

THE

Dr. W. J. LEYDS
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TITLE TANGLE

IN

SOUTHERN RHODESIA

By **JOHN BARKLIE.**

Solicitor to the High Court of Southern Rhodesia,
Solicitor of the Supreme Court of Jurisdiction,
(Ireland); Gold Medallist and sometime Findlater
Scholar of the Incorporated Law Society of Ireland.

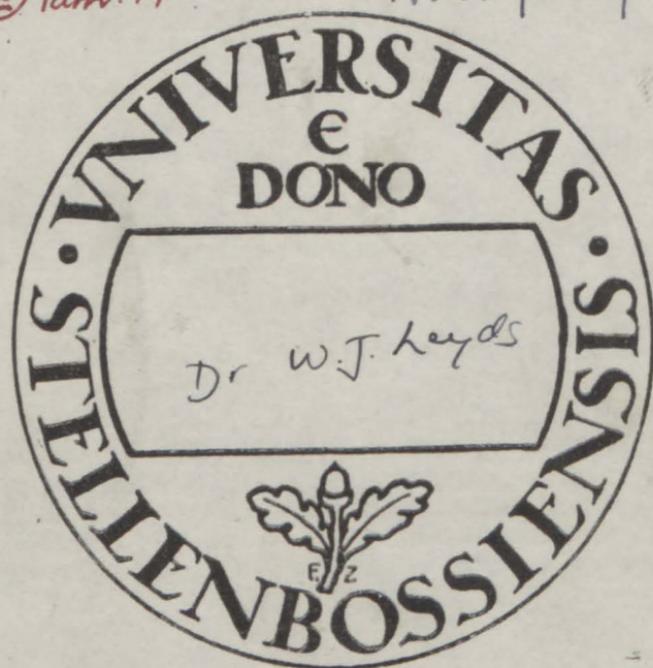
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Bulawayo.

TO HIS FRIEND—

HERBERT HENRY MONTGOMERY,

“Largan-Taur,” Glenville, Bulawayo,

THIS WORK

is most respectfully dedicated by

THE AUTHOR.

PREFATORY NOTE.

LAND Registration in Rhodesia dispenses with investigation of title to a great extent. Conveyancing is in consequence largely a matter of formal procedure, requiring but little expert knowledge. It is, therefore, only to be expected that the legal practitioner in Rhodesia, having no occasion to unravel tangled titles in the daily performance of his duties, has little of the zest of the real-property lawyer at Home for puzzling problems regarding the vesting of estates and interests in land. At any rate no lawyer exclusively associated with the legal system of the territory has hitherto come forward with anything like an exhaustive discussion of the evidence throwing light on the question of the ownership of the land. Mr. Bertin's book "Land Titles in Southern Rhodesia" deals primarily with the sub-grants made by the Chartered Company. The Company's own title, although touched upon, is rather assumed than established. The question being thus neglected or avoided by colonial-trained lawyers, I have ventured to examine it. My connection with the legal profession, both at Home and in Rhodesia, may be some qualification for the task, whether adequate or not, I leave the reader to judge.

JOHN BARKLIE.

Largan Taur Farm,
Near Bulawayo,
14th June, 1915.

NOTE.—It is not intended that any profit should be made from the publication of this pamphlet. A large number of copies have been distributed free. But in order that it may be available to the general public it has also been placed on sale at 1/- per copy. Should by any chance the proceeds of the sale exceed the cost of publication, the balance will be handed to the Memorial Hospital.

THE TITLE TANGLE

IN

SOUTHERN RHODESIA.

A subject to be settled, not a mystery to be marvelled at.

RHODESIA was a land of mysteries before the Pioneer Column entered it. Ere archæologists have agreed upon a solution of the mysteries of the Zimbabwe Ruins and the ancient mine-workings in our new-old country, another mystery is supposed to have arisen in regard to a question of more practical importance and, we submit, of more easy solution. "Who owns the land *now*?" is surely a question of much more intimate concern to us than the enquiry, however interesting, as to who lived in it in the unchronicled past. The latter subject may ever remain a matter of barren debate among the learned, the former topic is not only capable of settlement beyond further controversy but is certain to be finally settled soon—not by archæological dispute but by conclusive evidence similar to that upon which questions of title are daily investigated and disposed of. In other words, whatever muddle there may be in the matter there is no mystery about it. It is a common-place difficulty that can be dealt with and decided and dispatched and done away with. Nothing more.

An Important Question.

Land is life. We always live in dependence upon the land if not always stationed directly upon it. Unconcerned about land questions, we may drudge at a desk that is supported on a fifteenth floor—it may come to that even in Rhodesia some day—but the solid earth that ultimately supported that floor is but a small part of the spreading land that sustains the life of the desk-drudge and of all humanity. The

land question is everybody's question, and the man who is unconcerned about the land ought to be under it. There are, however, not many such men in Rhodesia, black or white.

It is recognised by modern civilized societies that the ownership of or right to land is a matter that should be settled and established with an unusual degree of certainty and be protected by special safeguards. If in Rhodesia there is any doubt about this all-important question of land ownership, it is one of the most disquieting doubts that can disturb any country, and the dissipation of that doubt is of ultimate interest to every inhabitant of the territory.

A Recent Question.

The European occupation (in an organised way) of Southern Rhodesia is well within the memory of men not yet middle-aged. Therefore, the effect upon territorial ownership of that occupation, taken in conjunction with the events and documents that connectively preceded and followed it, should not, one would think, be a matter of darkness, dispute and difficulty. So far as the question depends on documents, an English or Irish solicitor, who has prepared abstracts of title going back for their root some hundreds of years, and each one involving the perusal of piles of parchments, would consider the point of Rhodesian proprietorship a rather plain proposition. The facts are so recent they can scarcely yet be called historical. The documents are so few and so explicit they can scarcely be confused or misconstrued. With such data before us, the only mystery is that anyone ever mused that there was a mystery. In this matter we are not called upon to construct history from hieroglyphics or to trace title from tradition.

A pregnant premiss.

The territory of Southern Rhodesia, to which alone our present investigations relate, is administered by the British South Africa Company acting under the authority of a Royal Charter. Everyone admits the truth of this statement, which indeed seems to convey no information that would surprise even a backward schoolboy. For the purpose of our enquiry, however, it has a significance that we wish to impress at the outset upon every reader, even the most superficial. A clear apprehension of the apparently obvious fact we have enunciated will materially assist us in arriving at a conclusion on the subject we have in hand. It will be observed (a) that the Chartered Company "administers" the territory, that is

manages it for a superior (b) that it is a "British" company, and (c) that its powers, which are entirely derivative, have received documentary expression. Briefly put, the Chartered Company is the creation of the Imperial British Government, acting under the ultimate authority of that Government and without any independent, self-constituted powers. The Company acts under authority, it is not an autocrat. Everyone impliedly concedes all this who admits the undeniable truth of the introductory sentence of this paragraph.

Various views on the question.

There is quite a variety of views touching the title to the land of Southern Rhodesia. The following is probably a full statement of all the current opinions on the subject, put more or less in the concise manner in which they are usually expressed in conversation. It is not easy to imagine the possibility of any additional conclusion being come to by anyone.

1. The land, says one, belongs to the Chartered Company as an ordinary commercial asset ;
2. It belongs indeed to the Chartered Company, admits another, but only as an administrative liability ;
3. The land, according to a third theory, belongs to the Imperial British Government ;
4. The land, alleges another, belongs to the people of Rhodesia (from which class the natives are supposed to be excluded) ;
5. The land, say some, has never been completely and finally alienated from the native inhabitants, who have still outstanding claims upon it of a valid and substantial character.

Our aim and its method.

We propose to enquire which of the above conflicting conclusions is right, or whether any one of them is entirely right in itself. We wish to pursue a calmly investigative rather than a contentiously argumentative plan as far as possible. But as the subject is concededly a controversial one, and as we wish to arrive at a clear conclusion upon it, we shall not hesitate to draw our own inferences from the evidence and to express them plainly. We do not intend to content ourselves with merely recounting the facts and documents and leaving them to speak for themselves like a bald abstract of title. Whatever conclusion is ultimately arrived at, we cannot be blamed for it if it is reasonably founded upon the available evidence from which nothing material has been purposely omitted.



The Charter not the Commencement.

The best known, or at any rate the most frequently mentioned document having any bearing upon Rhodesian land is, of course, the Charter constituting the British South Africa Company and specifying its powers. It is, however, not a document purporting to grant title to territory, nor even to guarantee the validity of the concessions that had been previously obtained from Native Chiefs by the promoters of the Company. It merely authorises the retention by the Company on certain terms and for certain purposes of those concessions "so far as they are valid." The Charter, highly important as it is, cannot then be the basis of our investigations. The concessions on which it was founded must be first considered.

The "Rudd Concession."

The first document to claim our attention is the famous "Rudd Concession," granted on the 30th October, 1888 to Messrs. Rudd, Maguire and Thompson (the emissaries of the late Rt. Hon. Cecil J. Rhodes) by the Matabele King, Lo Bengula with the consent of his Council of Indunas. See Appendix A. This is the modest beginning of the land question in Southern Rhodesia. It is not a grant of land in the ordinary sense at all, but a concession of mineral rights. It purports to grant the "charge" (whatever that may be) over all metals and minerals in the regions ruled by the Matabele King, with power to win the same and hold the profits derivable therefrom. Nor were these vague and limited rights unconditionally and absolutely granted. The grantees expressly covenanted to pay therefor to the native King, his heirs and successors, £100 per lunar month, to supply certain specified arms and ammunition and to deliver a steamboat with guns on the Zambesi River or pay £500 in lieu thereof at the Matabele king's election. The grant is rendered of a rather precarious nature by a stipulation contained therein that it is to cease and determine if the monthly payment shall be three months in arrear. Thus the grantor retained a reversionary interest. In other words, if a certain condition were not fulfilled by the concessionaries the advantages conceded were to return to the source whence they were derived—that is a native source. On this rather shaky foundation the British South Africa Company was constructed. The royal superstructure is imposing, but there was surely some misgiving on the part of the Imperial authorities as to whether the initial stone was well and truly laid by Lo Bengula. The concession was adopted to start with, but only "so far as valid." It is not now worth

while investigating the antecedent authority of Lo Bengula to validly grant the concession. We have the certificate of the Rev. Charles D. Helm endorsed on the instrument of concession to the effect that all the constitutional usages of the Matabele nation had been complied with in the transaction. We accept the concession as a starting point, and whether valid or not, the Chartered Company anyway is estopped from disputing the title of its own landlord, for such Lo Bengula undoubtedly was and was acknowledged to be.

The "Rudd Concession" Criticised.

It will be observed that this concession does not grant the property in the unworked minerals of Lo Bengula's territories. The concessionaries obtained a charge over and a right to work those minerals. Probably an English lawyer would say that they took a profit *a prendre* in gross. The lay reader, unacquainted with legal technicalities, may not recognise much difference between a grant of the unworked minerals and a grant of the exclusive right to work them. But as the fish may be mine for the catching though not actually mine until I have landed it, so the minerals vested in the concessionaries as property when they won them but not before. This distinction was no doubt clearly in the astute mind of Lo Bengula. He preserved his sovereign position by the wording of the grant. The concessionaries thereunder would still be working the King's mines, for their own benefit no doubt, but upon the King's terms. And he further preserved his authority by a resolute condition or power of re-entry contained in the grant in the event of failure to pay the monthly rent. In fact the concession is merely a conditional, limited and terminable grant of incorporeal rights rather vaguely defined, and it would, of course, lie upon the Chartered Company as the assignees of the benefits conferred by the grant to show conclusively upon any disposition thereof that the conditions incident to the valid continuance of the grant have been observed and performed. If this cannot be done then the benefits conceded have, under the terms of the grant, reverted to their native source. There is no title to the land of Southern Rhodesia here at any rate.

Summary of the "Rudd Concession."

To sum up the "Rudd Concession," it is

- (a) Not a grant of land,
- (b) But merely a charge upon minerals and a right to win the same,
- (c) Subject to a monthly rent, and
- (d) Liable to forfeiture.

The Charter Granted.

But the "Rudd Concession" was the foundation, however fragile, for the Charter. A petition was presented to the late Queen Victoria in Council by seven noble lords and gentlemen, including the late Dukes of Abercorn and Fife and Mr. Rhodes, stating that the petitioners desired to carry into effect divers concessions and agreements which had been made by certain of the chiefs and tribes inhabiting what is now Rhodesia, and that this enterprise would be greatly advanced by the incorporation under Royal Charter of a British Company for the purpose. Accordingly, on the 29th October, 1889 the desired Charter was granted, incorporating the petitioners under the style of "The British South Africa Company."

Under the Charter the Company's right to acquire land are restricted.

At present we are only concerned with the provisions of the Charter in so far as they affect the question of land ownership. For our purpose the outstanding fact of the Charter is that it does not grant any land. It is a declaration rather than a grant. It authorised the Company to hold, use and retain for the purposes of the Company and on the terms of the Charter the full benefit of the then already existing concessions, "so far as they are valid." The concessions are neither confirmed nor guaranteed by the Charter, they are merely adopted so far as they are valid. The Company was also further authorised, subject to the approval of the Secretary of State, to acquire *by concession, agreement, grant or treaty* rights, interests, authorities, jurisdictions and powers affecting the lands referred to in the concessions which had been obtained or other lands in Africa, and to hold, use and exercise the same for the purposes of the Company and on the terms of the Charter. It is to be particularly observed that the Company was only authorised to acquire further rights to land by contractual means and not by conquest or even by prescriptive occupation. This aspect of the case will be dealt with later. At present it is only desired that attention be directed to the fact.

Under the Charter the Company must observe its obligations under Concessions.

Bearing in mind the pecuniary liabilities imposed upon the grantees by Lo Bengula's mining concession and the consequences involved in their non-fulfilment, it is worth

while to remark that the Charter provides that the Company shall be bound by and shall fulfil the stipulations on its part contained in any concession. Failure to observe the terms of a concession—even terms in favour of a native grantor—is thus a violation of the Charter, and a violation of the Charter may entail its withdrawal.

Under the Charter the Company can deal with but not trade in land.

The special powers conferred upon the Company in regard to its dealings with land are shortly these:—To make concessions of mining, forestal and other rights, to improve and develop land, to settle the land and promote irrigation, and, most important provision of all. “to grant lands for terms of years or in perpetuity, and either absolutely or by way of mortgage or otherwise.” And let it be observed here that the Charter, although it gives power to “grant” land, does not specifically give power to “sell” it. It seems a strange thing as a matter of conveyancing that the Chartered Company was given what is virtually a mere power of appointment and not a power of sale. We shall advert to this anomaly hereafter.

A wide restriction.

One restriction upon the Company’s dealings with the land calls for special attention. The Charter expressly lays it down that careful regard is always to be had to the customs and laws of the natives “especially with respect to the holding, possession, transfer and disposition of lands” and other rights of property. This sweepingly comprehensive limitation upon the Company’s powers of disposal of land cannot well be exaggerated. If the Company must pay respect to native rights to land, then, when we consider the overwhelming preponderance of the natives over the Europeans, and their wider distribution throughout the territory, it would appear that the land-granting powers of the Company are restricted indeed.

Imperial supremacy.

The predominance of the Imperial Government is repeatedly asserted in the Charter. The Company must be British in character and domicile, its directors must be British subjects, its flag must indicate the British character of the Company. The Company’s differences with and treatment of the natives, its dealings with foreign powers, its

right to deal with territory affected by any adverse claim are all under the ultimate control of His Majesty's Secretary of State. To the Imperial Government the Company is bound to account annually in respect of its administrative revenue and expenditure. The Company is the controlled creation of the British Crown. Wide as is the range of its operations, it is conclusively debarred from setting up or granting any monopoly of trade. Finally, it may be noted that the Crown reserves the right to revoke the Charter (and so dissolve the Company) if its powers are not properly exercised—a proviso not consistent with fixity of tenure. Such is the British South Africa Company.

*Power to grant perpetuities is not necessarily full
ownership.*

It has been urged on behalf of the Chartered Company that the power to grant land in perpetuity conferred upon it by the Charter has vested in the Company a proprietary interest in the land of the territory corresponding to an English estate in fee simple. This amazing argument has actually been seriously advanced in the public press, otherwise it might have been contemptuously ignored. It can be disposed of without difficulty.

But the maxim *Nemo dat quod non habet* does not apply to real estate (immovable property) in the way it usually does to chattels personal (moveable property). A power to grant land must not be confused with an estate in land. A person holding an estate in fee simple can by virtue thereof undoubtedly make a perpetuity grant of his land, but it by no means follows that no one else can create a perpetual estate. A power of appointment (that is, of conveyance) may be exercised by a person who has no estate whatever in the land so as to completely alienate a fee simple estate in it. A person may grant an estate of wider dimensions than he himself enjoys—for instance, a mere tenant for life may by virtue of the Settled Land Acts convey the whole inheritance in the land. As we have already pointed out, the Chartered Company receives no grant of land under the Charter. It received a power to grant land, and the very fact that it was deemed advisable to give such a power, if it proves anything at all, proves that the Chartered Company had nothing in the nature of an absolute estate in fee simple. It is not necessary it is simply an absurdity to add a power to grant in perpetuity to the privileges of a tenant in fee simple. He has that power in virtue of his estate and can use it, without special

authority. Only a limited owner or a stranger could need a power to grant the land out-and-out. Which of the two the Chartered Company is may be revealed subsequently.

A doubt dispelled.

It is a common remark that every title in Southern Rhodesia granted by the Chartered Company must of necessity be bad and ineffectual if the Company did not own the land it professed to grant. Any misgiving that anyone may have on that score may at once be dismissed as baseless. It is yet too early in our enquiry to say how the title to the land stands, but as at this stage the question of the validity of the Company's grants is probably in the mind of the reader as a difficulty more or less disquieting according as he is or is not a grantee from the Company, we may deal with it here. The point is not whether the Chartered Company owned the land it purported to grant, but whether it had power to grant it. If the Company acted within the scope of a competently conferred power to grant, then nothing more is required to establish the title it gave. If the power to grant conferred by the Imperial Government was duly given and properly exercised, then the Imperial Government must confirm every grant made in pursuance thereof. All that the Chartered Company or its grantees need show is that the Imperially conferred power to grant was duly exercised by the Company. The ownership of the land need not concern any grantee in whose favour the Company has duly granted land under the power contained in the Charter. For such a grantee this enquiry need not be of more than academic interest.

The Supplemental Charter.

On the 8th June, 1900, a short supplemental Charter was granted to the Company. It does not deal with the subject of the holding and disposal of land, and is consequently not material for our present purpose. It, however, made the Company rather more subordinate to the Imperial Government by giving a power of inspection and a right to copies of all documents of the Company to persons authorised by the Secretary of State for that purpose. Any director or officer of the Company refusing or neglecting to comply with the requirements of the Secretary of State was thereby rendered liable to the forfeiture of his office. The Company is also reminded that it is not a sovereign power by a clause that prevents it from establishing a force of military police. Clearly the Chartered Company has not been created a "chartered libertine" by any means. The control of the Crown is complete.

The Deed of Settlement.

The principal Charter directed the execution within a year of a Deed of Settlement that should provide further as to the objects and management of the Company. Subsequently the time was competently extended, and ultimately on the 3rd February, 1891 the prescribed deed was executed by the seven persons who had been constituted the original members of the Company and by the Company itself under its corporate seal. This document was duly approved by the Lords of the Council. It is a declaration of the objects for which the Company had been created and a formulation of rules regulating its management. Roughly, it may be said to bear the same relation to the Charter as articles of association do to the memorandum under the Companies Acts. It does not assert any power of the Company to sell land, although it expressly authorises it to sell shares in Companies. It makes no proprietary claim inconsistent with the Charter, which, as we have seen, was not a grant of title to land. But the deed does proclaim that one of the objects of the Company is to provide for and promote the welfare of the inhabitants of Africa. There is nothing parochial about that. We are only concerned about that portion of Africa called Southern Rhodesia, and we think that the welfare of the inhabitants thereof would be materially promoted by a settled land question, and we hope the Company will co-operate with those who desire to remove that question out of the region of uncertainty and debate. We have consulted this document for possible enlightenment on the land question. It is of no assistance on the subject.

The Supplemental Deed of Settlement.

A supplemental Deed of Settlement comprising only two short paragraphs in its operative part was executed by the Company on the 1st May, 1901. It is in no way concerned with the subject of our enquiry.

Occupation without Ownership.

In 1890 the Pioneer Column marched from Mr. Rhodes' farm near Kimberley and entered Mashonaland. The Pioneers are regarded in Rhodesia, if not with the veneration bestowed upon the Pilgrim Fathers, at any rate with the respect due to brave men who encounter perils in order to lay the foundations of civilized rule in a barbarous country. When they entered the territory it is not too much to

say that the young Chartered Company did not own a single square inch of the surface soil of the country. Nevertheless the Company, or its representatives, promised grants of land to the invading Pioneers. To redeem this and similar promises the "Rudd Concession" was manifestly inadequate. And the Company could not then be said to have conquered the country, even had the Charter permitted the acquisition of land by conquest. A good deal more than the "Rudd Concession" was needed, and the Company did get something more, if not all that could have been desired.

The "Lippert Concession."

Mr. Edward Amandus Lippert, a German financier and banker, had obtained from Lo Bengula a concession of further rights more directly dealing with land than did the "Rudd Concession." The original validity of the grant was doubtful, but the Company elected to acquire it when properly authenticated. In its final shape the concession bears date the 17th November, 1891. Its authenticity is competently vouched for. On the 5th March, 1892, it was approved of by Lord Knutsford as Secretary of State. Sir Lewis Mitchell, in his biography of Mr. Rhodes, claims that this concession gave the Chartered Company its undoubted title to the land. He did not, however, supply a copy of it in the appendix of documents given in his book. Only very recently has it become known to the general public. It is now available for perusal and discussion. See Appendix B.

The "Lippert Concession" criticised.

This famous deal from which such a comprehensive title is supposed to be derived will be found on examination to dwindle down to somewhat dwarfish dimensions. It only confers the right to lay out and grant farms, townships, building plots and grazing areas and confers no express power of sale. It will be observed that the purport of the document is expressly a concession of limited rights exercisable over land, and not a specific grant of the land itself. The distinction may become better apprehended when more simply stated as follows. Supposing Lo Bengula, with the consent of his indunas, had made an express grant of the land, then the Company could have exercised all proprietary rights over it without any special mention of any rights in particular. But not having a grant of the land, the Company has not the full ownership and can only make the best of such rights as were conceded. And further, although prescribed privileges affecting the land

were granted, yet in the nature of the case they could only be exercised gradually. Pending the exercise from time to time of those privileges by the grantee, the beneficial enjoyment of the land remained just as it had been in the hands of the natives. In other words, so far as this concession alone is concerned (and for the moment we are dealing with nothing else) any land in the territory that has not yet been definitely appropriated under the concession as a farm, a township, a building plot or a grazing area may still be used as of yore by the natives until it has been so appropriated. The conveyancing method of the "Rudd Concession" had been followed in granting not a corporeal thing but incorporeal rights. Lo Bengula preserved his paramount position by both concessions.

Besides, the concession is merely a grant at a rent for a limited term of years—£500 per annum for 100 years. It is, if not a mere license, at best a lease at a rent, with a superior landlord and an ultimate reversion. All the unpleasant incidents of a rent-paying tenancy are necessarily attached to the concession. And neither Mr. Lippert nor his assignees can dispute the title of their licensor or landlord, they are estopped from that by both law and common sense. It is not at all clearly expressed in the concession whether Mr. Lippert can do acts thereunder capable of remaining valid and binding after the expiration of the 100 years term. He has a right to grant "for such periods as he may think fit." That might or might not be held to confine the operative duration of Mr. Lippert's acts to periods strictly within his term. We express no opinion. At any rate, so far as the strict letter of the concession is concerned, Mr. Lippert's assignee, the Chartered Company, can be no better off in this respect than he was. In addition, however, to the concession the Company has its power to grant land conferred by the Charter. Even if there were no warrant for the bestowal of this latter power, assuming that the Company has relied upon it in making its grants, that power can be confirmed by the Crown, and it would probably be better to rely upon it for the establishment of the Company's subgrants than upon the vague expressions of the concession.

And further, a candid construction of the concession shows that it merely constituted Mr. Lippert as Lo Bengula's agent for land development. This was evidently the intention of the document, judging both from its recitals and its operative part. It is recited that, as large numbers of white people to whom it was desirable to assign land were coming into the territories of the Matabele King, it was desirable that he should appoint some person (as he purports to put it) "*to act for me* in these respects." This recital conclusively binds

Mr. Lippert and his assignees. Moreover, the native king only concedes the power "to give and grant certificates *in my name* for the occupation of any farms, townships, building plots and grazing areas." This is surely the relationship of principal and agent. The position of the concessionary closely corresponds to that of the *publicani* of the Roman Empire, who farmed the Imperial revenues, paying a fixed sum to the State and taking their collections for their own use. Mr. Lippert had no granting power save under the concession, and, of course, he could not give his assignees any greater powers than he himself had got. Therefore the Chartered Company, so far as it depends on this document alone, is no better off than Mr. Lippert was. It has only the four rights over the land given by the concession, and these rights fall far short of absolute ownership. Mr. Lippert has a power under the concession to sue and be sued in the name of the Matabele King as well as in his own name. In fact, the document reads as much like a power of attorney as a lease or a license. In the one aspect there must be a principal in the other a landlord, and in either case the position of the Company is subordinate.

The "Lippert Concession" in Downing Street.

Restricted and burdened as the above concession was when originally granted, the Imperial Government, when signifying its approval of it and of the assignment thereof to the Chartered Company, limited the exercise of the rights under it still further. The Company is restrained from assigning the concession or transferring any share in the profits arising out of it without the knowledge of the Secretary of State. The Company holds this concession subject to the superior rights of its native landlord on the one hand and to the control of the Imperial Government on the other. There is no absolute right of full land ownership in the Company under this concession and its Imperial confirmation.

Summary of the "Lippert Concession."

To sum up the "Lippert Concession," it may be said that

- (a) It grants no land at all, but only rights over land ;
- (b) It is only for a period of years reserving rights to a superior ;
- (c) The grantee thereunder is only constituted the executive representative of a superior ; and
- (d) Restraint has been imposed upon alienation.

So to consider the "Lippert Concession" as a land conveyance is to be guilty of a legal confusion.

The Orders-in-Council.

The Imperial Government has issued various Orders-in-Council from time to time applicable to Southern Rhodesia. Some of those Orders are in the nature of constitutional documents granting administrative privileges, conferring executive powers, regulating governmental details and otherwise providing for the reign of law in the new territory. As we are anxious not to ignore anything that may possibly throw light upon the land question, we have deemed it advisable to consult those Orders in search of information on the subject of our enquiry. The investigation, however, only shows that the Imperial Government has scrupulously avoided any declaration committing itself to a definite position on the question of land ownership. The most important of those Orders are the two that confirmed the administration of the territory upon the Chartered Company namely, the Matabeleland Order-in-Council, 1894 and the Southern Rhodesia Order-in-Council, 1898, which revoked the former Order but incorporated many of its terms while introducing numerous additional provisions. So far as they touch the question of the land at all the aim of these Orders is rather the safeguarding of the natives' land rights than the establishment of those of the Chartered Company. Section 81 of the latter (practically a repetition of section 49 of the former) Order provides that "the Company shall from time to time assign to the natives inhabiting Southern Rhodesia land sufficient for their occupation, whether as tribes, or portions of tribes, and suitable for their agricultural and pastoral requirements." It might seem that this provision indicated that the natives had no land of their own but required an assignment from the Chartered Company. In reality, however, it is a restriction upon the arbitrary exercise of the powers over the land that were given by the "Lippert Concession." If any natives happen to become dispossessed thereunder they must be suitably compensated in land for their loss. European settlers need not have land but native communities must have. The natives are thus legally better off as regards the holding of land than white people are. In fact the provision merely protects the land rights of the natives and does not presume full ownership in the Chartered Company. It may be significant, if not very important, to note that in a legal document like an Order-in-Council the technical expression "assign . . . land" is used. That is the phrase properly applicable to a transfer of land made by a person having only a leasehold interest such as the "Lippert Concession" is. Section 13 of the 1898 Order provides that "a native may acquire, hold, encumber and dispose of land on the same conditions as a person who

is not a native"; and Section 84 of the same Order provides for compensation in land to natives who may have been dispossessed by mining operations and the construction of public works. Of course "compensation" can only be given when property is taken away or injuriously affected by an outsider. The natives then, it is to be presumed, still have a property in the land. This is about all we can collect from the Orders-in-Council.

Most of the Orders-in-Council deal with such subjects as naturalisation, validation of marriage, fugitive offenders, extradition and so forth, and have no bearing on the present investigation.

Default of documents and a deduction.

Proclamations, notices, regulations and ordinances, issued in the territory, as being made in pursuance of derived executive powers cannot be of any material assistance to us in this matter. We need not try to seek enlightenment from subordinate sources. If the documents are defective then, apart from the Imperial Government (with whose connection with the territory we shall deal later) there is only one independent source from which proper title to the land can be derived, and in that source there still remains a residue of title if it has not yet been wholly exhausted. That source is of course, the antecedent possessors of the country—the natives. Their paramount title has been conclusively admitted by the acceptance of and reliance upon the Rudd and Lippert Concessions, both emanating from the natives. These grants are of a restricted character as we have seen. Nevertheless, we may safely assume that they have not been enlarged by more comprehensive ones. If there were such we should have heard of them, for section 45 of the High Commissioner's Proclamation of the 10th June, 1891, provided that no concession or grant made by any native chief should be recognised by any Court of Law unless and until sanctioned and approved by her Majesty's Secretary of State. The natives cannot therefore dispose of their land secretly. Their grants are more like public treaties than private transactions. If the documents are defective, then the deduction in favour of outstanding native rights of ownership is obvious. Claims not depending on documents have been made upon the land. We shall consider these, but in the mean time the possibility at least of native proprietary rights should not be disregarded.

What the documents disclose.

We may take it that the two concessions we have examined are all the documents in existence that could

confer title from the native quarter, and we have not found any out-and-out grant of land. Charters, Deeds of Settlement, Orders-in-Council have not assisted the enquiry. What we have discovered from the documents is :—

- (a) That the Chartered Company has a charge upon and a right to win the minerals of the territory, but the grant thereof was a conditioned one as it is liable to be defeated for non-payment of rent to a superior native landlord.
- (b) That the Company has further a terminable "right" to lay out farms, townships, building plots and grazing areas as the agent of I.o Bengala, but this is also held upon a rent-paying condition.

Thus the Chartered Company has a limited "charge" and a terminable "right" but not "land."

When we have dealt with the position of the Imperial Government we shall be in a position to appreciate better what the partial character of the native grants signifies.

Alleged ownership by conquest and occupation.

The inadequacy of the native concessions to confer full title has been recognised both by opponents and defenders of the Company's claim. The London solicitor for the Company, Mr. Hawksley, stated in Bulawayo in 1907 that "the Chartered Company claimed to be owners of the land; they had got their concession, plus conquest, plus occupation." Here we have algebraical signs but not mathematical certainty. Had the concessions been conclusive the other two props to proprietorship would have been unnecessary. Mr. Bertin ("Land Titles in Southern Rhodesia" page 12) takes practically the same position. He says, "The Rudd and Lippert Concessions, the Royal Charter, the rights of conquest succeeded by undisturbed possession extending over a period of 22 years, and the fact of present possession, constitute a sound argument in favour of the validity of the Company's claims, which occupies a strong position when it is borne in mind that there does not appear to be anyone who can show a better title to the land." Thus conquest and prescriptive occupation are sought as supports for the Company's title.

Claim by conquest controverted.

As regards conquest, it may suffice to point out that the Charter does not give the Company any power or authority to acquire any land by conquest, and apart from the Charter the Company is a non-entity. The Charter brought it into being, the Charter prescribed its powers. By the Charter the Company may acquire land by "concession, agreement,

grant or treaty," but certainly not by conquest. Contract not conquest is the method of the Charter. If the Company has not got the land by the prescribed means, it certainly has not done so by unprescribed methods. To claim by conquest is to cut the Charter. The Company was not sent out to rob the natives of Africa of their land by violence but to have careful regard to native customs and laws, especially with respect to the holding, possession, transfer and disposition of land (Charter, Section 14). Have the champions of conquest considered this? Have they reflected on the concluding paragraph of the Charter, providing that in case the Company shall have substantially failed to observe and conform to the provisions thereof it may be revoked?

And what, pray, is the Chartered Company that it should claim the authority to acquire territorial rights by war and conquest? The British South Africa Company is not an independent sovereign state, but merely a British corporation as its name signifies. As a corporate person it is a British subject and the supplemental Charter reminds it of that fact by restraining it from establishing a force of military police. On this point we may safely leave the Chartered Company in the hands of the Imperial Government, confident that the latter will not assent to a claim which no subject can maintain. The claim by conquest is so utterly reckless as to surprise us at the desperate straits to which the supporters of the Company's claim are reduced. The Company and its promoters declared in the Deed of Settlement that one of the Company's objects was to provide for and promote the welfare of the inhabitants of Africa. To accomplish this praiseworthy purpose it claims to have conquered the country as its own private domain.

Ownership by occupation objected to.

Nor does "concession, agreement, grant or treaty" include prescriptive possession developed from forcible occupation. This is merely another aspect of the claim by conquest. Besides it is put forward too early. The period of prescription in regard to real (immovable) property is much longer under Roman-Dutch law than under modern English law. In South Africa the period is thirty years. Prescription is rather a doleful defence. If it means anything, it means that no good title can be shewn, but should be presumed from the circumstance of long occupation. Besides, has the Company really occupied the land as a private proprietor? By what means has the Company acquired private as distinct from public occupation? Moreover, the period of prescription can only be computed from

the time when the Company paid its last instalment of rent to Lo Bengula or his representatives. Prescription cannot run against a landlord in receipt of his rent. The rent is still being paid or it is not. If it is, then no prescriptive right has been acquired by the Chartered Company. If it is not, then the Company has violated not only the two concessions but also the Charter. By section 5 of the Charter the Company is bound to fulfil all the stipulations binding upon it under any concession. We are aware of the rent-paying conditions of the two concessions. The Charter enforces these conditions. We have seen what are the consequences to the Company of its failure to observe the terms of the Charter. The claim by prescription does not land the Company into land ownership, but it may possibly land it into the limbo of dissolution. And before dismissing this point let us remark one thing. Mr. Bertin speaks of "*undisturbed* possession extending over a period of 22 years." Within that time we have had the Matabele War of 1893 and the Matabele Rebellion of 1896. Surely these were disturbances sufficient to satisfy anyone. Could more dreadful disturbances be dreamed of?

So the Company's title to the supreme ownership of the land cannot be established by conquest or prescription. The Charter grants no land and cannot be relied on as a title deed, although Mr. Bertin seems to suggest that it can. We have seen what the Rudd and Lippert Concessions gave. Insufficient as these are, the Chartered Company has no more to depend on for its title.

The Settlers and Conquest.

Those who argue that the Chartered Company owns the land as an administrative responsibility and those who hold that the land belongs to the people of Rhodesia (that is the European settlers) rely upon the alleged facts of conquest and occupation. If conquest and occupation could give the land to the Company, it is only natural that the individuals who fought for and settled in the country and helped to make it habitable for Europeans and profitable to the Company should think that the Company conquered and occupied the country for the benefit of the white inhabitants and not for its own exclusive gain. This, of course, is not the view of the advocates of the Company. The Company is a profit-sharing corporation and regards the land as a commercial asset, no matter whether it was secured by Charter or Concession or Conquest or Control or by all four. The spokesmen of the Company have made its attitude on the question of land proprietorship unmistakably clear, and no one should imagine for a moment that it regards itself as a public

trustee of the land. And in any case, conquest that did not confer ownership could not create trusteeship. The Company has not acquired the land by conquest as a kind of pirate trustee for the settlers any more than it has done so as a private enterprise for its own benefit.

The correct case for public responsibility.

The public responsibility of the Company may, however, be contended for on a more valid ground than that of conquest. There is very good reason for the view that the "Lippert Concession" created in reality a public trust. An agency is a species of trust and an agent is practically a trustee for his principal. The peculiarity of this particular trust is that the fiduciary gets more than the beneficiary during a certain term of years. But the important point to be observed is that Lo Bengula appointed Mr. Lippert to act *for him* in dealing with the land, and authorised him to give and grant certificates of occupation in his (Lo Bengula's) name, and gave him permission to use his (Lo Bengula's) name in suing and being sued. These representative powers do not merely indicate, they actually create agency. And, moreover, they create a public agency or trust. Lo Bengula stood for his public. His indunas were consulted. The national usages were observed. The public of Rhodesia is now a more composite one consisting of natives and settlers. Whatever may be their difference, they have one thing in common, they are alike inhabitants of one country. In favour of the public of Rhodesia (white and black) the concession must now be construed. If there are any public advantages derivable under the concession, let both black and white as one public now enjoy them. The concession was Lo Bengula's method of developing and managing the land as a national asset—the grant was national in the width of its scope. As a national concern it must still be regarded. Lo Bengula simply allowed the exercise of certain rights, which have as yet only been partially utilised in one place and another. Wherever the concession has not yet been availed of and exercised (that is, throughout the greater part of Southern Rhodesia) there still remains a national or public right of possession of the land subject only to be affected by the exercise of any of the rights under the "Lippert Concession" and of the mining rights under the "Rudd Concession."

And the Chartered Company has to reckon with the people of Southern Rhodesia in respect of its dealings under the Concession. An agent is accountable to his principal. A trustee is accountable to his beneficiary. The Chartered Company is a public agent or trustee. It is therefore

accountable to the people of Rhodesia for the manner in which it has exercised its powers under the "Lippert Concession." It may be thought that the right of Mr. Lippert to receive the income arising from the concession "for his own benefit" is against this idea of the public having an interest in the exercise of the powers conferred thereby. It is, however, a question of present accountability, not of immediate beneficial enjoyment. The Company must show from time to time upon public demand how it has utilised the concession, and must ultimately yield up all the revenues and benefits thereof to the public.

So there is good reason for regarding the land as an administrative liability of the Chartered Company, not by virtue of conquest but under the "Lippert Concession."

When dealing with the point of the Company's administrative liability in regard to the land it may be as well to observe that under the Land Survey Regulations, 1894 it is 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." For instance, in adjusting the boundaries between two adjoining plots of land, if only one of the plots has been privately appropriated, the administrator is, as a matter of executive convenience, to be regarded as the owner of the other (that is of the unalienated) plot. The provision does not directly bear upon our question, but it is significant that the reputed ownership for any purpose of the unalienated land is placed in a public administrative officer and not in a private person representing the British South Africa Company as a commercial undertaking.

Public accountability for the proceeds of Land Sales.

The Charter confers no special powers upon the Chartered Company to "sell" land. No more does the Deed of Settlement or any Order-in-Council nor even the "Lippert Concession." And the Home Government only approved of the Lippert Concession on the express condition that the Company was not to assign it or the profits arising out of it. The Company has power to "grant" land, not to speculate in or sell it. It may be said that "sell" is implied in "grant." It does not necessarily follow. In fact it certainly does not follow, if the Company is in the position of an agent or trustee. It must then act within the scope of its express authority, and cannot divert the trust property to its own use by selling it and appropriating the proceeds. Argue as one may, it must be at last conceded that the Chartered Company has no expressly declared power to sell land. Of all things the possession of

an undoubted power to sell land is the most important to the Chartered Company. Such a power would be explicitly mentioned in any moderately well drawn memorandum of association detailing the objects of a company incorporated under the Companies Acts, as otherwise upon a sale of land the Company might have to meet the objection of *ultra vires*. It is most remarkable that the promoters of the Chartered Company should have permitted the least loophole for doubt on the subject. Perhaps they could not prevent it. At any rate the Charter must be construed as it stands. Now it is a matter of notoriety that the Company has sold land. It must vindicate its authority to do so. *Prima facie*, no doubt, a company acting under a Charter has the same power to deal with its property as an ordinary person, differing in this respect from a Company created in pursuance of an Act of Parliament. But this consideration would not avail the Chartered Company. It has no grant of land in its favour, it has merely defined rights and powers over land. It exercises rights over the property of others rather than deals with its own property. It is restricted to the exercise of the rights it has succeeded in getting, and any right that it has not got it cannot exercise.

This raises the point as to the Company's accountability for the proceeds of its land sales. If the Charter had declared that the Company could sell land and dispose of the proceeds in some particular way there would perhaps have been no difficulty. Satisfied that the Charter confers no express power to sell we set it aside and look at the "Lippert Concession." It specifies four rights exercisable over land, but not one of them is a power to sell it. And in full consistence with the exclusion of a power of sale the "Lippert Concession" gave Mr. Lippert no power to take the purchase money of land. As far as profits are derivable out of the concession they are confined to rents, licenses and taxes, and these Mr. Lippert could receive for his own benefit. That is, he might draw a periodic income out of the land, but not convert it into capital sums of money by sale. By numerous sales the Chartered Company has got a large sum of money out of the land that could not be classed as rents, licenses and taxes. If the "Lippert Concession" did not authorise the conversion of the land into money by sale, and sales have nevertheless been made, the question arises as to who is entitled to the proceeds of these sales. Not the Chartered Company. It cannot as agent or trustee acquire a benefit against its principal or beneficiary by a breach or non-observance of the terms of its agency or trust. What then is the consequence? Let us remember that we have found that the "Lippert Concession" must be regarded as a national document deal-

ing with the land on behalf of the public. Therefore, the irresistible conclusion is that whatever money the Chartered Company may have made out of sales of the land not authorised by the "Lippert Concession" is public money in the beneficial application of which the people of Rhodesia (black and white) have an undoubted interest. The Chartered Company may retain its periodic rents from land, as the "Lippert Concession" clearly allows it to do, but the proceeds of sales cannot be entirely dealt with as the private property of the Company.

Those who hold that the Chartered Company is liable to the people for its land administration will, no doubt, require this question to be satisfactorily solved, and will probably demand a strict scrutiny of the accounts of the Company's land sales. Any flaws in the Charter or concession will be feverishly fastened on by those foes of the Company to protect what they allege to be public property. We did not draft the documents out of which the difficulty arises. The doubt exists, we merely disclose it, and it will be for others to settle it when the time comes.

The Company's mining rights

The rights over minerals conferred by the "Rudd Concession" are apparently vested in the Company as an ordinary asset available solely for the commercial benefit of the Company—that is supposing that the concession is still subsisting and has not been avoided by non-payment of rent. It would thus be the most substantial and permanent right that the Company has, and, moreover, no one seems to question its title thereunder. If other documents had been as free from obscurities as the "Rudd Concession" there would have been less trouble in the territory to-day about title to land.

A recent assertion of Company ownership.

The latest authoritative assertion of the Company's ownership of the land was made by one of its directors, Mr. Rochfort Maguire, during the course of his speech in Salisbury, on the 22nd March, 1913, in which he expounded the Company's "Statement of Policy." Clause B of the "Statement of Policy" reads as follows :—"The Company regards the accumulated deficits upon administration and defence as part of the cost of the acquisition, maintenance and development of the land and minerals of the territory." Mr. Maguire when dealing with this clause said :—"The Board does not make any claim for the past deficiency between administrative revenue and administrative expenditure, a deficiency amounting to upwards of seven and a half millions

sterling. The Board regards that expenditure as incurred in establishing, developing and protecting our position as the owners of the territory."

Mr. Maguire has been connected with the Company ever since its inception, and is indeed one of the original grantees named in the "Rudd Concession." We may safely assume that what he has deliberately asserted the Company has duly authorised. So at the eleventh hour the Company is still unrepentant and relies on its own self-sufficiency.

In our view of the documents that define the Company's rights and powers, no debt or deficiency the Company ever incurred or involved itself in would entitle it to the ownership of an inch of land. The Company was to acquire land by "concession, agreement, grant or treaty," not by incurring debts or involving itself in deficits. In other words, the Company has no power to seize the country for debt under a sort of glorified sheriff's attachment.

And why associate the people of Rhodesia with this amazing arrangement? In doing so the Chartered Company really gives away the case it tries to establish. For supposing for mere argument's sake, that the people are liable for the past deficits and the land is seized in discharge of their liability, then, to be consistent, the Company must admit that the people are proprietors of the land. And if this is so, the people are entitled to redeem the property from seizure. If they can pay the money (a thing they probably have not the remotest intention of even trying to do) then the Chartered Company must restore to them the subject of the seizure. The position to which the Chartered Company thus commits itself by this proposal can only be regarded with ridicule.

Is the Company not quite convinced of the validity of its old algebraical claim to the land by "concession, plus conquest, plus occupation"? That claim is not founded on such a firm basis of fact as to remove it from the field of controversy. Do the Company's directors desire to dispel the doubts that exist by entering into a deal with the people? We may take it for granted that the directors are chiefly concerned (just as good officials they ought to be) for the commercial interests of the Company, and that they are not primarily public philanthropists. There is an appearance of gratuitous favour about the proposal that may perhaps prove deceptive to the people, for there is a disposition to accept favours unquestioningly. It is proverbially ungracious to look a gift horse in the mouth, yet the people had better pause to reflect on the question whether they are receiving any benefit or being relieved from any burden. This prudent pondering may reveal to them that there is remarkably little to rejoice over from a popular standpoint.

In reality the people neither gain benefit nor escape liability. The deficits are of the Company's creating, and for them the Company is in the first instance responsible. The Company is still primarily liable for the administration of the country, which has been directly committed to it and not vested in the people. The greater part of this deficit was created before the people had any direct or indirect control of the administration. Even at present, fiscal votes in the Legislative Assembly must originate with the Company, as it is ultimately responsible for financing the country. The people may therefore be well excused if they decline to be deluded into a tacit or express acceptance of the proposal. They have nothing to gain but possibly much to lose by so doing. The non-success of the Company's speculations may be misfortune for it, and the people may be very sympathetic. But they are not bound to remedy the Company's losses by the release of any claim, present or prospective, that they may have upon the land. Grounds should not be given to the champions of Company ownership to proclaim in London that the people of Rhodesia have foregone their rights to the land in return for the remission of the administrative deficit. The Company can deal with the deficit as a matter of account with its own shareholders, but it should not be associated with a claim to the land as against the people of Rhodesia.

Further, the Company came to what is now Rhodesia under the appointment of the Imperial Government. It is the British Crown that the Company represents in Rhodesia rather than the people of the territory, who were not and could not have been consulted about the creation of the Company. The Company's financial failures must ultimately be a matter for arrangement between the Company and the Home Government, and not between the Company and the people. If there is any responsibility anywhere outside the Chartered Company for its money matters, then that responsibility, if any, must rest upon the Imperial Government. That Government sent the Company to what was to be Rhodesia. *Respondeat superior*. Let the authorities at Home answer for the acts and accidents of the agent which it has created and still controls.

Under the Charter the Company is annually accountable to the Secretary of State for its expenditure for administrative purposes and its receipts from public revenue, and under the supplemental Charter a further liability to disclose documents is imposed. Here is superiority on the one hand and accountability on the other. There is thus no doubt as to the quarter in which the Company's debts and deficiencies have to be dealt with. It is the Home Government, that must decide how (if at all) the Company is to be compensated for

its losses. The Home Government has not yet proposed, much less decided, that the past deficits are to be extinguished by a wholesale appropriation of the country by the Chartered Company for its own use. When it is so proposed, the people will, no doubt, have an opportunity of presenting their point of view. In the meantime they need neither concern nor commit themselves.

The position of the Imperial Government.

Those who contend for present Crown ownership have a rather less substantial case than have the supporters of the Company's claim.

The position of the Crown in regard to land rights in the territory of Southern Rhodesia is peculiar and somewhat perplexing. Rhodesia is but another instance of the singular lack of definite purpose that has so often characterised the dealings of the Imperial Government with the concerns of the oversea units of the Empire. Dangerous difficulties that might have been foreseen and prevented have frequently been allowed to develop and deepen until they could only be removed by waging war or wasting wealth in compensation for claims that should not have been allowed to arise. Rhodesia is only another instance of England's easy-going, problem-producing imperialism. *Even now, Rhodesia has not been formally annexed to the British Crown.* Moreover, it has not even been expressly declared to be a protectorate, although it has often been described or asserted to be such in divers Orders-in-Council. Briefly stated, the position is as follows. In 1888 the regions in which Southern Rhodesia is now comprehended were declared to be within the sphere of British influence. Early in that year King Lo Bengula had entered into a treaty of peace and amity with Great Britain. In this state of matters the Charter was granted in 1889. In subsequent proclamations and Orders-in-Council the authority of the Crown is frequently, if rather vaguely asserted, but not always expressed in the same terms. On 13th April, 1891, in a proclamation of the High Commissioner of South Africa it was declared that the region in which Southern Rhodesia is now included "falls within the sphere of British influence." In the Orders-in-Council of May, 1891, July, 1894, and October, 1898, it is recited that the territories in question are "under the protection of Her Majesty the Queen," and Southern Rhodesia is scheduled in the list of protectorates appended to the British Protectorates Neutrality Orders-in-Council, 1904. Other Orders-in-Council merely recite that Her (or His) Majesty has "power and jurisdiction" in the territory. In an Order-in-Council of 1901, applying the

Fugitive Offenders Act, 1881, to certain African territories, Southern Rhodesia and other places are clearly distinguished from the Transvaal and the Orange Free State. The last-named provinces are recited as having been annexed to His Majesty's dominions, while Southern Rhodesia is merely classed as a territory in which "His Majesty has power and jurisdiction." Finally, by an Order-in-Council made in 1906, extending the Colonial Probates Act, 1892, to Southern Rhodesia, it is recited that the High Court of Southern Rhodesia is a British Court in a foreign country within the meaning of the said Act." And "the meaning of the said Act" is not that Rhodesia is a "foreign country" in the sense that Scotland has for some legal purpose to be regarded as such. The Act is made applicable to the Court of Southern Rhodesia as "a British Court having jurisdiction out of the King's dominions."

And so stands the Imperial Government as far as Southern Rhodesia is concerned. The Crown may have a paramount political authority, but it has no proprietary land rights in the territory. It has neither asserted ownership by formal annexation nor enforced it by direct occupation.

The position is very plainly presented in the following extract. "From a constitutional point of view the status of Rhodesia as a whole is not free from obscurity. The country was first declared a British sphere of influence, but its opening up was undertaken and paid for by the Chartered Company. It has never been declared a protectorate in express terms, but the Orders-in-Council constituting its three governments describe it as being "under the protection of Her Majesty the Queen." It has never been formally annexed to the British Dominions like Basutoland, and therefore it seems that unappropriated rights in land do not vest in the Crown. But it is undoubtedly subject to the jurisdiction of the British Government, and the Company's powers and rights are exercised and enjoyed by virtue of the Charter which they hold from the Crown. (See "The Government of South Africa," part 1, pp 33, 34, Cape Town, 1908).

We are now in a position to understand why the Crown did not grant any land to the Company by the Charter. The reason is simply because it could not validly do so and recognised the fact, as every candid enquirer must do. Thus vanishes the view that the Imperial Government owns the land as the creator, the *fons et origo*, of the Chartered Company.

Where ultimate ownership is to be sought for.

When we thus come to realise that the reputed ownership both of the Crown and the Company must be dismissed as

untenable, because the one has not annexed the country and the other has not succeeded in securing a concession that amounts to a conclusive capture of the land, we find ourselves better able to trace the ultimate title to its true source.

The concessions under which the Chartered Company claims did not exhaust all the proprietary interests of the grantor, Lo Bengula, as the representative of his nation. He granted to Mr. Rudd and his colleagues a charge over and a right to win minerals, but on a condition the non-observance of which defeated the grant. He granted to Mr. Lippert rights to utilise the land as his agent, but only for a term of years and at a rent. The *land* itself was never granted by Lo Bengula. It has not been acquired under the Charter, nor by conquest, nor by adverse occupation. Nor has it been seized by the Company for debt; nor has the Crown annexed it. In whom then is the ultimate ownership vested? There seems no way out of the difficulty but to candidly admit that there is still a reversionary interest, a superior estate, residing in the original native source out of which the two partial concessions were drawn. The two native concessions were national documents. Lo Bengula granted them with the concurrence of his indunas as national representatives according to the usages of his nation. The substantial interests that were retained out of these concessions remained in the hands of the Matabele, and if those interests have not been subsequently acquired under some other grant with Imperial sanction (and they certainly do not appear to have been so acquired) then the Matabele have still the superior ownership of the land. The *r* title is paramount to, though limited to some extent by the Rudd and Lippert Concessions. They hold the land subject to the Company's defeasable charge upon the minerals and its terminable rights to lay out farms, townships, building sites, and grazing areas. But they hold the land itself, and that is more than the obvious construction of the documents allows the Company to claim.

The position may be unpalatable, it may even be repulsive to the racial sentiments of the settlers in Southern Rhodesia. This enquiry, however, has not created the situation, but merely reveals it. It is only too apparent how dangerously unsatisfactory the position is. It is manifestly something to be remedied rather than to be rejoiced over. Better a thousand times over is it to realise the position and remedy it than to be imperilled by ignoring it. There has been not only doubt about the Rhodesian land question, there has been positive delusion which is much worse. The natives' claims have been generally overlooked by superficial students of the subject, whose prejudices only permitted them to see the

Crown, the Company or the colonists as possible proprietors of the land. This attitude is not, however, universal. Some of the settlers have not forgotten that there were landowners in what is now Rhodesia prior to the Rudd and the Lippert Concessions, and that their prior rights were only affected and not effaced by those concessions.

And certainly the natives have not forgotten the circumstance. This might with safety be inferred from the fact that the events that have produced the Rhodesian land position are so recent. But we do not need to rely upon unverified inferences however well they may be founded. We have satisfied ourselves as to the natives' attitude on the question by independent personal enquiry from a Matabele quarter, and anyone else in the territory who is interested can, of course, do the same. The reply we received to our enquiry as to who owned the land was concise and conclusive and conveyed in the one word: "Lo Bengula." We were further assured that this is the general view of the Matabele people. Nor could we get an admission that Lo Bengula was dead. The Matabele simply will not admit that. We were assured, however, that Lo Bengula had still many sons living. This complete conviction about the natives' right to the land and its prompt expression are remarkable, more especially when we remember that the natives are not communicative to white men about their political matters, indeed they are not particularly communicative on any subject relating to their own affairs.

It has been contended that the settlers have as good a claim to the country as the Matabele, inasmuch as the latter had only come into the country some seventy odd years ago or thereabouts. The Matabele would, nevertheless, have a better occupation title than the Chartered Company can claim. But this is to set up a conflict of wrongs, not a conflict of rights, and two wrongs never make a right. And the Chartered Company cannot raise this defence. It is estopped from disputing the title of its rent-receiving grantor. It has admitted the ownership of the Matabele by going to them for grants and concessions. It cannot settle down in virtue of these concessions and say that they were *ultra vires*. The Company would then not have a leg to stand on even for the limited grants that it enjoys. We merely mention this matter as a popular argument we have heard. We regard it as a weak quibble.

General Summary.

We have now completed our investigations of the land question in Southern Rhodesia. The conclusion we have

come to, and which we believe to be fairly founded upon documentary evidence, are as follows :—

(a) The superior and ultimate ownership of unalienated land in Southern Rhodesia remains vested in the Matabele, subject to the limited rights and benefits of the Chartered Company under the Rudd and Lippert Concessions, which are only rent-rendering tenancies, terminable, the one by virtue of the right of re-entry and the other by effluxion of time, and neither of which is a grant of land.

(b) That the Chartered Company enjoys for its own use a charge over the metals and minerals of the territory with the right to win the same, but subject to the payment of a monthly rent, the non-payment of which renders the charge and right liable to forfeiture.

(c) That the Chartered Company has the right for some seventy-eight years to come to lay out and grant farms, township building plots and grazing areas in the territory subject to the payment of a head rent, and that these rights cannot be capitalised by land sales but must only be exercised for profit in such a way as to receive periodic income therefrom.

(d) That the last-mentioned rights have been granted in such a way as to make their possession practically a matter of public agency or trusteeship for the exercise of which the Company is accountable. And as regards capital sums received by the Company from the exercise of their rights, there is not simply a public accountability but a liability to apply these sums for public purposes, as the Company cannot take such sums for its own use under the terms of the grant.

(e) That the Company never obtained an express grant of "land" nor a specific power to "sell" land, and these two facts are after all the most important factors in the Southern Rhodesia land problem.

Suggestions,

The title tangle in Southern Rhodesia has not been entirely created by the Chartered Company, the Imperial Government has had a share in producing it. It is not so much what has been done as what has been omitted that has made the muddle. The Home Government, owing to indolent indifference or want of Imperial ambition, omitted to annex the territory or to satisfactorily define the extent and nature of its relation thereto. The Chartered Company, owing to inability and not, we presume, to unwillingness, failed to obtain a concession sufficiently comprehensive to confer upon it complete ownership of the land. Owing to these omissions and failures the present state of affairs has arisen. The Chartered Company as an interested party and a subordinate

power cannot be looked to for a settlement of the question. The Imperial Government must be approached to unravel the tangle. Southern Rhodesia has some kind of dependence upon Great Britain. It should be definitely declared what the nature of that dependence is. There will be a convenient opportunity for doing this upon the consideration of the affairs of the territory when the administrative clauses of the Charter come up for review by the Home Government in 1914. After that date we hope there will be no doubt left as to the extent of the jurisdiction of the Imperial Government in the territory, and that the powers of the Crown will be so established as to enable the land question to be settled, as it can only be, by the assertion of the Crown's supreme territorial rights.

This is not a political pamphlet. If the government of the territory is involved in the discussion, it is simply because the Chartered Company happens to be the government and also claims the land. After all, it is not the form of government that matters, but the manner in which its functions are discharged. If under their political institutions the people enjoy proper personal protection and are permitted to become and remain prosperous in their lawful pursuits, it does not matter much whether the government is by a chartered company, or as a Crown colony, or under a constitution. In our estimation the most important thing for Southern Rhodesia is a satisfactorily settled land question, and if manifold political consequences should be involved in accomplishing the settlement, such charges, however sweeping, would be unimportant in comparison with the benefits that would accrue to the country from the establishment of the land system upon a basis that would be generally understood and approved of. To accomplish this, if possible, we venture to put forward a few suggestions, disclaiming any ulterior political intentions, even if, owing to the nature of the question, political issues are touched upon. Were these suggestions adopted, the Chartered Company would not forfeit one lawful right, administrative or commercial, that it possesses.

It will be observed that our suggestions are quite consistent with the assumption that the Chartered Company will retain the administration of the territory. If it does not do so, then it seems idle to discuss how its powers over land should be regulated in the future. For if the Chartered Company is deprived of its public powers in the territory there seems no reason why it should hold extensive land rights therein that would give it private control for upwards of seventy years. The Company was formed to administer the country. If the object for which it was created is otherwis

provided for there is no reason why the Company should continue. If the administration is withdrawn from the Company it should be fully—even generously—compensated for its land and mineral rights and withdraw from the territory altogether. The people of Southern Rhodesia possessing the control under the Crown of the land and minerals would presumably shoulder a debt for the compensation money. To decline to do so would be little short of ingratitude, for there is no doubt that the Chartered Company opened up the country and spent large sums therefor which it should not as a matter of political honesty be obliged to lose. That question can be settled by others should the occasion arise.

Our suggestions are as follows :—

The first and most obvious reform is that the Imperial Government should come forward and identify itself more intimately with the territory by formally annexing it, and so putting an end to any doubt as to the territorial rights of the Crown. By this procedure the land of the territory, which has never been expressly granted to the Company, would vest in the Crown, subject, of course, to the Company's limited rights under the two concessions. With the land there would vest in the Crown :—

1. The outstanding and ungranted national rights of the natives ;
2. The rent reserved by the " Rudd Concession " ;
3. The right of re-entry under the " Rudd Concession " ;
4. The rent reserved by the " Lippert Concession " ;
5. The reversion of the " Lippert Concession."

The Crown, as the supreme expression of the national will, can have no interests that are opposed to the national interest. Therefore, by annexation the Crown would also become the guardian of the public rights arising by virtue of the representative, or fiduciary character of the " Lippert Concession." The Home Government has already asserted a control over the disposal of that concession. It could exercise such control much more consistently and effectively after annexation, as it would then have a proprietary right in the territory, rather than a mere paramount connection as at present. Of course, in justice, the rents reserved by the two concessions should be paid to Lo Bengula's representatives, or at any rate applied towards some exclusively native object.

After annexation the Crown should confirm every perpetuity grant (indeed every grant that the Company has made beyond the term of the " Lippert Concession ") where such grant has been made for a money consideration or by reason of public services. The Company has made grants of land

purporting to be of longer duration than the Company's leasehold term alone would warrant. Relying upon the strict letter of the Charter, we have assumed that the Crown has given the Company power to make perpetuity grants without regard to the duration of its own estate. We think, having regard to the transactions that have been allowed to take place, that this is a plausible if not the proper view, and for the purpose of convenience it should be adopted. But it must be remembered that the Imperial Government at the date of the Charter had itself no proprietorship in the territory that would enable it to give an absolute granting power to another. Besides the authorities at home could not have foreseen that the Chartered Company would only be able to obtain leasehold interests in the land, and so the possibility of granting perpetuities out of a leasehold interest (a weird legal monstrosity) was not contemplated when the power to grant was conferred. The power conferred by the Lippert Concession to grant for a "*period or periods*" seems to impose a limit of time and is too vague to be confidently relied upon. Therefore, to satisfy all doubts the Company's grants upon sales or for public services should all be confirmed, or at any rate declared to have been made in pursuance of the power in the Charter.

The Home Government should also consider whether in future it should expressly confer upon the Company an undoubted power to grant perpetuities notwithstanding the limited duration of the Company's land rights or whether it should appoint some co-operating authority to join with the Company in its grants and bind the reversion so that all possible interests should be concerned in those transactions. Whichever plan is adopted, it will be necessary to separate the benefits rightly coming to the Company out of its limited interest from those that properly belong to the reversion.

And further, it should be ascertained and declared by the Home authorities what power to sell land (if any) the Company possesses and for what objects the proceeds of land sales are to be applied. It must be decided on the evidence of the documents, more especially of the "Lippert Concession" whether the Chartered Company is entitled to hold the proceeds of its land sales as commercial assets or as administrative responsibilities for which it is accountable under the Charter. When the administrative clauses of the Charter come up for review, it will of course have to be decided whether the Company's rights over the land are to any extent capable of being regarded as administrative liabilities. It will undoubtedly have to be decided whether under the correct construction of the "Lippert Concession" periodic income

out of land, such as rent, is to be treated and applied as the private property of the Company, and whether the proceeds of land sales are to be dealt with as public property. A final and binding declaration on these points is of the utmost importance. We do not think that the subject of the Company's land administration should be relegated to Law Courts for settlement. It should be dealt with by the Home Government as a part of the Company's general administration of the affairs of the territory when the Charter comes up for review, and treated as a matter of public importance and not as a subject of private concern.

And finally, annexation and the consequent acquisition of the land rights of the natives would make the Crown in a special way the protector of native interests. Of course, when we speak of annexation we are not suggesting the confiscation of native rights, in fact we think that annexation would more completely safeguard those rights. It would enable the Crown to approach the natives and effect a land settlement directly with them by some treaty or contractual arrangement that they would be parties to and that they would understand and that they would abide by. In this way residence in the country would be made safer for the settlers, who must see the dangers that lie ahead owing to the rapid increase of the native population under settled European government and the gradual diminution of land areas available for native occupation, by reason of the appropriation thereof in the course of the white settlement of the country. The establishment of a satisfactory *modus vivendi* between white and black depends upon a just settlement of the claims of the natives, and the Crown as the disinterested patron of both parties could effect such a settlement as would ensure peace and security.

APPENDIX A.

"THE RUDD CONCESSION."

KNOW ALL MEN BY THESE PRESENTS THAT WHEREAS CHARLES DUNELL RUDD, of Kimberley, ROCHFORD MAGUIRE, of London, and FRANCIS ROBERT THOMPSON, of Kimberley, hereinafter called the grantees, have covenanted and agreed, and do hereby covenant and agree to pay to me, my heirs and successors the sum of one hundred pounds sterling British currency, on the first day of every lunar month; and, further, to deliver at my Royal Kraal one thousand Martini-Henry breech-loading rifles, together with one hundred thousand rounds of suitable ball cartridge, five hundred of the said rifles and fifty thousand of the said cartridges to be ordered from England forthwith and delivered with reasonable despatch, and the remainder of the said rifles and cartridges to be delivered as soon as the said grantees shall have commenced to work mining machinery within my territory; and, further, to deliver on the Zambesi River a steamboat with guns suitable for defensive purposes upon the said river, or, in lieu of the said steamboat, should I so elect, to pay me the sum of five hundred pounds sterling, British currency. On the execution of these presents, I, Lo Bengula, King of Matabeleland, Mashonaland, and other adjoining territories, in the exercise of my sovereign powers, and in the presence and with the consent of my Council of Indunas, do hereby grant and assign unto the said grantees, their heirs, representatives, and assigns, jointly and severally, the complete and exclusive charge over all metals and minerals, situated and contained in my kingdom, principalities and dominions, together with full power to do all things that they may deem necessary to win and procure the same, and to hold, collect and enjoy the profits and revenues, if any, derivable from the said metals and minerals, subject to the aforesaid payment. And WHEREAS I have been much molested of late by divers persons seeking and desiring to obtain grants and concessions of land and mining rights in my territories, I do hereby authorise the said grantees, their heirs, representatives and assigns to take all necessary and lawful steps to exclude from my kingdoms, principalities and dominions, all persons seeking land, metals, minerals or mining rights therein, and I do hereby undertake to render them such needful assistance as they may from time to time require for the exclusion of such persons, and to grant no concessions of land or mining rights

from and after this date without their consent and concurrence; PROVIDED THAT if at any time the said monthly payment of one hundred pounds shall be in arrear for a period of three months, then this grant shall cease and determine from the date of the last made payment, and, further, provided that nothing contained in these presents shall extend to or affect a grant made by me of certain mining rights in a portion of my territory south of the Ramakoban River, which grant is commonly known as the Tati Concession.

THIS GIVEN under my hand this thirtieth day of October, in the year of Our Lord eighteen hundred and eighty eight at my Royal Kraal.

(Signed) LO BENGULA, his X mark.

WITNESSESS.

(Signed) CHAS. D. HELM,
J. F. DREYER.

(Signed) C. D. RUDD,
ROCHFORD MAGUIRE,
F. R. THOMPSON.

Copy of endorsement on the original Agreement.

I hereby certify that the accompanying document has been fully interpreted and explained by me to the Chief Lo Bengula and his full Council of Indunas and that all the constitutional usages of the Matabele nation had been compiled with prior to his executing the same.

DATED at the Umgusa River, this 30th day of October, 1888.

(Signed) CHAS. D. HELM.

APPENDIX B.

THE LIPPERT CONCESSION.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, LO BENGULA, King of the Amandabele nation and of the Makalaka, Mashona, and surrounding territories, send greeting.

WHEREAS I have granted a concession in respect to mineral rights, and the rights incidental to mining only; AND WHEREAS my absolute power as paramount King to allow persons to occupy land in my kingdom, and to levy and collect taxes thereon, has been successfully established; AND WHEREAS, seeing that large numbers of white people are coming into my territories, and it is desirable that I should assign land to them; AND WHEREAS it is desirable that I should once for all appoint some person to act for me in these respects.

Now, THEREFORE, and in consideration of the payment of one thousand pounds (£1,000) having been made to me to-day, I do hereby grant to EDWARD AMANDUS LIPPERT, and to his heirs, executors, assigns and substitutes, absolutely, subject only to the annual rent of £500 being paid to me or to my successors in office, in quarterly instalments, in lieu of rates, rents and taxes, the following rights and privileges, namely:—

The sole and exclusive right, power and privilege for the full term of one hundred (100) years to lay out, grant or lease for such period or periods as he may think fit, farms, townships, building plots and grazing areas; to impose and levy rents, licenses and taxes thereon, and to get in, collect and receive the same for his own benefit; to give and grant certificates in my name for the occupation of any farms, townships, building plots and grazing areas; to commerce and prosecute and also defend in any competent court in Africa or elsewhere either in my name or in his own name, all such actions, suits and other proceedings as he may deem necessary for establishing, maintaining or defending the said rights, powers and privileges hereby conferred: PROVIDED ALWAYS THAT the said rights and privileges shall only extend and apply to all such territories as are now, or may hereafter be, occupied by or be under the sphere of operations of the British South Africa Company, their successors, or any person or persons holding from or under them, and PROVIDED THAT from the rights granted by these presents are excluded only the

grazing of such cattle, the enclosing of such land, and the erection of such buildings and machinery as are strictly required for the exercise of the mineral rights now held by the British South Africa Company under the said Concession.

The powers granted to E. Ramsay Renny-Tailyour, under date 22nd April, 1891, are hereby withdrawn and cancelled in so far as they are in conflict with these presents.

Given under my seal at Umvutcha, this 17th day of November, 1891.

Elephant Seal.
LO BENGULA.

WITNESSES :

(Signed) E. R. RENNY-TAILYOUR.

JAMES RILEY.

JAMES FAIRBAIRN.

X JAMES UMKISA'S CROSS.

(Signed) ED. A. LIPPERT.

I hereby certify that the above document has been fully interpreted and explained to the King, Lo Bengula, and to his indunas, according to the established usages of the nation.

(Signed) W. J. TANTON,
Interpreter.

C. M. ACUTT,
Interpreter.

There were present at the discussion of the above grant, besides the King, Lo Bengula, Umhlaba (the Regent), Umlagela, Gambo Umjana, Lutulo, all indunas; and of Europeans, Mr. Moffat, Tanton (interpreter), Ed. Lippert, E. R. Renny-Tailyour, James Riley, C. M. Acutt (interpreter) and James Umkisa (servant).

(Signed) ED. LIPPERT.

I certify that this document is a full and exact expression of the wishes of the Chief, Lo Bengula, and his principal indunas, and that I sign this in accordance with the wish of the Chief.

(Signed) J. S. MOFFAT,
Assistant Commissioner.

Extract from the official letter conveying to the British South Africa Company Lord Knutsford's approval of the "Lippert Concession" and its transfer to the Company.

"Downing Street, March 5, 1892.

"I am to state, for the information of the British South Africa Company, that Lord Knutsford approves the concession in question and its transfer to the Company, subject to the terms of the Company's Charter, and on the express condition and reservation that the Company do not assign the concession or transfer any share in the profits arising out of it, either to any person or body, politic or corporate, without the previous knowledge and sanction of the Secretary of State. His Lordship's formal and conditional approval is written upon the deed of transfer itself."

PHILPOTT & COLLINS,
BULAWAYO.

