hambruch, Paul Nauru L.Friederichsen & Co. Hamburg 1914

[9] Ninth Annual Report of the Nauru Mission, 1910

[10] Kretzschmar, Dr. med. K.E. Nauru 1913 a privately published volume of 50 copies specially set printed and bound by Nauruans of the Evangelical Mission for named persons. Translator unknown.

[11] Jung, op. cit. p. 67

[12] Report of 27 September 1895 in Fabricuis, Wilhelm, *Nauru 1888-1900*, ANU Canberra, 1992 at p262

[13] *Nauru 1888-1900 *p.264

[14] Note 26, post

[15] Weeramantry, Christopher Nauru, Environmental Damage under International Trusteeship. O.U.P. Melb. 1992 p. 158

[16] Ibid. p. 159

[17] Ibid. P. 160 ["Topside" is the raised centre area of Nauru from which phosphate rock is mined.]

[18] Ninth Annual Report op cit p28

[19] Jung, Ibid

[20] Evidence by Maien Deireragea, Secretary of the Nauru Lands Committee, to the Commission of Inquiry into the Rehabilitation of the Worked-out Phosphate Lands of Nauru. Transcript of proceedings (hereafter referred to as "Proceedings") . p2715

[21] Kretzschmar Ibid p.25

[22] Ibid. p.34. This is borne out by the earlier view of Jung who wrote that "After the disarmament of the natives and after the inhabitants of the occupied districts had returned to their former homes, many of these serfs were installed as "watchers" or care-takers by their masters on their former lands...It is precisely this circumstance which has been the cause of many later land disputes, because the watcher and, years afterwards, his children considered themselves to be the rightful owners of the land they cared for and thus came into conflict with the actual owners (their masters)." op. cit. p 69

[23] Hambruch, op cit

[24] Ibid. p 298

[25] Ibid. p 291

[26] Jung, op. cit. p. 72 One may assume that Jung saw himself providing a justice that had not always been applied, for he also writes how in the old days "The chiefs were also called upon by the natives to mediate in disputes over land. They usually used their power in such a way that they took over the land from the quarrelling parties and took it as their own." p.65

[27] Hambruch, for example, states: "In Nauru as also on the Carolinas there exists the notion of land lease. With the permission of the owner and of the chief of the clan a person can take on lease, for the purpose of planting, a piece of land from another. The lease is paid in coconuts to the owner and to the chief of the clan." ["Nauru" p. 298]

[28] *Oceania*VII p 34 (see n.1 supra)

[29] None of this is to deny the possibility (if not probability) that there was much land not "owned" by anyone, especially on Topside, where people might have been able to plant trees, dig wells or excavate for fossilised shells. There were numerous caves on topside which do not appear in old records to have been owned. However there is some suggestion that one or two of the caves were used as burial places.

[30] Song "I don't know what to do" Trans. K. Clodumar.

[31] The concession included "the right to exploit the existing Guano deposits, irrespective of vested interests of others." [Section 1(c) of the Concession]

[32] *Transcript of Proceedings of the Commission of Inquiry* (ÒProceedingsÓ), p.561,2.

[33] Ibid. p. 573

[34] The story of the discovery of the phosphate is told in Ellis, Albert, *Ocean Island and Nauru, their story.* Angus & Robertson, Sydney 1936. Although Ellis appears to have been the inspiration behind the exploitation of Nauru's phosphate, its existence appears to have been known much earlier and in 1917 it was said that the belief of its late discovery was "...quite astonishing since Franz Hersheim [a German trader living on Nauru before its annexation] clearly stated that the whole rocky base of the island consisted of high grade phosphates..." Haller George, *Die Phosphat Gesellschaft der Sudsee*, chapter 12.

[35] "...the right to mines, has its original from the king's prerogative of coinage, in order to supply him with materials: and therefore those mines, which are properly royal, and to which the king is entitled when found are only those of silver and gold" Blackstone I Ch. 8 p.284

[36] Blackstone, William Commentaries on the Laws of England Book 2, Oxford 1766 p18.

[37] 36 American Jurisprudence (1941) "Mines and minerals" The courts of the United States of America have had to come to grips with law introduced from Europe, particularly France, in Florida and Spain in Texas but have largely adopted the principle that the underlying law changed when the States joined the Union.

[38] Proceedings p579

[39] Letter of consent dated 12 December 1905 translated and annexed to the Agreement dated 25 June 1920 made between His Majesty King George V and others and Pacific Phosphate Company Limited.

[40] Agreement dated 21 February 1906 made between Jaluit Gesellschaft and The Pacific Phosphate Company Limited, annexed to the Agreement of 25 June 1920, op.cit.

[41] Kaiserliche Bergverondnung fr die afrikanischen und Sdseeschritz-gebiete mit Ausnahme von Deutsch-Sdwestafrika shortened to

"Bergverordung" or the Mining Law.

[42] Proceedings p605

[43] Ibid. p609

[44] Viviani, Nancy *Nauru* A.N.U.Press, Canberra 1970 p41. This view is one which has been expressed by legal advisers to the Nauru Local Government Council before Independence in the submission on ownership of phosphate lands delivered on 31 May 1965. It has no basis in either municipal or international law.

[45] Secretary of State to the Governor General of Australia 18 August 1914 "...no proclamation formally annexing any such territory should be made without previous consultation with His Majesty's Government"

[46] Secretary of State to the Governor General of Australia 15 October 1914 "I am informing High Commission for Western Pacific that 'Messina' should convey an officer from the Gilbert and Ellice Islands Protectorate to take charge at Nauru" While this did not eventually occur and an official was sent from Australia as an Assistant Administrator, the telegram was replied to and the suggestion accepted on 19 November 1914.

[47] Clause 1. Although this Agreement has the form of a commercial agreement it is clear from the terms of the Phosphate Deposits Agreement referred to in the Recitals that the interests of the Pacific Phosphate Company Limited were to be acquired, by force if necessary, and vested in the British Phosphate Commissioners.

[48] The conveyance is "to the present Commissioners...as joint tenants...to be held by the present Commissioners and the Board of Commissioners from time to time hereafter to be duly appointed under the Phosphate Deposits Agreement...for the purposes and upon the terms and with and subject to the powers and in accordance with the provisions contained in the Phosphate Deposits Agreement". Clause 10 provides for the appointment by deed of new Commissioners to be trustees for the purposes of the conveyance and for the making of a vesting declaration.

[49] This appears to follow from the fact that the conveyance did not convey, and indeed could not convey, any greater title or right than the transferor had to convey, or any lesser obligation.

[50] Under the terms of the Concession of 21 November 1905 it is provided (Clause 7) " Before commencing the exploitation on each separate Island belonging to the Marshall Group, the Jaluit Gesellschaft is to give the Administration of the Protectorate sufficient notice to enable them to take the necessary measures required in the interests of the Natives" and Clause 14 states in its opening "Any claim by the natives of the Islands against the Company in respect of anything done by the Company shall be settled by the Company..."

[51] Concession Clause 14

[52] " 5.Subject to the approval of the Administrator, land may be leased for such periods as the Administrator may approve, subject to the following conditions:- (a) Phosphate-bearing lands may be leased to the British Phosphate Commissioners...subject to:- 1. Payment to the

owner...at the rate of 20 pounds per acre...and 2. Payment of Royalty on all phosphate actually shipped ...at the rate of three pence per ton, of which two pence shall be paid to the owner and one penny to the Administrator, to be held in trust for the benefit of the natives of Nauru..."

[53] As indicated in n.52, there may be an implication of this right but the Ordinance permits of at least one alternative interpretation, that the royalty is merely a share of the FOB price received for any phosphate sold.

[54] Section 4 provides: "...(a) The Commissioners to have the right - To lease any phosphate-bearing land on the Island of Nauru, to mine the phosphate thereon to any depth desired, and to use or export such phosphate"

[55] The first was the taking of phosphate as a landowners mineral to make it a free mineral. However while this was clearly an expropriation, German courts have determined that it was not.

[56] Weeramantry op.cit.

[57] Section 5 provides: "The Commissioners may, subject to the approval of the Administrator and the owner(s), which approval shall not be unreasonably withheld, lease such non-phosphate bearing lands on the Island of Nauru as may be required by the Commissioners for or in connection with the operations of the Commissioners..."

[58] Report to the Council of the League of Nations on the Administration of Nauru during the year 1928, p29

[59] Nauru Lands Committee Ordinance 1956. In 1963 the Ordinance was amended so that the members would be appointed by the Council.

[60] General Instructions to the Lands Committee, 1 February 1928, p29.

[61] Administration File folio 15

[62] See for example *Ikirir v. Duburiya and Ors *(1971) Nauru Law Reports 1969 to 1982 p.39 at p.41., and *Eideraneida Waidabu v. Susannah Capelle and Ors* p.71 at p 73.

[63] See the remarkable and interesting case *Hammer DeRoburt & ors v. Bernard Dowiyogo & Ors* (the NLGC Dissolution Case), Supreme Court of Nauru, 21/8/ 1992

[64] Op cit.