DEUXIÈME PARTIE

DISCOURS PRONONCÉS DEVANT LA COUR

PART II.

SPEECHES MADE IN COURT.

1.

SPEECH BY SIR DOUGLAS HOGG

(representing the British Government)

AT THE PUBLIC SITTINGS OF SEPTEMBER 8th, 1927[1].

May it please the Court; this is the fourth time upon which I have had the honour to represent my country before this supreme Tribunal. It is the first time that it has fallen to my lot personally to raise a question as to the jurisdiction of the Court. I am conscious that even in the most eminent tribunal there must be an inclination so to construe the powers of the Court as to render its jurisdiction as extensive as possible. I am familiar with the maxim *boni judicis est ampliare jurisdictionem*. Nevertheless, I am confident that the English Case is right in saying that in raising our present objection we are supporting the prestige and the authority of the Court. Nothing can be better calculated to render nations unwilling to enter into agreements submitting their cases to the decision of the Court than a consciousness that those agreements are likely to be construed in such a way as to embrace questions which were never intended when the agreement was signed. Few things can be worse for the dignity of the Court than that it should find itself involved in trying a multitude of causes which are, in effect, claims by private persons such as are dealt with in the ordinary municipal courts but which are diverted to this tribunal because it happens that the respondent is a sovereign State and that the claimant is a subject of some other Power. I make this preliminary observation in order to vindicate myself from any implication of lack of the respect which I unfeignedly feel for this Court and because of the somewhat sarcastic allusions in the Greek Reply to our anxiety for its prestige and authority. But in truth, the question which the Court has to determine is purely a question of law and not one of expediency or of dignity, and I know full well that it will be decided as a question of law by the judges before whom I have the honour this day to appear.

The disputes arising out of the concessions claimed by M. Mavrommatis have been the subject of the Judgments of this Court, No. 2 and No. 5, in which the majority of the Court, as constituted to-day, have taken part. I shall

[1] Documents quoted in this speech:
Greek Case; see Part III, No. 2, pp. 109-175 of this volume.
Annexes to the Greek Case; see Part III, No. 2 *a*, pp. 176-450.
British Preliminary Objection; see Part III, No. 4, pp. 451-468.

venture to assume that the Court is familiar with the facts leading up to these judgments, and if I refer to one or two outstanding facts and dates, it is because, in my submission, the principles enunciated in these judgments go a very long way to decide the present dispute in my favour, if, indeed, they are not conclusive of the question when properly understood. With regard to the facts, after the date of the last judgment, I am prepared, for the purpose of my present argument, but only for that purpose, to accept the accuracy of the documents annexed to the Greek Case and to assume that these documents are a complete record of the relevant facts. If my present contentions were overruled and it were necessary to try the merits of the dispute, these assumptions necessarily would disappear. It is obvious, for instance, that there must be a large mass of documents in existence relating to the transactions between Lord Gisborough and his Agents and M. Mavrommatis and his Agents, and that these might well be of vital importance in regard to any claim put forward for damages. But they do not seem to me to be relevant at the present stage. If I do not make the same admissions with regard to the allegations in the Greek Case and in the Greek Reply as to oral declarations and undertakings, it is because, in the first place, many of these are inconsistent with the documents themselves and, in the second place, because the documents mainly in issue have, by their express terms, to be interpreted and construed according to the principles of English law, and according to these principles it is elementary to say that oral declarations by the Parties as to what they meant or intended cannot be received in evidence. If the Court should hold me wrong in these assumptions, it might be necessary to obtain oral testimony to contradict some of the allegations; but for the present, at any rate, I propose to submit my argument on the basis which I have outlined.

The Court will remember that M. Mavrommatis' original case was based upon two concessions, one in regard to electricity and the other in regard to drinking-water, for the town of Jerusalem, both dated January 27th, 1914, and two concessions, one for electricity and the other for water, for the town of Jaffa, dated January 28th, 1916. The Court will also recall that in the course of the previous proceedings it appeared that the High Commissioner for Palestine, on September 12th, 1921, had granted a concession to a Mr. Rutenberg for the supply of electricity and irrigation water to the district of Jaffa and that this concession allowed Mr. Rutenberg to have the use of the El-Audja waters for the purposes of the concession, and that on September 21st, 1921, the High Commissioner had made an agreement with Mr. Rutenberg by

which the Commissioner undertook to grant to Mr. Rutenberg a concession for the use of the Jordan and Yarmouk rivers for the purpose of the supply of electricity to Palestine and Trans-Jordania as soon as certain preliminary points had been agreed between the Parties. This latter agreement contained a clause, No. 29, by which the High Commissioner undertook, at the request of Mr. Rutenberg, to expropriate any conflicting concessions upon payment of fair compensation. The previous complaint of the Greek Government was that the British Government, by reason of their general conduct with regard to M. Mavrommatis and, in particular, by this agreement and this concession, had been guilty of a breach of those international obligations subject to which, under the terms of the Mandate for Palestine, Article 11, they were alone entitled to provide for the public ownership or control of the natural resources of the country; that the result of this breach had been to render the execution of the concessions of M. Mavrommatis impossible, and therefore, that the British Government must pay damages to M. Mavrommatis. To this claim the British Government raised a preliminary objection, that the matter was not within the jurisdiction of the Court, and the first judgment of the Court with regard to M. Mavrommatis' concessions, Judgment No. 2, was a judgment in which it decided upon this preliminary objection, that the objection was well-founded so far as it related to the Jaffa concessions but that with regard to the Jerusalem concessions, having regard to the terms of the Protocol of Lausanne, M. Mavrommatis had rights which the Mandatory was bound to observe in making use of the powers of public control conferred upon it by Article 11 of the Mandate and that an allegation of failure to observe that obligation fell within Article 26 of the Mandate and consequently was within the jurisdiction of the Court.

The second hearing before the Court took place on the merits of this second claim when the Court held that Clause 29 of the Agreement of September 21st, 1921, was inconsistent with the rights of M. Mavrommatis in regard to his Jerusalem concession and therefore that in making that Agreement under the powers conferred by Article 11, the Mandatory had committed a breach of the international obligations referred to in the article. But the judgment went on to affirm that no loss had been sustained by M. Mavrommatis by reason of this breach and that therefore no damages could be awarded to him.

At this second hearing there was also submitted to the Court, not by virtue of any jurisdiction conferred under Article 26 of the Mandate, but by special agreement between the British and the Greek Governments, a further question as

to whether M. Mavrommatis' Jerusalem concession fell under Article 4 or under Article 6 of the XIIth Protocol of the Treaty of Lausanne.

This question the Court answered by deciding that it fell within Article 4. I shall have to call attention presently to some of the passages of these two judgments in order to elucidate the principles which they lay down; and I shall have also again to emphasize the importance of remembering that in the second judgment there were two points submitted, one arising under the Mandate and the other submitted by voluntary agreement of the Parties. For the moment I proceed with a summary of the events after the second judgment as set out in the documents annexed to the Greek Case. After the second judgment had been delivered on March 26th, 1925, and had decided that Article 4 of the Lausanne Protocol was the relevant article, it became necessary by reason of the terms of the Protocol to negotiate for the readaptation of the Jerusalem Concessions in order to put them into conformity with the new economic conditions. M. Mavrommatis appointed Sir Hamar Greenwood, a well-known British politician, as his expert, and the British Government appointed Mr. Lees, the Director of Public Works under the Palestine Government, as their expert, and these two experts reached an agreement in December, 1925. This agreement was carried into effect on February 25th, 1926, by two written agreements made between the High Commissioner and M. Mavrommatis. By these two agreements, it is very important to remember, new concessions were granted by the High Commissioner to M. Mavrommatis, one for electricity and the other for water, and in consideration of these grants M. Mavrommatis irrevocably abandoned his old concessions of January 27th, 1914, which he had held from the Turkish authorities. The new contracts provided for the formation of a company within one year to take over the concession and for the subscription and payment in cash within the same period of £100,000 in one case and £40,000 in the other, and that within seven months in one case and within eight months in the other, plans should be submitted by M. Mavrommatis for the purpose of executing the concessions, and the agreements provided that in these three matters time was to be of the essence of the contract. The agreement went on to provide that the High Commissioner should notify his approval or disapproval of the plans within three months after receipt; and in the event of his not approving, revised plans should be submitted within one month by M. Mavrommatis and should be approved or disapproved by the High Commissioner within a further period of one month. In these latter respects, time was not stated to be of the essence of the contract, but the agreements

provided that if the revised plans were not approved, they should be submitted at the request of M. Mavrommatis to an independent expert whose decision should be binding on both Parties. The agreements further contained an express provision stipulating that in each case they were to be interpreted and construed according to the laws of England.

Before these concessions had actually been granted but after their terms had been agreed by the experts, on January 22nd, 1926, M. Mavrommatis had executed an agreement transferring to Lord Gisborough all his rights and benefits under the concession. Lord Gisborough on the same day made agreements with firms of consulting engineers for the preparation of the necessary plans. It is stated in the Greek Case that Mr. Lees, the British Government's expert, had agreed that the waters of the El-Audja should be used for the purpose of the water concession of February 25th, 1926. That allegation is specifically denied by the British Government. In his original concession of January, 1914 (which will be found in Series C., No. 5, of the Publications of the Court, set out at page 209), M. Mavrommatis was required by Article 5, which appears on pages 210 and 211, to submit two alternative projects, one making use of the springs of the Arroub situated to the south of Jerusalem, and the other using those of the Ain-Fara and Ain-Favouar situated to the north of Jerusalem. It was further provided, as is pointed out in the Greek Reply, that M. Mavrommatis might submit different projects altogether if he so desired; but it was stipulated, as is not pointed out in the Greek Reply, that if there were any differences between the Parties as to which plans should be adopted, the Turkish Minister of Public Works should have an absolute right of decision. In fact, the plans submitted by M. Mavrommatis provided only for the use of the springs of the Arroub, and that spring alone was referred to in the previous proceedings. Under the Agreement of February, 1926, which is to be found in the Annex to the Greek Case at page 83, the provision is, under Clause 6, on page 85, that the source (or sources) of the water is to be subject to the approval of the High Commissioner and no specific source is stipulated. It is true that El-Audja was one of the sources which were considered by the experts. It is equally true that other sources were considered and it appears from the report of Lord Gisborough's own engineers, which is printed in the Greek Annex at pages 131 and 134, that they had considered the use of other sources altogether from El-Audja, and that they had come to the conclusion, not as stated in the Greek Case that no other source was possible, but that on the whole the El-Audja source was to be preferred from an engineering point of view

since the capital cost of the works in that event was about the same as if the waters on the Jordan side were used; and El-Audja had the advantage that there were other populations along the line of supply which might perhaps be induced to take water as well as Jerusalem.

These reports were made and framed after the Agreements of February, 1926, and show quite plainly that at that date there had been no source fixed for the execution of the water contract. The Greek Reply indeed alleges that the price of 7 piastres, which is provisionally fixed by Clause 19 of the agreement, shows that El-Audja was the contemplated source, because, says the Greek Reply, that price is based on the estimated cost of bringing the water from El-Audja. But it will be noticed from the reports themselves, about the middle of page 135, that the experts reported that the capital cost would be the same whether El-Audja were selected or whether the most suitable source in the Jordan valley were selected; and further Clause 19 itself contains express stipulations for varying the price to be charged for the water if the capital cost were something different from that which was anticipated. The document relied on by the Greek Government as evidence that an agreement as to the source was made is a letter dated March 7th, 1927, more than a year afterwards, which appears in *Annex No. 128, on page 236 of the Greek Government documents* and which is verified by an affidavit of Mr. Raffety, the writer of it. But if the Court will be good enough to look at that document on page 236, which takes the form of a letter from Messrs. Rofe & Son, the consulting engineers, addressed to M. Mavrommatis, the Court will see that that document not only does not record any such agreement but is totally inconsistent with the fact of any such agreement having been reached because it records not that Mr. Lees had agreed to the use of the waters of El-Audja but merely that Mr. Lees had expressed his own opinion that provided that the British Government were satisfied that the El-Audja was the proper source to be selected, other interests in the springs would not be allowed to stand in the way,—I am quoting the concluding paragraph in the letter.

The Court will therefore see that that letter conclusively shows that Mr. Lees cannot have agreed that the El-Audja spring was to be used, since it records that he did not make an agreement but only that he expressed an opinion that if the Government thought El-Audja was the right source, it would not allow other interests to stand in the way. But in truth it is immaterial to discuss this question of an alleged agreement because by the express language of the Agreement of February 25th, 1926 (which is the document which has to be construed), not only is no source stipulated but the question of the source to be used is expressly left to the approval

of the High Commissioner, and the document therefore is inconsistent with the agreement which is suggested.

The next event in order of date is the grant on March 5th, 1926, of the Jordan concession to Mr. Rutenberg, in accordance with the obligations undertaken by the High Commissioner by the Agreement of September 21st, 1921. I merely mention this at this point in order to preserve the chronological sequence of events; I shall have to deal with the effect of the Rutenberg concessions later on. On April 19th, 1926, Lord Gisborough despatched the plans and specifications for both concessions to the High Commissioner who acknowledged their receipt on May 5th (Annex No. 39 *bis*, at the bottom of page 149). On May 18th Lord Gisborough's solicitors sent to the Colonial Office a copy of the Agreement of January 22nd (Annex No. 42, page 151) and on June 17th (Annex No. 45, page 153), the Colonial Office, in acknowledging the receipt of that agreement, guarded itself against any recognition of the assignment or any waiver of the terms of the concession. Before the receipt of this agreement the Colonial Office had been told that M. Mavrommatis had entered into arrangements with Lord Gisborough, as trustee for the proposed company, but the Colonial Office had never been informed of the terms of the agreement nor had it been informed that that agreement took the form of an out-and-out assignment by M. Mavrommatis to Lord Gisborough. Such a form of agreement is certainly not the normal way of carrying out a conditional transfer to a proposed company, as may easily be ascertained by looking at any book of precedents for the purpose. By the beginning of July, 1926, the contractors employed by Lord Gisborough, Sir John Jackson, Ltd. and Messrs. Rofe & Son, the engineers, had become aware that the water concession was quite useless unless there was also granted a drainage concession which would involve the construction of works at a cost of anything from £180,000 up to, I think, half a million, and at the same time it appears from the correspondence that Mr. Rutenberg was making a claim that the use of the El-Audja waters for the purpose of the water concession was inconsistent with his Jaffa concession. These facts are recorded in the Annexes, Nos. 46, 48 and 49, which are to be found on pages 153 and 155. For the moment it is enough, perhaps, for me to mention in passing that it is common ground between the Parties that Mr. Rutenberg had no justification under his concession for his claim to object to the use of El-Audja. The Greek Government Case is quite correct in stating, as it does in paragraphs 22 and 72, and reiterating, as it does at the end of paragraph 9 of its Reply, that this claim of Mr. Rutenberg was one which was not justified by the terms of his

concession, and that view has been consistently held by M. Mavrommatis and his advisers, as appears from his statement in his letter of July 9th, 1926 (Annex No. 49, page 156, towards the end). I only mention in passing that the Court will notice that the claim was put forward under and by virtue of the Jaffa concession of September 12th, 1921, and had nothing whatever to do with the Jordan concession granted to Mr. Rutenberg on March 5th, 1926. As a result of these difficulties, correspondence and interviews took place which will be found set out in the annexes to which I have just referred. On July 18th, 1926 (Annex No. 50, page 157), M. Mavrommatis appears to have informed Lord Gisborough that the Agreement made on January 22nd, 1926, had lapsed on July 10th, and he demanded the delivery up of all the plans, estimates, specifications and reports relating to his concessions. I am not discussing the merits of the case, but it is a little difficult to understand how, after that date, it can be contended that the plans were held by the High Commissioner on behalf of M. Mavrommatis or with his consent. The circumstances which led up to this demand by M. Mavrommatis are not relevant and are left by the Greek Case in complete obscurity. I would only here point out that it is impossible to consider, as M. Mavrommatis seeks to suggest, that this letter of July 18th was written in consequence of the disapproval by the Colonial Office of the terms of his Agreement of January 22nd, since that disapproval was not communicated until July 21st, three days afterwards, by Annex No. 52, on page 158. I do not develop that point further, because it does not seem to me to have any bearing on the question of jurisdiction, as apart from the question of merits. During July and August negotiations were taking place between Sir John Jackson, Ltd., the contractors employed by Lord Gisborough, and M. Mavrommatis and the Colonial Office with regard to the proposal to grant a new concession to include the drainage and also with regard to the disputes which had arisen between M. Mavrommatis and the contractors and with regard to the objections which had been raised to the use of the El-Audja source. These negotiations and disputes extend from Annex No. 52, on page 158, down to Annex No. 67, on page 175, and in the course of them M. Mavrommatis twice gave formal notice to Lord Gisborough (Annex No. 63, page 173, and Annexes Nos. 66 and 67, page 175), repeating his denunciation of the Agreement of January 22nd, 1926, and insisting on his claim to have the plans delivered up to himself. No agreement either with Mr. Rutenberg or with regard to the drainage system was reached, and on September 3rd, 1926, in consequence of M. Mavrommatis' demands, Lord Gisborough's solicitors telegraphed to the High

Commissioner (Annex No. 69, at the top of page 178) requesting him either to return the plans to themselves or else, alternatively, to treat them as deposited on behalf of M. Mavrommatis, and by Annex No. 70, on the same date and on the same page, they informed M. Mavrommatis of their action. On receipt of this intimation, on September 4th, the following day, M. Mavrommatis telegraphed to the High Commissioner requesting him to retain the plans as deposited on his, M. Mavrommatis' behalf, and to advise the Colonial Office to that effect. The telegram itself is not exhibited to the Greek Case, but the confirmation of the telegram in the letter of September 6th is exhibited on page 179. On September 21st (Annex No. 76, page 181) the Colonial Office officially advised M. Mavrommatis that, in accordance with his request of September 4th, the High Commissioner had accepted the plans of the works to be built under his concessions as deposited by him, with effect from September 5th, that is to say, from the date of the receipt of the telegram of September 4th. On September 23rd (Annex No. 79, page 182) the Colonial Office officially informed M. Mavrommatis that the plans for the electricity concession were approved subject to certain named conditions, and by the same letter M. Mavrommatis was asked to acknowledge receipt and to signify his acceptance of the conditions, and he was informed that a further letter regarding the plans for the water concession would be addressed to him in due course. On the following day, September 24th (Annex No. 81, page 184), M. Mavrommatis wrote to the Colonial Office acknowledging the two letters of September 21st and 23rd and advising them that he had indicated to his consulting engineers the alterations suggested in the electricity plans and that he would write again on receiving their report. In pursuance of this promise, on October 7th (Annex No. 89, page 191), M. Mavrommatis wrote to the Colonial Office accepting the alterations in the electricity plans. By the same letter, M. Mavrommatis made application for an extension of time for the formation of the company, both with regard to the electricity and to the water concessions, and he appealed to the Colonial Office to approve the plans for the water concession without delay. On October 10th, page 194, M. Mavrommatis wrote a long letter making a series of claims with regard to his Jaffa concessions which have already been ruled to be outside the jurisdiction of the Court. On October 25th (Annex No. 102, page 201) the Colonial Office refused an extension of the time-limits for the electricity concession. On November 26th (Annex No. 109, page 204) M. Mavrommatis wrote a long letter to the Colonial Office complaining of delay in approving the water plans and saying that it was impossible for him to arrange for the formation of the company

in pursuance of his agreement unless extensions of time were granted. On December 1st (Annex No. 112, page 207) M. Mavrommatis wrote a letter to the Colonial Office claiming that the plans for the water concession should have been approved before August 5th—three months from May 5th—and alleging that in consequence of the failure to pass the water plans it had become impossible to finance the undertaking and that he claimed damages. On December 2nd (Annex No. 113, page 208) the Colonial Office officially intimated to M. Mavrommatis that the High Commissioner had approved the plans for the water concession subject to one or two minor alterations set out in the letter. In the Greek Case it is suggested that this letter of December 2nd was in consequence of M. Mavrommatis' letter of the previous day. But this, of course, is a complete misconception; Government departments, unfortunately, do not work with quite such celerity. In fact the draft of the letter of December 2nd had been prepared some days earlier on receipt from the High Commissioner of the intimation of his approval of the plans and the acknowledgment of M. Mavrommatis' letter of December 1st was in fact made on December 6th (Annex No. 114, page 209) in which M. Mavrommatis was asked whether the Colonial Office was to understand from the letter of December 1st that the request for an extension of time was withdrawn. It does not appear relevant to discuss the correspondence after this date because M. Mavrommatis' claim is based upon his repudiation of his obligations by his letter of December 1st, on page 207. But just in order to complete the story, it may be stated that, on January 19th (Annex No. 120, page 219) and again on April 26th (Annex No. 133, page 247) the Colonial Office invited M. Mavrommatis to state definitely whether or not he repudiated his obligations under the two concessions of February 25th, 1926, and offered extensions of time for the fulfilment of these concessions if M. Mavrommatis intended to carry them into execution. But M. Mavrommatis refused altogether to consider these extensions and declined to consider the fulfilment of his contract, except on the terms that the Government of Palestine should guarantee the money to be raised by the proposed company. That is to be found in Annexes Nos. 138 and 139, on pages 252 to 254.

I have tried to summarize the facts as concisely and, I hope, as uncontroversially as possible. From the summary, I think it will be manifest, as indeed it appears from the Greek Case, that the complaint made by that Government to which we are now raising our preliminary objection, is that there has been failure by the High Commissioner for Palestine to fulfil the obligations imposed upon him by the concessions of February 25th, 1926, because, according to the Greek Case, the plans

for each concession were submitted on May 5th, and were not approved, in the case of the electricity concession, until September 23rd and, in the case of the water concession, until December 2nd. Whether or not these approvals were given within the period of time of three months stipulated by the concessions depends primarily upon the question whether the plans must be taken to have been validly and finally deposited by M. Mavrommatis when they were received from Lord Gisborough on May 5th, in which case the three months would end on August 5th, or whether the deposit must be treated as having taken place on September 5th, when M. Mavrommatis requested the High Commissioner to treat them as deposited on his behalf, in which case the three months would lapse on December 5th, after the date of each approval. The question whether the approvals were given within the proper period of time, would, of course, further depend upon the secondary question, whether, even if M. Mavrommatis could originally have insisted upon treating the deposit as being made on May 5th, he can now be heard to say that the High Commissioner was in default, having regard to the express intimation made to him on September 21st, that the deposit was accepted as being made on September 5th, and his acceptance of that intimation, without demur, on September 24th, and so far as the electricity concession is concerned, there is a further difficulty in M. Mavrommatis' way that he now claims to treat the failure to approve the plans before August 5th as a breach of contract entitling him to repudiate this concession, although, when the plans were approved on September 23rd, with certain modifications, he expressly accepted this approval and these modifications by his letter of October 7th (Annex No. 89, page 191).

As I understand the Greek Government Case, they contend that the alleged failure of the High Commissioner to approve the plans within three months from May 5th entitles M. Mavrommatis to treat each of the concessions of February 25th as non-existent and restores in their full validity the concessions of January 27th, 1914, which by those agreements M. Mavrommatis irrevocably abandoned. It is then said that the effect is that the concessions of January, 1914, remain unadapted and therefore that the provisions of Articles 4 and 5 of the XIIth Protocol of the Treaty of Lausanne which provided for their readaptation have not been carried out. It is argued that this is a failure to obey the judgment of the Court which declared that those concessions were within Articles 4 and 5 of the Protocol, and that therefore it is a failure to observe the international obligations accepted by the British Government, that this constitutes a breach of Article 11 of the Mandate and therefore that it is submitted to the jurisdiction of the Court

by virtue of Article 26 of the Mandate. I hope I have correctly summarized the chain of reasoning in the Greek Case: I hope also that I shall not have very great difficulty in satisfying the Court that this chain of reasoning breaks down at every single link; and unless it succeeds at every link the preliminary objection must of course prevail.

In the first place it is not true to say that if the High Commissioner failed to signify his approval or disapproval of the plans within the three months stipulated by the Agreements of February 25th, 1926, M. Mavrommatis was at once entitled to treat these agreements as non-existent. By their express terms each of these agreements is to be construed and interpreted in accordance with English law and I think it would be difficult to find any English lawyer of repute who would express such an opinion.

The Greek Reply in paragraph 11 contends that the act of giving up the old concessions was conditional upon the grant of new ones which were themselves dependent on the fulfilment of various conditions; that the lack of fulfilment of those conditions prevented the grant of the new concessions becoming effective and that the old concessions therefore continued because the consideration upon which their abandonment was based did not materialize. In truth the new concessions were granted out and out by Article 4 of the Agreements of February 25th—the language is the same in each concession. On page 84, for instance, the wording is: "In consideration of the said renunciation, the High Commissioner hereby grants to the concessionnaire the concessions as hereinafter described." It is true that the concessions so granted contained certain conditions and that if M. Mavrommatis failed to comply with those conditions, the High Commissioner had a right to rescind the concessions. But in fact the existence of the right to rescind the concessions is in itself proof that the concessions had already been validly granted, because it is impossible, at any rate in English law, to rescind something which has never been done; and the fact that the new concessions might in certain events be rescinded does not in any way involve that until rescinded they are ineffective and still less that when they are rescinded the consideration constituted by their grant has wholly failed. It might with equal justice be argued, for example, that if an insurance policy is forfeitable upon failure to comply with certain conditions, the effect of the forfeiture would be to entitle the assured to recover the premiums which he had paid, which I venture to submit is not only an accurate analogy but a *reductio ad absurdum* of the argument put forward.

The Greek Government Reply, paragraph 12, refers to the distinction in English law between a condition and a warranty

and it suggests that it was a condition of the 1926 Agreement that there should be a grant of an effective concession and that there was a warranty in the agreements that that obligation should be complied with within a certain time. That is a complete misapprehension of the effect of the agreements. There was no condition as to the grant of an effective concession. The agreements themselves constituted an immediate and an effective grant of the concession. There was therefore no room for any such condition nor for any such warranty as the Greek Reply suggests. The truth is that there was an absolute grant of a concession, which concession was in itself subject to the fulfilment by the concessionnaire of certain conditions, failure to observe which involved a right in the High Commissioner to rescind the concessions already granted; and there was no doubt a warranty by the High Commissioner that he would approve or disapprove plans within a certain time, failure to observe which warranty would no doubt entitle M. Mavrommatis to damages indeed, but not to treat the agreements or his obligations under them as non-existent. The Greek Government Reply comments, in paragraph 11, upon the fact that the British Government had deemed it inadvisable to make mention of the point raised in paragraph 58 of the Greek Government Case as to the intentions expressed by the Parties at the time of execution of this agreement. Unfortunately, in the copy of the Greek Case supplied to the British Government, there is no paragraph 58. The paragraphs go directly from 56 to 59, and it is therefore perfectly true that we have not dealt with a paragraph which, as far as we know, does not exist. But if there be such a paragraph, and if it does purport to state the intention of the Parties, as expressed at the time of the execution of the contract, then it is plainly inadmissible by the ordinary rules of English law which make the interpretation of a written document dependent upon the language contained in the document and excludes contemporary statements by the Parties as to what they meant to say or do. The rule is elementary. It is well stated in the standard work cited by the Greek Government, Sir William Anson's *Principles of the Law of Contract*, where we find on page 320 of the 16th edition—it is on page 317 of the 14th edition which the Greek Government cited—the principle laid down in one sentence: "When we come to extrinsic evidence as affecting the terms of a contract, the admissibility of such evidence is narrowed to a small compass, for according to the general law of England the written record of a contract must not be varied or added to by verbal evidence of what was the intention of the Parties"; and the passage appearing in the text there is in fact a citation from a well-known judgment of a very great English master of the common law, Lord Blackburn,

in the case of *Burges* v. *Wickham*, Volume III, Best & Smith, page 396. In another standard book, Leake's *Law of Contracts*, 7th edition, page 123, we find the same principle set out. "It is a general rule of law that contracts in writing cannot be varied by extrinsic evidence of the intention of the Parties. The rule applies equally, whether the Parties have agreed that the terms expressed in the writing shall represent their contract, or whether their contract be reduced to writing under the requirements of a statute; and whether it be contained in several writings or in a single formal deed of writing; and whether it be a contract under seal or a simple contract." According to English law, in the construction of a written document the intention of the Parties is to be deduced from the language of the document itself and not from extrinsic evidence as to what the Parties declare they intended to do by their written contract.

The Greek Reply suggests that the provisions as to the time within which the High Commissioner shall notify his approval or disapproval of the plans are provisions in which time is of the essence of the contract; but in my submission it is clear from the terms of the agreements themselves that according to English law those stipulations as to time are not stipulations in which time is of the essence of the contract. Ever since the Judicature Act of 1873, Section 25, Sub-Section 7, the rule of equity has prevailed in English law on this question and the ordinary rule of equity is that time is not of the essence of the contract unless it is made to be so either expressly or by necessary implication. If the present contracts are scrutinized it will be found that a plain distinction is drawn between the times provided for the formation of the company, the subscription of its capital and the original deposit of plans and the other subsequent dates mentioned in Clause 4 of the contract. With regard to the first three it is stipulated expressly that in respect of all these conditions, time shall be deemed to be of the essence of the contract. No such stipulation appears with regard to the subsequent times named in the latter part of the clause and the irresistible inference to be drawn from this distinction must be that it is only with regard to the former conditions that time is regarded as essential. It is suggested in the Greek Case that the reason why there is no such provision with regard to the later periods named is because it was impossible to contemplate that the High Commissioner should commit a breach of contract. I can only say that I know no precedent for any such doctrine in the English law, and further I would point out that some of these later periods contain obligations imposed upon M. Mavrommatis, not upon the High Commissioner, and therefore that the suggested explanation does not cover the facts.

It is further contended both in the Greek Case and in the Reply that it must be patent that the times within which approval or disapproval of the plans must be notified and within which the subsequent revisions and so on must be dealt with must all be of the essence of the contract; since, say the Greek Government, it would plainly be impossible to form the company until after the plans had been approved, and the company has to be formed within twelve months, and those twelve months are stated to be of the essence of the contract. But again, this argument is inconsistent with the terms of the agreement itself. Under the water concession the plans have to be submitted within eight months from the date of the concession.

The High Commissioner then has three months within which to approve or disapprove. In the event of his disapproval M. Mavrommatis has one month for the submission of revised plans. If such revised plans are submitted, the High Commissioner has another month within which to approve or disapprove of the revised plans. If he does not approve the revised plans, an independent expert is to be selected to whom the question of the plans is to be submitted and whose decision is to be final. If the period of eight months, three months, one month and one month are added together, it will be found that a period of thirteen months is contemplated under the terms of the agreement before the question becomes ripe for submission to the independent expert. How long it may take for the expert to be selected and for him to give his decision, is not stipulated at all; but it is plain that before ever the dispute reaches the independent expert, the time within which the company has to be formed may have been exceeded by at least a month. In the case of the electricity concession, the plans have to be submitted within seven months instead of eight months and the other times are the same. So that in that concession twelve months may elapse in accordance with the terms of the agreement before any steps are taken to select the independent expert to whom the plans are to be submitted for decision and yet in that case too, not only has the company to be formed, but its capital has to have been subscribed within a definite period of twelve months and no more.

In view of those dates, it is, in my respectful submission, idle to suggest that the contracts provide that the formation of the company can only take place after the plans have been approved and that it is a necessary condition precedent to the formation of the company that such approval should have been given.

In the next place, even if M. Mavrommatis would have had the right to rescind the contract upon failure by the High Commissioner to approve the plans within three months, under

English law the admitted facts of this case preclude the exercise of any such right. The principle is well established that if time be made of the essence of the contract, that may be waived by conduct, and that if the time is once allowed to pass and the Parties go on negotiating for the carrying out of the contract, then time is no longer of the essence of the contract. In such circumstances, a Party is not indeed bound to wait an indefinite time. But having once gone on negotiating beyond the time originally fixed, he is unable to give immediate notice of abandonment; he must give reasonable notice of his intention to cancel the contract, if the other Party does not fulfil his obligation. I cite one passage which has since been quoted more than once, from a judgment of Sir Richard Malins in the case of *Webb* v. *Hughes* in *Law Reports*, 10, "Equity Cases", page 281, a case with regard to a contract of a sale of land. At page 286 the learned judge thus lays down the principle: "If time be made the essence of the contract, that may be waived by the conduct of the purchaser, and if the time is once allowed to pass and the Parties go on negotiating for conclusion of the purchase, then time is no longer of the essence of the contract. But on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinite time, and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may, in a reasonable manner, give notice to the vendor and fix a period at which the business is to be terminated. But having once gone on negotiating beyond the time fixed, he is bound not to give immediate notice of abandonment but must give a reasonable notice of his intention to give up his contract if a title is not shown." Applying this principle to the present case, so far as the electricity concession is concerned, the notice of approval, subject to modifications, was given by the High Commissioner on September 23rd and was accepted by M. Mavrommatis by his letters of September 24th and October 7th. It is quite impossible, therefore, for M. Mavrommatis now to claim that the contract was repudiated by the failure to approve these plans before the fifth of August. So far as the water concession is concerned, the letters which I have cited in my summary of the facts show that M. Mavrommatis went on negotiating with regard to the approval of the plans right up to December 1st, when he attempted to repudiate the contract, and that he never gave any notice fixing a time within which the plans must be approved or disapproved, or intimating his intention to cancel the contract if such approval were not given within that time. It follows that if the time within which the plans had to be approved or disapproved were ever of the essence of the contract, M. Mavrommatis would have lost

his right to rescind according to the settled principles of English law.

Further, even if M. Mavrommatis had a right to repudiate the contract and exercised it, in the circumstances of this case, there could not have been a *restitutio in integrum*, because on August 5th, and equally on December 1st, the time for readapting the 1914 concessions given by the articles of the Protocol of the Treaty of Lausanne had long passed by and the Parties could not ever be put back into the same position which they would have occupied if the contracts of February, 1926, had never been agreed. It is a well-settled principle that in any such case, the breach of any condition no longer gives the right to rescind, but only a claim for damages, and it is illustrated, among many other authorities, by the very case of *Wallis* v. *Pratt*, in 1910, 2 King's Bench Division, to which the Greek Government refers in its Reply, where the dissenting judgment of Lord Justice Fletcher Moulton was afterwards adopted and approved by the House of Lords in 1912, Appeal Cases.

But if M. Mavrommatis did have a right to repudiate the contracts of 1926, and if he did exercise that right, and if it was possible thereby to restore in their pristine validity the 1914 concessions which he had irrevocably abandoned nearly twelve months before, the result would be, not that the British Government had committed breaches of the agreements of 1926, since they would, on that hypothesis, no longer exist, nor that the British Government had committed a breach of Article 11 of the Mandate, since, as I shall demonstrate presently, that article is broken only when the international obligations therein referred to are disregarded by reason of the exercise of a power conferred by that article. The result would be that the British Government had failed to observe Articles 4 and 5 of the Protocol of the Treaty of Lausanne, since they would not have readapted the concession within the period limited by those articles. But this would be a breach of the Protocol and not of the Mandate, nor of the judgment. It is clear that the relevant paragraph of the judgment did not impose an obligation to readapt, by virtue of the judgment, but only decided, by the consent of the Parties, which article of the Protocol was applicable to the concessions in question. The failure to readapt would, under these circumstances, no doubt be a breach of the articles of the Treaty, but not a breach of the judgment which merely answers the specific question submitted to the Court. This is made abundantly clear by the language of the judgment itself, Judgment No. 5, when dealing with this point, where the Court says, at the bottom of page 27 and the top of page 28 :

"It is not by reason of the jurisdiction conferred on the Court under Article 26 of the Mandate, but in consequence of an agreement between the Parties resulting from the written proceedings, that the Court has jurisdiction to decide whether M. Mavrommatis' Jerusalem concessions fall to be dealt with under Articles 4 and 5 or Article 6 of the Protocol. The Court's jurisdiction, however, does not extend beyond giving a reply to this question. Only by virtue of a further agreement could other disputes relating to the application of the articles in question be dealt with by the Court unless, of course, such disputes resulted out of the grant of the Rutenberg concession and to this extent fell within the scope of the jurisdiction obtained, as indicated above, from Articles 26 and 11 of the Mandate."

[*Public sitting of September 8th, 1927, afternoon.*]

When the Court adjourned. I had just cited the passage on pages 27 and 28 of the Judgment No. 5 of the Court, showing that the jurisdiction of the Court did not extend to disputes arising with regard to the readaptation of the 1914 concession. I gather, however, that the Greek Government itself recognizes the accuracy of this juridical position. The Greek Government in paragraphs 4 and 5 of its Reply states specifically that it does not base its claim that this Court has jurisdiction upon any failure by the British Government to comply with the decision of the Court, but that the allegation of a lack of compliance is cited merely as an indication of the failure to carry out Article 11 of the Mandate, and not at all as a criterion of the competence of the Court. The Greek Reply goes on to say that while it maintains the position that the breach of a judgment given by virtue of powers conferred by a compulsory clause can be brought before the Court, it concedes that when the judgment is given by virtue of powers conferred by an *ad hoc* agreement between the Parties, this principle does not apply and that there is then no power in the Court to examine into the fulfilment of its judgment.

The British Government does not think it necessary in these circumstances to restate the arguments contained in its Preliminary Objection, because in the first place the alleged failure to comply with the judgment is relied on by the Greek Government only as evidence of a breach of Article 11 and not as in itself giving any jurisdiction, and in the second place because the alleged breach appears to be a failure to carry out obligations arising under those articles of the Protocol which the Court declares to be applicable, and that

declaration is made not by virtue of any compulsory jurisdiction, but by virtue of an express submission of that particular point for decision. In these circumstances the point as to the competence of the Court to compel compliance with its judgments when given under a general submission, important as that point undoubtedly is, seems not to arise for decision in the present case; and on that ground, whilst not in any way receding from the position taken up in our Preliminary Objection, I do not propose either to elaborate or recapitulate the arguments there submitted upon that particular point.

There is just one other matter raised by the Greek Government Reply as to which I must say a word in explanation. In paragraph 6 of the Reply it is stated that at the previous hearing upon the merits, the Court and the Parties had contemplated the possibility of the present situation arising. Even had that been the case, it seems a little difficult to understand how it could affect the present discussion, since the argument at that time was not upon the jurisdiction of the Court but on the merits of the particular dispute. But, in truth, on a reference to the record of the proceedings it is, I think, plain that the Greek Government fails accurately to reproduce the position which was being taken up. The reference to my argument is on page 139 of Series C., No. 7, and I think that a reference to the passage cited in the Reply will show that the point which I was there discussing was the claim of M. Mavrommatis to have an immediate assessment of damages, and the point which I was submitting was that it was impossible for the Court to assess damages as M. Mavrommatis was claiming that it should do, since the damages would have to be for breaches of the readapted concessions and no one knew what the terms of the readapted concessions, upon which of course the quantum of damages must necessarily depend, might ultimately be; and I went on to say on page 139 in the passage quoted that if the time fixed for readaptation had arrived and if there had been a failure to carry out the steps stipulated in the Protocol, it was possible that the Greek Government might perhaps not unreasonably go to the Court and ask the Court to say that it had still jurisdiction to intervene under Article 11 of the Mandate. And my speech went on: "I can at least understand that argument being put forward. The decision"—that is, the decision whether the argument could be entertained—"would depend whether or not in the view of the tribunal its general jurisdiction was, to use the language of the judgment, "excluded", or whether, in the language of the judgment equally, the general jurisdiction was suspended until the expiration of the times named in the article." I venture to

submit that it is hardly possible for any unbiassed person to read that argument which I have quoted textually as an admission that there was jurisdiction to intervene even in the events which were there being discussed, and which are not the events which have in fact occurred. It is equally significant to observe that M. Politis, who was then representing the Greek Government, in his answer on pages 179 and 180, clearly took the view that in such a case as I had suggested there would be no jurisdiction in the Court. A reference to pages 200 and 201 of my Reply seems merely to show that I there restated the position which I have taken up on page 139; and the passage which is referred to in the Greek Reply from the judgment of the Court as being a reply to the questions thus raised, to which I have already called attention on page 28 of the judgment, so far from being an assertion that the Court would have jurisdiction in the circumstances named, clearly implies and indeed decides that it would have no such jurisdiction unless it could be shown that the failure to readapt the concessions which was complained of was due to the exercise by the British Government of the powers of public control conferred by Article 11 by their grant to Mr. Rutenberg of a concession conflicting with that of M. Mavrommatis.

It is clear then from the express statement of the Greek Government that their allegation that this Court has jurisdiction is based upon Article 11 of the Mandate and nothing else. Fortunately for me the Court has already expressed its view as to the effect to be given to that article in its previous judgments. If the Court will be good enough to look first of all at Judgment No. 2, in which the question of jurisdiction is first discussed, it will see that the limits within which it was possible to bring a breach of international obligation within the terms of the Mandate are carefully defined. After quoting the terms of Article 11, on page 17, the Court goes on to say that the question to be solved is whether the dispute should be dealt with on the basis of that clause. On page 19 it reaches the conclusion that the Mavrommatis concessions in themselves are outside the scope of Article 11, but that the question before the Court is whether, by granting the Rutenberg concessions, the Palestine and British authorities have disregarded international obligations assumed by the Mandatory. It decides, on page 21, that the Rutenberg concession constitutes an application by the Administration of Palestine of the system of public control which is authorized by Article 11 and therefore may fall within the scope of that article. Having reached that conclusion, it points out, on page 23, that these powers must be exercised, by virtue of the express language of Article 11,

subject to any international obligation accepted by the Mandatory, and it decides, on page 24, that the international obligations there referred to are not, as the Greek Government contended, international obligations in general, but only those contracted which have some relation to the powers granted to the Palestine Administration under the same article.

Finally, on page 26, it states as its conclusion that since the Rutenberg concessions fell within the scope of Article 11, it is obvious that the Palestine Administration is, as regards these concessions, bound to respect obligations which Great Britain has accepted under the Lausanne Protocol. "If," says the Court, "the administration has, by granting the Rutenberg concessions, committed a breach of these obligations, there has been an infringement of the terms of Article 11 of the Mandate which may be made the subject of an action before the Court under Article 26." It appears, therefore, from the judgment itself, that it is not sufficient in order to invoke Article 26 to show that international obligations have been disregarded by the Mandatory or by the mandated Power. It is necessary to show that that disregard of international obligations has occurred in the course of the exercise of the powers of public ownership or control which are conferred by Article 11 and which are conferred subject to the observance of the international obligations referred to in that article.

The second judgment, Judgment No. 5, which deals with the merits of the Mavrommatis claim, follows up and reinforces this decision and makes its limitations clear beyond any possible doubt. After quoting the judgment just referred to, on page 27, the Court says: "Since the Court's jurisdiction extends only to cases where M. Mavrommatis' concessions have been affected by the acts contemplated by Article 11 of the Mandate, in so far as such are contrary to the obligations contracted under Protocol XII, it follows that this jurisdiction does not extend to the works constructed by the British troops in the summer of 1918, nor to the alleged use made by them of M. Mavrommatis' plans regarding the water concession. Those are circumstances entirely unconnected with the concessions promised to Mr. Rutenberg." The judgment decides, as I have already reminded the Court, that the existence of clause 29 in the Rutenberg Jordan Agreement of September 21st, 1921, was contrary to the obligations contracted by the Mandatory in signing the Protocol, and that there has therefore been a breach of Article 11, and it reiterates this limitation in the passage beginning at the bottom of page 40, where the Court says that: "If the British Government had in fact decided not to allow M. Mavrommatis to proceed with his concessions, this decision not being the consequence of a request on the part of Mr. Rutenberg, there might be

some doubt as to whether this would be an act falling within the jurisdiction of the Court. For, according to the judgment of August 30th, 1924, the Court's jurisdiction is confined to acts against which the terms of Article 11 of the Mandate are directed." It follows therefore from the express decision to which I have called attention, that we have to see now whether the alleged failure to respect the rights of M. Mavrommatis results from the exercise by the British Government of the power of control conferred on it by Article 11 of the Mandate. The answer to this question must clearly be in the negative. The Greek Government itself concedes that there was nothing in the El-Audja—Jaffa concession of Mr. Rutenberg inconsistent with the rights of M. Mavrommatis, either under the original concession of January, 1914, or under the concession of February, 1926. That attitude has been consistently maintained by M. Mavrommatis from the first. We find in Annex No. 46, on June 30th, 1926, that Messrs. Lane & Cottier, the solicitors then acting, after referring to Mr. Rutenberg's claim, in the middle of page 154, say: "We have considered Mr. Rutenberg's concessions upon this point and we are of opinion that he has no such right"—that is a right to interfere—"and that the High Commissioner, if he concurs in the views of the experts, is fully justified and empowered to authorize the taking from that source of the water required by the proposed waterworks company." On July 9th, Annex No. 49; there is a further letter in which the statement is made by Sir Charles Cottier, towards the bottom of page 156: "I do not accept the interpretation by Mr. Rutenberg of his concession. My reading of the article is that he only has an exclusive right to take water from that source to be used for generating electrical energy and for irrigation purposes within the limits of his concession. I am advised by Counsel that this claim to the ownership of the waters of El-Audja is untenable." The Court will remember that in clauses 22 and 72 of the Greek Government Case, the same position is taken up. I see, for instance, in clause 72, that the Greek Government say that the Palestine authorities rightly thought that Mr. Rutenberg's argument was contrary to the letter and the spirit of his concession. Clause 2 above did not give him the ownership of the source; it only gave him the right to use it for certain purposes; any use of the source by a third party for another purpose not contrary to his own was perfectly compatible with his right. In that opinion of the Greek Government, the British Government respectfully concurs, and the fact that we hold the same view with regard to Mr. Rutenberg's rights under his 1921 Jaffa concession is, perhaps, best shown by the fact that on December 2nd, 1926, the plans of M. Mavrommatis for the use of the El-Audja waters were

in fact approved by the High Commissioner for Palestine. The same conclusion is, in effect, reached by the Court itself—or at least recorded by the Court itself—in Judgment No. 5, on page 32, where it says, in reference to the Agreement of September 21st, 1921, that is to say the agreement with regard to the Jordan valley: "This is the only agreement which need be considered, for it is common ground that the concession granted on September 12th, 1921,"—that is the El-Audja concession which we are now discussing—"to Mr. Rutenberg for the supply of electrical energy and the irrigation of the district of Jaffa, does not affect the rights derived by M. Mavrommatis from his concessions for the supply of electricity at Jerusalem." Equally, it was decided by the Court in its last judgment, on page 33, that there is nothing in the Jordan Agreement with Mr. Rutenberg, that is the Agreement of September 21st, 1921, which is contrary to the rights of M. Mavrommatis, except the objectionable Article 29 to which the Court referred. It is not suggested in the present case that the Jordan concession has in any way interfered with M. Mavrommatis' rights, and, indeed, if the Court will look at the concession itself, as granted on March 5th, 1926, it will see that the objectionable clause 29 had been carefully eliminated and that an express provision had been put in—I think it appears on page 260 of the Greek Government's documents—which expressly safeguards and preserves M. Mavrommatis' rights. Indeed, the Greek Government does not, either in its Case or in its Reply, suggest that at any point the concession actually granted to Mr. Rutenberg in respect of the Jordan valley was in breach of any of M. Mavrommatis' rights, or that Mr. Rutenberg attempted to use the powers given under that concession to interfere in any way with M. Mavrommatis' claim.

What is said by the Greek Government is that Mr. Rutenberg wrongly claimed that his Jaffa concession of September 12th, 1921, entitled him to object to the use by M. Mavrommatis of the El-Audja water and that the British Government ought to have refused to grant to Mr. Rutenberg the Jordan concession to which he was legally entitled by virtue of the Agreement of September 21st, 1921, in order to compel him to refrain from his unjustified opposition to the use of the El-Audja water by M. Mavrommatis, claimed under his Jaffa concession of September 12th, 1921. In other words, the British Government is not alleged to have exercised its powers of public control in any way inconsistent with its international obligations. What is alleged to have happened is that someone who has received from the British Government rights which did not conflict with M. Mavrommatis' rights, has wrongfully made use of these rights to set up claims which have no foundation in law. This, in

my submission, obviously cannot constitute any breach of duty by the British Government. It is not enough, as is suggested at the commencement of paragraph 9 of the Greek Reply, in order to constitute a breach of Article 11, that the exercise of the powers conferred by Article 11 should render possible a breach of M. Mavrommatis' rights by wrongful claims made by Mr. Rutenberg. In order to constitute a breach of Article 11, such a claim by Mr. Rutenberg must be involved in and warranted by the terms of the concessions granted by the Mandatory or the mandated Government under the terms of Article 11. Considerable perplexity has been occasioned to the British Government by a statement which appears towards the end of paragraph 10 of the Greek Reply, in which it is alleged that Sir Hamar Greenwood told M. Mavrommatis that Mr. Lees had promised to file a memorandum recommending the British Government not to fulfil their obligations in respect of the grant of the Jordan concessions to Mr. Rutenberg until Mr. Rutenberg had agreed to allow M. Mavrommatis to use the El-Audja water for the purpose of his Jerusalem water concession. The Greek Reply states that the Colonial Office does not dispute the fact that a memorandum was handed in by Mr. Lees, but alleges that the memorandum had been lost, and that it was not found again until Mr. Rutenberg had been granted confirmation of his Jordan concession. It is not stated in the Greek Reply who is said to have made that allegation or to whom the allegation is said to have been made. But immediately on receipt of the Reply, enquiry was made at the Colonial Office, and no one can be found there who has any knowledge of any such statement ever having been made or of any such memorandum ever having been found. Further, a careful search has been made in the dossiers or the files of the Colonial Office and there is no trace to be found in any file of any such memorandum as is referred to in the Reply. In consequence of that fact, at my instance a telegram was sent on September 6th, from the Colonial Office to the Governor of Ceylon, where Mr. Lees now is, in these terms: "Following for Lees. Mavrommatis case opens at Hague September 8th. Reply by telegraph (*a*) whether you ever promised Sir Hamar Greenwood to send Colonial Office memorandum recommending Government not to confirm Jordan electricity concession until El-Audja water question had been settled with Rutenberg; (*b*) whether you ever made such a recommendation either to the Palestine Government or to the Colonial Office." The reply to that telegram, dated September 7th, was received last night and is as follows: "Following from Governor, Colombo" —which is the capital of Ceylon—"begins. Your telegram

of September 6th; Lees states that replies to both questions (*a*) and (*b*) are in the negative", and it is signed "Lloyd". So that I can only say with regard to this statement in the Greek Reply that there seems to be some extraordinary misunderstanding in the mind of somebody acting for the Greek Government, but that at any rate it seems quite plain that the allegations as to the promise to dispatch the memorandum and the subsequent discovery of any such memorandum, are all based on a complete misapprehension, and none of them in fact ever happened. So far as I can judge, there can be no relevance on this question of jurisdiction, in determining the truth or the untruth of these allegations; but in view of the fact that not only are they made but it is stated in the Reply that they are not disputed, I have thought it right to exhaust such means as are open to me in order to ascertain whether the facts are as stated in the Greek Reply, with the result which I have just indicated to the Court.

It follows, in my submission, from the reasoning which I have had the honour to submit to the Court, that the arguments upon which the Greek Government seek to build up their case and which, as I have pointed out, must all hold good in order to establish the jurisdiction which is alleged, break down in fact at every point, and therefore that the jurisdiction upon which it insists does not in law exist.

It remains, however, to say a few words about the supplementary point raised in the British Government's Preliminary Objection that in any event the Greek Government cannot properly intervene until its national has exhausted his rights of action in the municipal courts of Palestine. The doctrine which is here invoked has been fully developed in the Preliminary Objection, and the Greek Government in its Reply does not seek to impugn the authority or the accuracy of the citations contained in that document. It is true that the Reply refers to the fact that Dr. Borchard states that there are numerous exceptions to the rule; but it does not and it cannot suggest that any of the exceptions which Dr. Borchard proceeds to state, can have any relevance to the present case. The Court will see that the passage in Dr. Borchard's work, published in 1922, in a chapter commencing at page 817 and going on to page 819, goes a very long way to confirm the accuracy of the submission which we are making. It will be sufficient for me, therefore, to refer the Court to the citations of authority which I have made in my Preliminary Objection, without taking up the time of the Court by verifying them at the oral hearing. I would respectfully ask the Court to be good enough to verify for themselves the quotations which I have there set out.

But the Greek Government in its Reply seeks to detract from the effect of this principle on two grounds. First of all it claims that the doctrine is only applicable to intervention by diplomatic action and that it has no application to the submission of a dispute to judicial decision by the Court. I venture to submit to the Court that that is a mistaken view. From the decision of the Court in the first judgment Judgment No. 2, it appears clearly that the right of the Greek Government to intervene at all on behalf of M. Mavrommatis rested upon what the Court there laid down on page 12 as an elementary principle of international law, namely "that a State is entitled to protect its subjects when injured by acts contrary to international law committed by another State from whom they have been unable to obtain satisfaction through the ordinary channels", and it points out that a case, when thus taken up, comes before the Court as a dispute between the two contending States, although no doubt it originated from an injury to a private individual. But unless and until the complaining State has a right by international law to take up the cause of its subject and to resort either to diplomatic action or to international legal proceedings, it has no *locus standi* before either the International Court or other tribunals to which an appeal is made, and on the principle which the Court has laid down, the right of the State to intervene, and therefore its *locus standi* vis-à-vis the respondent Government, arises only when the injured subject has been unable to obtain satisfaction through the ordinary channels. The Greek Government in its Reply further emphasized the fact that this objection was not raised in the previous proceedings when, as the Greek Government alleges, the same point was open. But in truth the Greek Government is mistaken in thinking that any such point was open in the previous proceedings.

At the time of the previous proceedings, M. Mavrommatis had only concessions granted by the Turkish authorities before the occupation of Palestine by Great Britain, and therefore he had no cause of action in any court against either the British Government or the Palestine Government for failure to observe these concessions. He had no redress except by diplomatic action taken by his Government on his behalf. It is only when the British Government, in pursuance of the obligations imposed on it by Articles 4 and 5 of the Protocol, has entered into direct contractual obligations with M. Mavrommatis, that M. Mavrommatis has a right to assert a claim for damages in the municipal courts if those obligations have been disregarded. This position of direct contractual relationship between the High Commissioner and M. Mavrommatis was attained for the first time on February 25th, 1926, and did not exist when the former proceedings were instituted.

The Greek Government in its Reply seeks to place reliance on the fact that some recent international treaties recognize the existence of this rule and its applicability to international arbitration or other legal proceedings by expressly incorporating the rule in the terms of the treaty itself; but this hardly seems a sufficient reason for excluding its application from all cases in which it is not expressly incorporated. And, indeed, the numerous instances which will be found cited, for example, in the first note on page 819 of Dr. Borchard's work, in which the rule was applied before international tribunals, although it had not been incorporated by express terms, as well as the passages cited in our original Preliminary Objection, seem fatal to any such conclusion. I observe that in the Greek Government Reply reference is made to the fact that under the laws of Palestine M. Mavrommatis would have to secure the consent in writing of the High Commissioner before instituting proceedings in the Palestine Courts against him. This is a condition which is very familiar to every student of British law: it is practically the reproduction of the rule in our British Courts by which the fiat of His Majesty the King has to be obtained before proceedings are commenced against him by Petition of Right. It is, I hope, a matter of common knowledge that this constitutional practice is never under any circumstances used to prevent the institution of any *bona fide* claim and that the fiat is invariably given whenever a *prima facie* cause of action is shown. But to prevent any possibility of misunderstanding or doubt upon this matter, I have obtained from the High Commissioner for Palestine his express statement in writing that he would of course give his consent to any proceedings by M. Mavrommatis in the Palestine Courts for the purpose of asserting his rights against the High Commissioner. That consent, dated August 12th, 1927, is addressed to the Right Hon. L. C. M. S. Amery, the Secretary of State for the Colonies, and is written from the Government Offices, Jerusalem. It is in these terms:

"Sir,

"I have the honour to refer to litigation pending before the Permanent Court of International Justice between His Majesty's Government and the Government of the Hellenic Republic in regard to concessions granted by me to M. E. Mavrommatis, and to state that if M. Mavrommatis instituted proceedings in the proper Palestine Courts for breach of contract on the ground that I failed to approve the plans for the two concessions within the due dates, I should of course grant my

consent to the action being brought under the Palestine Crown Actions Ordinance, 1926.

"I have, etc.

(*Signed*) PLUMER, F.M.,
High Commissioner."

For the reasons which I have elaborated above, as well as for those which are set out and discussed in our Preliminary Objection (which I have not thought it right to recapitulate at length, although the Court will understand that I adhere to them and maintain them in their integrity), I submit that the British Government has shown that this claim is wholly misconceived and is one for which there is no jurisdiction for this Court to entertain. I do not think that it is altogether desirable in the interests of international courtesy that I should discuss the question which is raised at the end of paragraph 13 of the Greek Reply as to whether these proceedings are vexatious. I think, however, that in view of some of the statements which appear in the revised Case of the Greek Government and which appear in a far more objectionable form in the Case as originally lodged by the Greek Government, I should be allowed to state, on behalf of His Majesty's Government, as I do now state in a most emphatic and unequivocal manner, that it is our honest belief that the British Government and the Government of Palestine have loyally carried out the decision of the Court and the obligations imposed upon them under the Mandate for the Government of Palestine, and to say that we are perfectly prepared to litigate that question in the Palestine Court if and when M. Mavrommatis sees fit to prosecute his claim before that municipal tribunal.

That is the submission which I desire to make in supplement of the original written document which I have filed, and I should very respectfully ask the Court, on the grounds which I have indicated, to declare that it has no jurisdiction to entertain the present claim for damages and that M. Mavrommatis should be relegated to bringing the action in the appropriate Court, where it can be decided in the appropriate manner.

2.

DISCOURS PRONONCÉ PAR M. GIDEL
(représentant le Gouvernement hellénique)
AUX SÉANCES PUBLIQUES DU 9 SEPTEMBRE 1927 [1].

Monsieur le Président,
Messieurs,

Vous avez déjà rendu deux arrêts dans l'affaire que le Gouvernement hellénique s'est vu contraint de vous déférer à nouveau.

Ces deux arrêts constituent un point de départ singulièrement précieux pour ceux qui ont l'honneur de vous soumettre des explications orales concernant le présent litige.

Par votre Arrêt n° 2, vous avez proclamé votre compétence pour connaître au fond d'une contestation relative aux concessions Mavrommatis pour Jérusalem, à savoir la concession de la distribution publique de l'énergie électrique et de tramways électriques, et une concession de distribution d'eau.

D'autre part, dans son Arrêt n° 5, la Cour décide et juge que les concessions accordées à M. Mavrommatis en vertu des concessions signées le 27 janvier 1914 et relatives à certains travaux devant être exécutés à Jérusalem, sont valables, et la Cour décide en outre que les concessions susvisées accordées à M. Mavrommatis tombent sous le coup de l'article 4 du Protocole XII de Lausanne, c'est-à-dire qu'elles doivent être réadaptées.

Voilà, Messieurs, vos deux arrêts.

Aujourd'hui, il s'agit d'un différend qui se pose devant vous, aux détails des faits près, exactement dans les mêmes conditions, et qui soulève les mêmes questions que vous avez déjà tranchées.

Le différend actuel, en effet, porte, comme les précédents, sur l'interprétation et l'application des dispositions du Mandat ; et c'est pour cela que ce différend est porté à votre barre souveraine. Le Gouvernement britannique a-t-il, oui ou non, manqué, en sa qualité de Puissance mandataire, aux obligations internationales acceptées par lui pour la Palestine ? Le Gouvernement britannique, disons-nous, a été, en fait, dans l'impossibilité de remplir les engagements internationaux

[1] Documents cités dans ce discours :
Mémoire hellénique ; voir troisième Partie, n° 2, pp. 109-175 du présent volume.
Annexes au Mémoire hellénique ; voir troisième Partie, n° 2*a*, pp. 176-450.
Exception préliminaire britannique ; voir troisième Partie, n° 4, pp. 451-468.

dont l'Arrêt n° 5 avait défini la nature et précisé la portée. Nous avons donc convié le Gouvernement britannique à comparaître devant vous.

Comme en 1924, Messieurs, le Gouvernement britannique décline votre compétence.

Nous estimons, quant à nous, que cette compétence s'impose, exactement pour les mêmes raisons que vous avez si attentivement déduites dans votre Arrêt n° 2. Que la Cour veuille donc bien me permettre de lui rappeler les déductions de cet arrêt.

A la page 19, la question est posée :

> « La question soumise à la Cour », est-il dit, « est celle de savoir si, en accordant les concessions Rutenberg qui portent, au moins en partie, sur les mêmes objets [que les concessions Mavrommatis], les autorités palestiniennes et britanniques ont méconnu les engagements internationaux contractés par le mandataire et dont la Grèce pourrait réclamer le bénéfice. »

Ensuite, votre arrêt retenait l'article 11 du Mandat, et il en présentait l'exégèse ; il déterminait la limite des droits et des obligations qui en résultaient pour l'Administration palestinienne et pour la Puissance mandataire en matière de concessions. Page 23 : « Les pouvoirs attribués par l'article 11 à l'Administration de la Palestine doivent.... être exercés sous réserve des obligations internationales acceptées par le mandataire. »

Réserve nécessaire ; en effet, « puisque l'article 11 du Mandat reconnaît à l'Administration de la Palestine une large autonomie, il fallait mettre hors de doute que les pouvoirs accordés ne doivent pas être exercés d'une manière qui serait incompatible avec les engagements internationaux du mandataire ». La violation de ces engagements engage la responsabilité internationale du mandataire, car, conformément à l'article 12 du Mandat, les relations extérieures de la Palestine sont de son ressort.

Or, parmi ces obligations internationales acceptées par le mandataire figurent — continue votre arrêt — celles qui étaient primitivement visées par l'article 311 du Traité de Sèvres et qui ont été finalement incorporées dans le Protocole XII du Traité de Lausanne.

A la page 26, vous dites : « puisque [la Cour l'a démontré] les concessions Rutenberg tombent sous l'application de l'article 11 du Mandat, il est clair que l'Administration de la Palestine est aussi tenue, par rapport à ces concessions, de respecter les obligations résultant, pour la Grande-Bretagne, du Protocole XII. Si cette Administration, en octroyant les concessions Rutenberg, a contrevenu aux obligations susdites, il y a là

une atteinte à l'article 11 du Mandat, et cette atteinte peut faire l'objet d'une instance devant la Cour, en vertu de l'article 26. »

Enfin, page 28, *in fine*, vous dites : « La Cour est compétente pour appliquer le Protocole XII dans la mesure où l'exige l'article 11 du Mandat. »

Aujourd'hui, Messieurs, par le même raisonnement, votre haute juridiction est également compétente pour dire si les autorités palestiniennes et la Grande-Bretagne, en tant que Puissance mandataire, se sont acquittées des obligations leur incombant aux termes des articles en cause du Protocole XII de Lausanne.

Cette compétence est contestée : le Gouvernement britannique a déposé, en effet, une Exception préliminaire d'incompétence ; il s'exprime ainsi, page 291 :

« Tant que le pouvoir conféré à l'Administration par l'article 11 n'a pas été exercé, la question de l'interprétation ou de l'application du Mandat ne se pose pas.

« Pour donner à la Cour — dit-il quelques lignes plus loin, dans le même passage — compétence de connaître de la présente affaire en vertu du Mandat, le Gouvernement hellénique doit prouver que l'Administration de la Palestine a accordé à quelques autres personnes que M. Mavrommatis une concession ou des droits quelconques, représentant un exercice du pouvoir mentionné à l'article 11. »

Les prémisses sont exactes, la conclusion ne l'est pas.

Les prémisses, c'est : « tant que le pouvoir conféré à l'Administration par l'article 11 n'a pas été exercé, la question de l'interprétation ou de l'application du Mandat ne se pose pas ». Nous sommes, Messieurs, d'accord sur cette proposition.

Mais nous sommes en complet désaccord sur la deuxième proposition que j'ai eu l'honneur de vous lire, ainsi que sur les conclusions tirées par le Gouvernement britannique des prémisses qu'il a posées, prémisses auxquelles, je le répète, nous adhérons.

Quelle est la portée des actes visés par l'article 11 du Mandat ? Est-ce seulement l'octroi d'une concession ou de droits quelconques représentant un exercice du pouvoir mentionné à l'article 11, en antagonisme, bien entendu, avec les droits d'une personne internationalement protégée ? Ou bien, au contraire, est-ce tout fait accompli en usant des pouvoirs conférés à l'Administration par l'article 11 et qui porte atteinte aux droits d'une personne internationalement protégée ?

Pratiquement, si, de cette formule un peu théorique du débat, on fait application à la présente instance, le Gouvernement britannique vous dit : La Cour n'est pas compétente, à moins que la Puissance mandataire n'ait toléré un

manquement aux obligations internationales visées à l'article 11, et ce manquement ne peut se produire que si une concession lésant M. Mavrommatis a été accordée à M. Rutenberg.

Le Gouvernement hellénique déclare, quant à lui, ceci : Le manquement aux obligations internationales de la Puissance mandataire se produit dès que, dans une procédure quelconque relevant des pouvoirs visés à l'article 11 du Mandat, et par le jeu de ces pouvoirs, il a été porté atteinte aux droits internationalement protégés de M. Mavrommatis et qui ont été reconnus par votre Arrêt n° 5.

Voilà, Messieurs, les deux doctrines en présence.

Je crois — et je demande respectueusement à la Cour la permission de l'établir — que cette seconde doctrine, celle que soutient le Gouvernement hellénique, est seule conforme à votre Arrêt n° 2.

En effet, Messieurs, quel est votre raisonnement sur ce point spécial ?

Vous examinez successivement d'après les deux textes, le texte français d'abord, puis le texte anglais de l'article 11 du Mandat, ce que peuvent comprendre ces pouvoirs attribués à l'Administration de la Palestine. Vous constatez que le texte anglais paraît avoir une portée plus restreinte et vous adoptez l'interprétation restreinte qui peut se concilier avec les deux textes.

Le mot *control*, dites-vous, paraît indiquer — page 19 de votre arrêt — « les différentes modalités de mainmise ou d'ingérence de l'administration publique dans des entreprises qui ne sont pas un objet de propriété publique ».

Enfin, toujours dans votre Arrêt n° 2, à la page 20, vous concluez que le mot *control*, en anglais, est susceptible de deux sens, et que — je cite vos propres paroles — « ce sens plus large de l'expression anglaise paraît être le seul qui n'annule pas l'expression « contrôle public » du texte français : il n'est guère possible d'entendre cette dernière comme visant exclusivement le cas où une administration publique prend elle-même l'entreprise en mains. C'est ainsi (je crois cette phrase particulièrement importante) que même l'octroi d'une concession d'utilité publique à un individu ou à une société peut être *accompagné* de mesures qui sont un exercice du *public control.* »

Ainsi, dans cet Arrêt n° 2, vous proclamez, Messieurs, d'une façon catégorique, qu'il n'y a pas que l'octroi d'une concession qui constitue un exercice de *public control*, mais que rentrent également dans cet exercice du *public control* les mesures qui peuvent *accompagner* l'octroi d'une concession.

Aussi bien, Messieurs, ne saurait-il en être autrement : l'octroi d'une concession ne se réfère pas purement et simplement à l'instant précis où le titre de concession se trouve revêtu d'une validité définitive.

La concession de services publics, cela est vrai dans tous les pays, n'est pas un acte instantané ; c'est un complexe d'actes, une procédure administrative longue et touffue, susceptible de s'étendre sur de longs mois, de durer même des années, au cours desquelles une infinité d'actes divers, plus ou moins en relation avec l'objet final de la concession, peut émaner de ce contrôle public visé par l'article 11 du Mandat.

Tous ces actes qui constituent la procédure complexe de la concession, qui « accompagnent » l'octroi d'une concession, seront faits par l'Administration qui, dans le cas présent, d'après l'article 11 du Mandat, aura « pleins pouvoirs pour décider quant à la propriété ou au contrôle public de toutes les ressources naturelles du pays, ou des travaux et services d'utilité publique déjà établis, ou à y établir ».

Tous ces actes, Messieurs, non seulement l'octroi de la concession, mais tous ces complexes d'actes administratifs qui accompagnent la concession, tous ces actes doivent être faits, tous, « sous réserve des obligations internationales acceptées par le mandataire ».

Donc, Messieurs, le Gouvernement hellénique n'a pas, en vertu de votre jurisprudence même et contrairement à ce que prétend notre adversaire, à vous apporter la preuve de l'octroi, à M. Rutenberg ou à tous autres, d'une concession directement en contradiction avec les concessions de M. Mavrommatis.

Il suffit au Gouvernement hellénique de prouver que l'Administration palestinienne, ou bien celle du pays mandataire, ont fait usage des pouvoirs leur permettant « de prendre [je reprends les termes de l'article 11 du Mandat] toutes mesures nécessaires pour sauvegarder les intérêts de la communauté concernant le développement du pays », et des « pleins pouvoirs pour décider quant à la propriété ou au contrôle public de toutes les ressources naturelles du pays ou des travaux ou services d'utilité publique déjà établis ou à y établir ». Il suffit, dis-je, de prouver que les administrations compétentes ont fait desdits pouvoirs un usage quelconque en contradiction avec les « obligations internationales acceptées par le mandataire » et mentionnées dans ce même article 11 ; et, dès que cette preuve vous est apportée, votre compétence, Messieurs, est fondée.

Nous devons donc, au cours de ces explications, confronter l'exercice fait par les autorités palestiniennes de leurs pouvoirs, mentionnés par l'article 11, avec les obligations internationales acceptées par la Puissance mandataire en ce qui concerne les concessions Mavrommatis.

Quelle était essentiellement l'obligation de la Grande-Bretagne ? Elle tient en un mot : réadapter. Je supplie respectueusement la Cour de bien vouloir peser le sens de ce mot : réadapter. Les circonstances politiques et économiques ont

tellement changé, du fait de la guerre mondiale, particulièrement — bien entendu — dans les pays qui y ont pris une part directe, qu'il n'est plus possible, après la guerre, d'appliquer purement et simplement les contrats anciens de concessions. Ces contrats doivent être mis en conformité des conditions économiques nouvelles ; plus brièvement, ils doivent être réadaptés.

Messieurs, une adaptation ou une réadaptation, ce n'est pas une suppression ; ce n'est pas un remplacement ; c'est au contraire essentiellement une conservation ; c'est un maintien de quelque chose qui existait antérieurement ; mais ce quelque chose ne peut plus s'ajuster exactement aux conditions économiques nouvelles et, dans les clauses des anciens contrats, on doit, en conséquence, modifier telle ou telle stipulation : par exemple, le prix des taxes que paieront les usagers, les délais dans lesquels le service public à mettre sur pied devait être réalisé ; voilà des exemples, et on pourrait les multiplier presque à l'infini, des clauses qui sont de la nature de la réadaptation.

Mais supprime-t-on le précédent contrat ? Nullement. On a soin, au contraire, de le conserver, de le maintenir.

Ici encore, Messieurs, c'est à votre autorité que je fais appel. Si vous voulez vous reporter à l'Arrêt n° 5 (page 48 *in fine*), vous y lirez ces lignes :

> « .... le seul moyen pratiquement efficace de maintenir des concessions octroyées avant la guerre consiste à les réadapter aux conditions économiques nouvelles ».

Donc, la réadaptation, vous l'avez proclamé, est essentiellement un maintien.

La Grande-Bretagne comprenait-elle autrement ses obligations de ce chef lors des débats de l'Arrêt n° 5 ? Nullement. La Cour, en effet, se plut à ce moment à prendre acte des déclarations de son représentant. Votre Arrêt n° 5 s'exprime ainsi à la page 43 :

> « .... il ne paraît pas permis de douter que le Gouvernement britannique, qui a déclaré vouloir laisser à M. Mavrommatis toute liberté de mettre à exécution ses concessions relatives à Jérusalem, assure loyalement le respect de sa parole et, s'il est nécessaire, *protège M. Mavrommatis contre toute tentative de gêner l'exécution de ses concessions* ».

En résumé, la Puissance mandataire avait assumé — et la Cour avait consacré cet engagement — la charge de faire jouir M. Mavrommatis du bénéfice de ses concessions de Jérusalem dans les conditions exigées par la situation économique nouvelle.

Le Gouvernement hellénique a eu le vif regret de devoir constater que ces obligations n'ont pas été remplies, qu'elles n'ont reçu qu'un commencement d'exécution, que les concessions Mavrommatis ont été réadaptées sur le papier, mais sans qu'une jouissance effective en fût assurée à leur titulaire. C'est pourquoi le Gouvernement hellénique a été dans la nécessité de saisir la Cour.

Ici, Messieurs, se présente un point sur lequel le désaccord est complet entre les deux Gouvernements, un point qui est vital pour l'exception préliminaire dont vous êtes saisis.

Avant la réadaptation de ses concessions, M. Mavrommatis possédait un titre international entraînant votre compétence ; la Grande-Bretagne l'avait contesté, mais la Cour a rejeté cette prétention. M. Mavrommatis possède-t-il encore aujourd'hui un titre de cette nature, un titre international ? Le possède-t-il encore aujourd'hui, *après la réadaptation de ses concessions ?* Ou, pour poser la question à l'aide d'autres mots, les concessions Mavrommatis ont-elles ou non subi un changement de nature total et absolu depuis leur réadaptation et par le fait de leur réadaptation ?

Le Gouvernement hellénique estime que les concessions réadaptées participent toujours de la nature des concessions primitives et qu'elles continuent à être un titre international et, par suite, susceptible d'être évoqué devant la Cour. Le Gouvernement britannique, au contraire, soutient que les concessions Mavrommatis réadaptées ne sont plus qu'un titre purement interne qui n'est pas susceptible d'être invoqué devant vous et qui ne pourrait être porté que dans les prétoires de la Palestine. C'est entre ces deux thèses, Messieurs, que vous aurez à vous prononcer.

Admettons — nous dit le Gouvernement britannique — que vos réclamations soient fondées ; admettons que nous n'ayons pas fait ce que nous devions. Si M. Mavrommatis a à se plaindre de nous, qu'il nous assigne devant nos juridictions internes. En effet, les anciennes concessions qui — la Cour l'a jugé — entraînaient la compétence de la Cour, n'existent plus ; elles ont été remplacées par le contrat du 25 février 1926 ; ce contrat fait table rase et, sur cet espace désormais nu, un édifice complètement nouveau a été construit.

Messieurs, cette thèse est rejetée avec force par le Gouvernement hellénique ; elle nous paraît totalement inadmissible. Le droit anglais permet-il d'estimer que les anciennes concessions ont disparu ? C'est là un point devant lequel je ne puis que montrer la plus extrême réserve.

Mais, Messieurs, si le droit anglais est applicable aux contrats de février 1926, et quelles que soient les dispositions du droit anglais sur ce point, il est une chose que je puis affirmer de toutes mes forces : c'est que ces dispositions, quelles

qu'elles soient, ne sauraient l'emporter sur celles du droit international s'il y a un conflit entre le droit anglais et le droit international.

Il va de soi qu'il en serait de même pour n'importe quelle loi interne, de quelque pays que ce soit. Et c'est une vérité élémentaire que cette primauté du droit international.

Mais, nous dira-t-on, vous oubliez le texte du contrat. Les Parties ont stipulé (clause 46 de la concession, page 122) que les « présentes seraient interprétées et construites conformément aux lois anglaises et recevraient effet en conséquence ». C'est bien, en effet, ce qui figure dans le contrat. Il n'y a rien là que de très naturel, et le Gouvernement hellénique n'a pas un seul instant l'intention de vous demander de tenir cette clause pour non avenue. Cette clause, elle a son domaine d'application tout tracé. La concession va mettre en présence le concessionnaire et les pouvoirs concédants pendant une durée de soixante années environ. Il n'est pas possible que, pendant ces soixante années, ne surgisse pas quelque difficulté concernant l'application de la concession, concernant l'interprétation de ses clauses. Alors, le droit anglais s'appliquera pour ces litiges susceptibles de survenir entre le pouvoir concédant et le concessionnaire. C'est une précaution parfaitement louable ; plus que cela, c'est une précaution nécessaire que d'avoir stipulé un droit auquel il faudra que le concessionnaire et le concédant se réfèrent en cas de difficultés pendant la durée de leur contrat.

Mais l'existence même du contrat ne peut être régie que par le droit international. Et, ici, je ne fais pas appel au droit international commun, aux principes de la succession des États. Je fais appel à ce droit international conventionnel qui résulte de l'engagement assumé par la Grande-Bretagne de se conformer aux règles du Protocole XII de Lausanne.

Messieurs, ce droit international conventionnel domine l'existence du contrat, et c'est détourner de son sens la clause très judicieuse d'application du droit anglais pour la durée de la concession, que de prétendre appliquer cette clause de droit interne à l'existence d'une concession qui est régie par une disposition internationale conventionnelle.

Or, de quoi s'agissait-il dans cette clause conventionnelle ? Il s'agissait de réadaptation. J'ai dit tout ce que ce mot comportait ; j'y insiste sans y revenir.

Vous dira-t-on, Messieurs, que M. Mavrommatis a renoncé absolument à ses anciennes concessions ? Il y a renoncé ; mais *in consideration ;* on ne peut pas dissocier arbitrairement le contrat, prendre un paragraphe et laisser l'autre de côté. Le paragraphe 3 et le paragraphe 4 sont formellement liés ; il y a eu un contrat synallagmatique. M. Mavrommatis a consenti à certaines modalités de réadaptation en échange de l'octroi

de cette concession réadaptée, et d'une concession réadaptée effective. Il y a eu un contrat synallagmatique, peut-être un contrat innommé *de ut facias, facient facias*, etc. ; cela importe peu pour la discussion actuelle. Il suffit de constater qu'il y a eu contrat synallagmatique, et il ne s'agit pas d'aller contre la lettre du contrat en substituant je ne sais quelle intention problématique des Parties à un texte clair.

Le texte, nous le défendons en attirant l'attention sur l'importance des mots *in consideration*. Les conditions dans lesquelles ce contrat est intervenu ne permettent pas de traiter légèrement ces mots « en considération ». Les Parties savaient ce qu'elles faisaient ; elles savaient qu'elles «*réadaptaient*» ; elles savaient donc qu'elles *maintenaient* en *ajustant* simplement aux conditions économiques nouvelles. Elles avaient reçu de la Cour l'injonction de réadapter par votre Arrêt n° 5, et il ne pouvait être question que de réadapter, puisque votre Arrêt n° 5 décide expressément que les concessions tombent sous l'application de l'article 4 du Protocole de Lausanne.

Dans votre Arrêt n° 2 (page 14), vous avez d'ailleurs une expression bien significative et qui me paraît d'une essentielle portée :

> « Les négociations », dites-vous, « entre l'intéressé et les autorités se sont toujours déroulées dans le cadre d'actes internationaux. »

Que la Cour me permette, Messieurs, de reprendre cette expression de votre Arrêt n° 2 et d'en faire application à la présente phase de l'affaire comme elle s'appliquait aux phases précédentes.

C'est dans le « cadre d'actes internationaux » que les concessions réadaptées ont été classées, et c'est dans le cadre d'actes internationaux que ces concessions réadaptées se trouvent encore. Par conséquent, l'accord, quel qu'il soit, passé entre M. Mavrommatis et les autorités compétentes, est dominé par le droit international ; il est dans le « cadre d'actes internationaux », et ces actes internationaux établissent à l'égard de la Grande-Bretagne une obligation à laquelle elle ne saurait se soustraire.

Ma conclusion sur ce point est donc catégorique. M. Mavrommatis ou le Gouvernement hellénique — qui prend fait et cause pour lui — ont, aujourd'hui comme hier, après la réadaptation comme avant, toujours entre les mains un titre international qui, pour autant que les autres conditions de l'article 11 sont remplies, assure au Gouvernement hellénique un droit à votre compétence.

Je dois examiner maintenant, Messieurs, si les actes qui ont lésé M. Mavrommatis rentrent bien dans la catégorie de ceux visés dans l'article 11 du Mandat.

Est-ce bien de son droit de *public control* que l'Administration de la Palestine a fait usage en faisant des actes qui ont été préjudiciables à M. Mavrommatis ?

Je ne reviens pas sur la définition que vous avez donnée du *public control*, définition à laquelle j'ai eu l'honneur de me référer tout à l'heure. Pour le moment, je ne veux déduire de là que la nécessité, qui s'impose à nous, d'examiner attentivement les faits de la cause.

Le Gouvernement hellénique n'a, pas plus que le Gouvernement britannique, le désir d'entrer dans une investigation détaillée des faits, pour autant que cette investigation ne serait pas nécessaire à l'établissement de votre compétence ; mais un certain nombre de points de fait sont essentiels pour l'établissement de cette compétence : ce sont ces points de fait que je vous demande maintenant la permission de vous soumettre.

Il n'y a d'ailleurs pas chance que nous nous engagions dans une controverse sur la matérialité des faits, car, à très peu d'exceptions près, le Gouvernement britannique a bien voulu reconnaître que, tout au moins pour les besoins de la présente cause (je ne crois pas trahir la pensée de son très éminent représentant), il était d'accord sur la matérialité de presque tous les faits que nous invoquons.

Mais le Gouvernement britannique, qui vous a présenté un exposé d'un grand nombre de ces faits, vous a dit, par l'organe de son très éminent représentant, que ces faits doivent être *properly understood* ; c'est cette compréhension appropriée, Messieurs, que le Gouvernement hellénique demande la permission de vous soumettre ; il pense que cette exacte compréhension des faits ne peut conduire qu'à une conclusion, à savoir, votre compétence.

Nous ne sommes pas tout à fait d'accord avec le Gouvernement britannique sur cette compréhension des faits ; j'expose la thèse britannique d'après le n° 7 de son Exception préliminaire d'incompétence ; voici la substance de cette argumentation :

Les concessions Rutenberg de Jaffa ne portaient pas atteinte aux droits de M. Mavrommatis, — l'Arrêt n° 5 l'a déclaré.

Les concessions Rutenberg du Jourdain ne portaient atteinte à la concession « Mavrommatis électricité » que par une de leurs clauses, l'article 29.

Quant à la concession « Mavrommatis eau potable », elle ne se heurtait en rien à la concession Rutenberg du Jourdain.

Ici, Messieurs, je demande à faire tout de suite quelques réserves sur cette allégation, car, à ce moment, la Cour, en se prononçant sur la question, ne pouvait examiner le problème qu'à un point de vue ; or, à ce point de vue, votre décision était et continue à être encore parfaitement exacte :

vous avez déclaré que toute personne, nonobstant les concessions Rutenberg sur le Jourdain, avait droit à la production de la *force* hydro-électrique, mais pour son propre usage.

Y a-t-il eu, continue le Gouvernement britannique, d'autres concessions accordées que celles de Rutenberg ? Non, dit l'Exception préliminaire britannique.

Alors, nous demande-t-on, en quoi a-t-on porté atteinte aux droits de M. Mavrommatis ? et, en continuant, le Gouvernement britannique donne, de son argumentation, un résumé dans lequel il m'a semblé que la note sarcastique n'était pas complètement absente.

« La suggestion du Gouvernement hellénique, nous a-t-il dit (page 292), paraît être que, étant donné que Rutenberg prétendait que l'article 2 de sa concession de *Jaffa* le mettait à même de s'opposer à ce que M. Mavrommatis fût autorisé à se servir des eaux d'El-Audja pour sa concession d'eau, le Gouvernement britannique, d'une manière ou d'une autre, — on ne précise pas exactement comment, — a lésé M. Mavrommatis en accordant finalement à Rutenberg sa concession du *Jourdain*. »

Vous voyez, Messieurs, en quoi consiste le défaut de logique qui nous est reproché : nous parlons d'abord de la concession de Jaffa, puis de la concession du Jourdain, et nous établissons, à en croire le Gouvernement britannique, un lien qui n'existe pas entre ces deux concessions.

Il me sera facile de vous démontrer que le lien, s'il est indirect, n'en existe pas moins ; il est même très certain. Je vais en apporter la preuve.

Permettez-moi d'indiquer le plan que M. Rutenberg a conçu, qu'il a appliqué, par lequel il a, avec la complaisance des autorités responsables, entravé la mise à exécution des concessions Mavrommatis.

Ce plan est très clairement exposé déjà dans notre Mémoire, n° 68, page 21 ; j'irai donc aussi vite que possible.

Le but que se proposait M. Rutenberg, c'était de devenir le seul maître des concessions en Palestine ; et nous savons à quoi nous en tenir sur ses intentions par une pièce qui figure sous le n° 82 des annexes, page 184.

Nous avons là, en effet, le récit d'une entrevue particulièrement intéressante de M. Rutenberg avec l'agent de M. Mavrommatis, et dans laquelle il tente, au moment qu'il croit favorable pour une suprême tentative, d'obtenir définitivement les avantages qu'il désirait depuis longtemps.

Il confirme, à cette occasion, tout ce que les faits avaient surabondamment manifesté ; nous constatons d'abord que, comme entrée en matière dans ces conversations, M. Rutenberg déclare qu'il sera accommodant.

Il est devenu, depuis cinq ans, plus sage et plus doux ; exorde insinuant, mais de là, Messieurs, l'aveu que je retiens

surtout, que la lutte poursuivie par Rutenberg contre Mavrommatis remontait à cinq années.

Il déclare ses intentions anciennes et futures, sans aucun ambage ; il s'était opposé, dit-il, et il continuera son opposition à l'approbation du projet et des plans Mavrommatis, de prendre de l'eau à la source El-Audja. Il continuera cette opposition, à moins que M. Mavrommatis ne consente à lui vendre et à lui transférer sa concession d'électricité.

En effet, M. Rutenberg déclare qu'il a pris l'avis de ses hommes de loi et que, d'après eux, il possède le droit d'empêcher le Colonial Office (par une requête « en Cour », aux fins d'injonctions) d'approuver les plans de M. Mavrommatis pour prendre de l'eau dans la source El-Audja.

Il fait état de ses démarches répétées auprès du Colonial Office ; et, après ces menaces qui ont succédé aux déclarations pleines de conciliation du début, il propose deux solutions d'entente.

Ou bien (première solution), si M. Mavrommatis n'est pas disposé à lui vendre sa concession d'électricité de Jérusalem, alors Rutenberg consentira bien à se désister de son obstruction quant à la source El-Audja, — mais à la condition qu'on lui paye, pour cette utilisation de l'eau, une redevance de £5.000 par an ; telle est la première proposition.

La deuxième est la suivante : si vous consentez à me vendre votre concession d'électricité, dit-il, pour £10.000, alors l'affaire sera rapidement terminée.

M. Rutenberg ira — nous devons être le dimanche — dès le lundi matin au Colonial Office, et, à 10 heures du matin, « un petit morceau de papier » sera signé par lequel M. Mavrommatis transférera la concession d'électricité ; Rutenberg lui donnera un chèque de £10.000, et son opposition sous toutes les formes (*sous toutes les formes* est intéressant) aux concessions d'eau de M. Mavrommatis sera retirée.

Et le Colonial Office approuvera *immédiatement* (*at once*) le transfert, la régularisation des concessions.

Voilà, Messieurs, ce document qui est bien significatif.

Je reconnais très volontiers que ce document n'est pas signé par M. Rutenberg lui-même. Je suis tout disposé à admettre que l'agent de M. Mavrommatis a pu, sur certains points, forcer la note humoristique ; il n'en reste pas moins singulièrement intéressant de voir le marché cynique proposé par M. Rutenberg à l'agent de M. Mavrommatis, dévoilant tous ses moyens d'action, tous ses plans, et essayant de tirer parti de la situation, déjà pénible, dans laquelle se trouvait à cette époque M. Mavrommatis, du fait de la non-approbation de ses concessions, déposées cependant depuis si longtemps, — pour obtenir un marché avantageux, couronnant son opposition et ses manœuvres.

En effet, la situation était la suivante : Le 21 septembre 1921, M. Rutenberg avait obtenu une promesse de concession d'énergie hydro-électrique sur les eaux du Jourdain. Dans ce projet, vous vous le rappelez, figurait l'article 29 que votre haute juridiction a déclaré illicite. Dès lors, le moyen d'action directe sur lequel M. Rutenberg pouvait compter grâce à l'article 29 lui faisait défaut ; et il passa à un plan d'action indirecte. S'il parvenait à paralyser la concession de distribution d'eau de Jérusalem, il pourrait acheter à vil prix la concession électricité Mavrommatis et la concession de distribution d'eau potable Mavrommatis pour Jérusalem.

M. Rutenberg se dit que sa concession de Jaffa lui en fournissait le moyen ; il se prévaut de ce que l'arrêt de la Cour avait tenu pour constant que cette concession ne touchait pas aux droits résultant des concessions Mavrommatis. Or, la concession de Jaffa permettait à M. Rutenberg d'utiliser les eaux de la source El-Audja. Il imagine donc de prétendre, dès qu'il sait que la concession Mavrommatis va utiliser l'eau d'El-Audja, que lui, Rutenberg, possède l'usage exclusif de la source El-Audja.

Il eût été facile de déjouer cette manœuvre si les autorités palestiniennes l'avaient voulu. Un homme qui demande une concession est plus ou moins sous l'action des autorités à qui il la demande. Ces autorités ont une arme contre lui : l'octroi de la concession ; et, jusqu'au moment où l'acte est passé, un pouvoir discrétionnaire. M. Rutenberg émet, au titre de sa concession de Jaffa, qui est en règle, qui lui a été accordée, des prétentions excessives. Or, au même moment, il est en instance pour une autre concession.

Que peut faire l'Administration ? Elle peut lui dire : Si vous ne renoncez pas à la prétention excessive que vous faites valoir d'après une concession, valable, je le veux bien, mais qui ne vous donne nullement les droits que vous prétendez avoir, si vous ne retirez pas cette prétention, je ne vous donne pas l'autre concession que vous sollicitez. Le moyen était très simple. L'Administration palestinienne pouvait l'employer, si elle le voulait. Messieurs, elle ne le voulut pas. Elle accorda à ce tout-puissant personnage, le 5 mars 1926, quelques jours après la signature en règle des concessions réadaptées Mavrommatis, l'autre concession que demandait M. Rutenberg. Celui-ci eût été bien bon, dans ces conditions, de ne pas poursuivre l'exécution de sa manœuvre, puisque les autorités palestiniennes le traitaient avec tant de complaisance.

Dans la procédure écrite, il est indiqué que le moyen qui devait venir à l'esprit de quiconque voulait considérer un instant la question, avait été, non seulement aperçu, mais suggéré par quelqu'un. Ce quelqu'un, c'est M. Lees, l'honorable directeur des Travaux publics de l'Administration de la

Palestine. Dans la procédure écrite, vous trouverez l'affirmation que M. Lees avait déposé une note, ou un mémoire écrit, suggérant cette possibilité d'action pour l'Administration palestinienne afin de vaincre les résistances, condamnées par M. Lees, cela va de soi; cela résulte du document même auquel il est fait allusion à l'égard des concessions Mavrommatis.

Le Gouvernement britannique a dénié l'existence de ce rapport de M. Lees; il a produit à la Cour un télégramme de M. Lees. Nous ne pouvons que nous incliner devant les affirmations de M. Lees; nous ne pouvons que nous incliner devant les affirmations qui ont été produites par le Gouvernement britannique.

Mais nous ne pouvons, nous aussi, que maintenir les affirmations que nous avons produites, en les laissant à la personnalité de qui elles émanent et dont l'honorabilité et la situation sont telles que nous devons laisser la Cour purement et simplement en présence de deux affirmations contradictoires: d'une part, l'affirmation de M. Lees, contenue dans le télégramme produit à la Cour; d'autre part, l'affirmation de sir Hamar Greenwood, K.C., ancien sous-secrétaire d'État pour les Colonies, ex-ministre d'Irlande, actuellement membre de la Chambre des Communes, et expert du Gouvernement hellénique pour la réadaptation des concessions Mavrommatis.

En présence de ces affirmations opposées, si la Cour jugeait vraiment ce point essentiel, il lui serait facile de pousser ses recherches à fond. Pour ma part, je ne crois pas, Messieurs, que le point soit vraiment essentiel.

Quoi qu'il en soit, M. Rutenberg paralyse la procédure d'approbation des concessions Mavrommatis. Vous l'avez entendu, par la pièce que j'ai citée tout à l'heure, se targuer de son influence, déclarer: « Que Mavrommatis vienne avec moi au Colonial Office demain à 10 heures; tout sera fait immédiatement. » Est-ce là simple vantardise? Est-ce que M. Rutenberg se targuait d'un crédit imaginaire? Je ne le crois pas; nous avons tout lieu en effet de supposer que son influence était extrêmement forte et s'exerçait d'une manière très efficace auprès de toutes les autorités compétentes.

Aussi bien, Messieurs, savez-vous déjà à quoi vous en tenir sur ce point, car la forte position de M. Rutenberg auprès des autorités palestiniennes est amplement connue de la Cour par les débats précédents. La complaisance de ces autorités à l'égard de M. Rutenberg peut être déduite de faits qui sont relatés dans votre Arrêt n° 5. Il est constaté par cet arrêt (page 18) qu'entre le mois de septembre 1921 et la période de mars à mai 1922, des conversations eurent lieu sur la demande du Colonial Office. Je cite textuellement votre arrêt:

« . . . sur la demande du Colonial Office, des conversations eurent lieu également avec M. Rutenberg et avec le président et d'autres représentants de l'Organisation sioniste. Le Colonial Office était tenu au courant de ces conversations . . . .

« . . . En août 1922, M. Mavrommatis fut informé, par voie indirecte, que, de l'avis du Colonial Office, 1) ses concessions lui conféraient certains droits ; 2) ces droits devaient être respectés ; 3) il devait se mettre d'accord avec M. Rutenberg, ou bien 4) soumettre au Gouvernement de Palestine des propositions tendant à transformer les concessions en une possibilité réelle de fournir à Jérusalem des tramways et de l'eau. »

M. Mavrommatis se conforme à cette dernière suggestion ; il présente des plans. Mais le Colonial Office lui répond, le 21 octobre, d'une façon qui nous le montre disposé à sous-estimer et à montrer à M. Mavrommatis qu'il sous-estime l'importance de sa concession.

« . . . en ce qui concerne la concession eau, » dit encore votre arrêt à la page 19, « la création, pendant la guerre, d'une installation suffisante pour l'alimentation en eau de Jérusalem, semblait avoir ôté toute valeur à la concession ».

Enfin, je tiens à attirer respectueusement l'attention de la Cour sur la pièce n° 48 (page 155) des annexes. Cette pièce, émanant du sous-secrétaire d'État pour les Colonies, est adressée à sir Hamar Greenwood ; elle est datée de Londres, le 9 juillet 1926. Dans cette lettre, le Colonial Office insiste très vivement pour que M. Mavrommatis écoute avec une oreille aussi bienveillante que possible les propositions de M. Rutenberg : « Qu'un *modus vivendi* s'établisse entre eux ! » Ces propositions, vous les connaissez ; vous savez leur caractère dérisoire.

Voilà comment, par l'indication de ces faits, se rejoignent des actes, différents en apparence, je le veux bien, mais dont la connexité est réelle et même évidente, dès que l'on prend le dossier en mains. L'opposition de M. Rutenberg, la complaisance de l'Administration palestinienne à l'égard de M. Rutenberg : voilà les causes des retards subis pour leur approbation par les concessions réadaptées Mavrommatis.

Messieurs, comme vous l'avez jugé dans votre Arrêt n° 2 (page 19, alinéa 5), il y a un lien qui unit les concessions Rutenberg et les concessions Mavrommatis, et qui résulte, avez-vous dit, de « l'identité partielle de l'objet ».

Quel est cet objet partiellement identique dans les deux concessions ? Vous l'avez deviné déjà : c'est la source El-Audja ; c'est d'elle qu'il nous faut maintenant parler.

Messieurs, si la source El-Audja est le point de contact entre les concessions Rutenberg et les concessions Mavrommatis, si elle constitue bien cette identité partielle de l'objet reconnu dans vos décisions, l'intérêt apparaît capital de savoir à partir de quel moment l'Administration palestinienne a su que l'usage de la source El-Audja était nécessaire à M. Mavrommatis pour l'exécution de sa concession d'eau potable.

La thèse qui vous a été exposée par le Gouvernement britannique est que l'Administration palestinienne n'aurait connu l'intérêt de la source El-Audja pour la concession d'eau potable Mavrommatis qu'après que M. Rutenberg s'était vu conférer sa concession du Jourdain, après le 5 mars 1926, donc après que l'Administration palestinienne ne disposait plus contre M. Rutenberg de ce moyen d'action qu'aurait pu comporter la non-approbation définitive des autres concessions du Jourdain. La thèse hellénique, au contraire, est que, dès le début des négociations tendant à la réadaptation des concessions Mavrommatis, par conséquent dès la fin de l'été 1925, les autorités palestiniennes savaient parfaitement que la source El-Audja était la seule qui permît d'alimenter en eau potable, dans des conditions satisfaisantes, l'agglomération de Jérusalem. La thèse hellénique prétend également que, dès l'été 1925, M. Rutenberg avait marqué son opposition à l'utilisation d'El-Audja. Donc, dès ce moment, les autorités palestiniennes avaient le devoir de se préoccuper des difficultés ainsi posées.

C'est au printemps 1925 que M. Mavrommatis et les ingénieurs qui collaboraient avec lui décidèrent d'utiliser les eaux d'El-Audja. Pourquoi ? Parce que le programme à réaliser n'était plus ce qu'il était en 1914, au moment où les concessions avaient été établies sous le Gouvernement ottoman. L'agglomération de Jérusalem s'était, depuis lors, développée considérablement, et c'est un total de près de 100.000 habitants qu'il fallait désormais alimenter en eau potable, de sorte que les débits prévus, qui étaient de 3.000 m³ originellement, ont passé à 6.000 m³ d'une façon normale et, éventuellement, pour prévoir une extension possible de l'agglomération de Jérusalem, à 12.000 m³.

Dans ces conditions, il fallait se préoccuper d'une source abondante et dont la qualité fût certaine. Comment établissons-nous que c'est au printemps de 1925 que nous avons commencé à parler d'une façon ferme de l'eau d'El-Audja, que nous avons saisi dès ce moment les autorités britanniques, les autorités palestiniennes ayant été, à leur tour, saisies quelques mois plus tard ?

Nous le prouvons d'abord par notre annexe 5 (page 61) ; il s'agit d'une lettre accompagnée d'un mémorandum (la lettre sous l'annexe 4, le mémorandum sous l'annexe 5), qui furent transmis par M. Mavrommatis à la Légation de Grèce et qui furent transmis à leur tour par la Légation de

Grèce au Foreign Office. Si vous vous reportez au mémorandum, vous y voyez ce qui suit (page 61, troisième alinéa) :

« En vertu de l'article 5, le concessionnaire [M. Mavrommatis] a le droit de soumettre tout autre projet, afin de le mettre à même de fournir la ville de Jérusalem et de compléter la fourniture d'eau ; en raison des pouvoirs conférés dans cet article, il aura le droit d'utiliser les eaux d'El-Audja à cet effet. Au cas où il trouverait nécessaire de le faire, il présume qu'aucun obstacle ne lui sera opposé. »

Donc, dès le mois de mai 1925, M. Mavrommatis demande à avoir ses coudées franches en ce qui concerne l'utilisation d'El-Audja. La lettre que je viens de citer est parvenue aux autorités britanniques, accompagnée du mémorandum ; l'annexe 7 le prouve ; cette annexe est une lettre du ministre de Grèce à Londres, à M. Mavrommatis, timbrée sous le n° 1666, Londres, le 18 juin 1925. Elle est ainsi conçue :

« Honorable Monsieur,

« Le Foreign Office m'a communiqué qu'il a soumis vos propositions relatives à vos concessions de Palestine aux autorités anglaises de Palestine. Sitôt réception de leur réponse, il discutera la matière avec votre représentant. »

Une deuxième preuve que, dès le printemps 1925, l'attention des autorités compétentes a été attirée sur la nécessité de prévoir l'utilisation de la source El-Audja pour les concessions Mavrommatis, résulte de la déclaration d'un ingénieur spécialiste de travaux hydrauliques de la maison Rofe & Son ; il s'agit de M. Raffety. Cette lettre est datée du 7 mars 1927 et s'exprime ainsi (page 236 des annexes au Mémoire hellénique) :

« Le choix de la source de Ras-el-Aïn ou El-Audja a été envisagé par nous deux avant et pendant les négociations de M. Raffety avec M. Lees, directeur des travaux publics de Palestine, concernant les conditions de la nouvelle concession. »

Et M. Raffety a fait une déclaration assermentée dans le même sens ; l'affidavit est déposé auprès de la Cour.

Une autre preuve résulte de la lettre de sir H. Greenwood du 5 septembre 1927, car son autorité vient d'être invoquée afin qu'il puisse, lui aussi, vous donner des apaisements à cet égard. Cette lettre est ainsi conçue :

« Cher Monsieur, » écrit sir Hamar Greenwood à MM. Westbury, Preston & Stavridi, solicitors à Londres, « je suis tombé d'accord et j'ai signé la concession Mavrommatis réadaptée, en m'entendant avec M. Lees, expert pour le Gouvernement

britannique, que les eaux d'El-Audja seraient à la disposition du concessionnaire pour la fourniture d'eau de Jérusalem et de la contrée environnante. »

Pour contredire ces indications relatives au choix d'El-Audja bien avant que la concession du Jourdain n'eût été régularisée au profit de M. Rutenberg, le Gouvernement britannique contesta l'argument que nous avions apporté.

Cet argument était le suivant : nous avions dit dans notre Mémoire : le prix qui a été fixé pour le mètre cube d'eau prouve que M. Mavrommatis entendait utiliser pour la concession les sources d'El-Audja et non pas les sources, plus proches de Jérusalem, mentionnées dans la concession primitive, à savoir les sources d'Aïn-Fara et d'Aïn-Favouar, qui ne pouvaient donner qu'un débit insuffisant ; le prix de sept piastres le mètre cube tient compte, en effet, des travaux beaucoup plus considérables qu'il faudra faire pour aller chercher les eaux de la source El-Audja, notablement plus éloignée.

C'est presque le double qu'il faut taxer le prix du mètre cube d'eau, si l'on va chercher les eaux de la source El-Audja, par rapport au tarif qu'il suffirait de percevoir en faisant les travaux sur les sources proches de Jérusalem.

Mais cette nécessité s'imposait parce que — l'été 1924, particulièrement sec, avait permis de s'en rendre compte — les sources primitivement envisagées n'étaient pas capables de donner un débit suffisant.

Que répond à cela la Grande-Bretagne ? Vous avez entendu cette argumentation à votre audience d'hier. Le Gouvernement britannique invoque un rapport qui figure à la page 135 des annexes, un rapport qui est fait à la maison John Taylor, une maison d'ingénieurs. Et ce rapport, nous dit-on (alinéa 10, page 135), déclare que les travaux coûteront aussi cher avec El-Audja, mais pas plus cher qu'avec les autres sources.

J'avoue, Messieurs, que j'avais été frappé par l'argument de mon honorable adversaire ; je me suis donc reporté au texte de ce mémorandum, et j'ai constaté qu'il ne voulait aucunement dire ce que le Gouvernement britannique a cru pouvoir en tirer.

En effet, les auteurs du rapport ne comparent pas les sources primitivement envisagées, la source d'Aïn-Fara et Aïn-Favouar, avec la source El-Audja ; ce qu'ils comparent, c'est El-Audja avec d'autres sources qui ne sont ni Aïn-Fara ni Aïn-Favouar, et qui sont également plus éloignées de Jérusalem que ces dernières [1].

[1] Je demande, Messieurs, la permission d'ajouter un mot : l'alinéa 3 de ce même document, page 135, est absolument probant dans le sens que j'indiquais ; il est ainsi conçu :

Donc, puisque la distance kilométrique est à peu près la même pour ces sources, il est tout naturel que les prix soient les mêmes pour l'adduction venant d'El-Audja et pour celle venant de ces sources, venant de Jéricho.

Mais, je le répète, et j'insiste beaucoup sur ce point, les sources comparées à El-Audja dans ce rapport Taylor ne sont pas celles primitivement envisagées dans la concession de 1914.

Vous voyez donc, Messieurs, que l'argument invoqué par la Grande-Bretagne ne repose que sur une méprise et qu'il tombe complètement.

Les rapports des ingénieurs envoyés par M. Mavrommatis et la maison Jackson, en janvier 1926, établissent que, dès les études préliminaires faites contradictoirement avec les ingénieurs palestiniens, on était tombé d'accord sur la nécessité d'utiliser l'eau d'El-Audja.

Et M. Lees, l'honorable directeur des Travaux publics de la Palestine, était d'accord sur la nécessité d'utiliser cette source. Vous vous en rendrez compte en constatant, page 154, ce qui est dit dans le Mémoire au n° 46. A peu près vers le milieu de la page, nous lisons que MM. Lane et Cottier, les solicitors de la maison Jackson, écrivent ce qui suit au sous-secrétaire d'État pour les Colonies :

« Nous sommes d'avis que M. Rutenberg n'a pas le droit qu'il invoque sur la source El-Audja et que le Haut-Commissaire, *s'il entre dans les vues des experts*, est pleinement justifié et autorisé à admettre la prise d'eau de cette source requise par le Comité proposé. »

« S'il est d'accord sur les vues *des experts* ». Or, Messieurs, qui donc était l'expert pour le Gouvernement de Palestine ? C'était M. Lees. Donc, M. Lees était pleinement d'accord, lui aussi, pour l'utilisation de la source d'El-Audja.

En conséquence, la Cour ne s'arrêtera pas aux objections faites et qui sont tirées, d'une part, de la concession primitive, d'autre part, du texte de la concession réadaptée.

La *concession primitive* désignait nominativement certaines sources, soit ; mais elle ne les imposait pas, et l'article 5 prévoyait le droit pour le concessionnaire d'utiliser d'autres sources.

La *concession réadaptée*, dit-on encore, ne nomme pas El-Audja, alors que, si l'on avait décidé de l'utiliser antérieure-

"The choice therefore lies between the other sources, namely Ain-Sultan and Ain-Duk near Jericho, and Ras-el-Ain near Jaffa."

Donc, le calcul est fait par rapport à des canalisations venant soit de Aïn-Sultan ou bien de Aïn-Duk près de Jéricho, soit de Ras-el-Aïn, c'est-à-dire El-Audja, près de Jaffa ; mais la comparaison n'est faite aucunement entre El-Audja (ou Ras-el-Aïn), d'une part, et les sources primitivement envisagées, d'autre part.

ment à la réadaptation, on aurait, de toute évidence, nommé cette source dans le nouveau texte.

Notre réponse est facile. La Réplique hellénique a déjà donné la raison de ce silence (page 312 en haut). L'expert britannique s'en rendait compte, il savait que les travaux d'El-Audja seraient coûteux ; or, M. Mavrommatis avait, en vertu de sa concession, un tant pour cent sur les travaux ; il y aurait donc une augmentation du pourcentage à son profit. L'expert britannique ne voulut pas prendre sur lui de proposer tout de suite cette augmentation de pourcentage, résultant du choix d'une nouvelle source, et il tint à être couvert par l'opinion concordante des ingénieurs officiels.

La conclusion est la suivante : dès le début de 1926, antérieurement, donc, à la date où l'Administration palestinienne rendit définitive la concession du Jourdain, cette administration connaissait parfaitement le conflit existant entre M. Rutenberg et M. Mavrommatis, à propos de la source El-Audja ; ce conflit existait depuis l'été de 1915 ; elle ne s'en priva pas moins du moyen d'action excellent qu'elle possédait à l'égard de M. Rutenberg pour lever l'opposition de celui-ci. Or, cette opposition présentait une importance qui ne peut être sous-estimée ; je n'en veux pour preuve que la lettre du Colonial Office que j'ai citée tout à l'heure, et dans laquelle nous voyons le secrétaire d'État au Colonial Office insister, à raison de cette position de Rutenberg, pour que M. Mavrommatis entre en composition avec lui.

[*Séance publique du 9 septembre 1927, après-midi.*]

Monsieur le Président, Messieurs, je me suis efforcé ce matin, dans les derniers instants que j'ai consacrés à mes explications, de montrer à la Cour le plan de M. Rutenberg, les moyens qu'il avait mis en œuvre et la complaisance qu'il avait rencontrée auprès des autorités palestiniennes. Pour en avoir terminé avec cette question, il ne me reste plus qu'à présenter à la Cour quelques observations sur la valeur, sur le bien-fondé ou le mal-fondé de cette opposition Rutenberg. Ceci ne me demandera pas longtemps ; car cette opposition, si les autorités palestiniennes avaient voulu la considérer tout de suite et de froide réflexion, ne valait rien et ne pouvait pas même servir de prétexte à différer un seul instant l'approbation des plans de M. Mavrommatis.

En droit, d'abord, il y avait inopposabilité à M. Mavrommatis des prétentions de M. Rutenberg ; c'était affaire à lui avec l'Administration palestinienne, et celle-ci n'avait qu'à prendre ses responsabilités.

Mais la prétention était-elle même fondée ? Non. La concession de M. Rutenberg l'autorisait à disposer de l'eau

d'El-Audja pour la force motrice, et pour la force motrice exclusivement. Il n'avait, en aucun cas et à aucun degré, le droit d'empêcher des prises d'eau aux fins de distribution d'eau potable.

En fait, même si ces raisons de droit n'existaient pas, est-ce qu'il fallait s'arrêter à cette opposition ?

Vous verrez tout de suite que cela était impossible, si je vous soumets deux chiffres : celui du débit de la source El-Audja, qui était de 850.000 m³ par vingt-quatre heures, et celui de la consommation maxima pour la ville de Jérusalem et ses environs en eau potable, qui est seulement de 12.000 m³. Il y a une telle disproportion entre ces chiffres qu'il apparaît aux esprits les moins prévenus qu'une prise d'eau aux fins de distribution d'eau potable ne pouvait nullement porter atteinte aux intérêts de M. Rutenberg.

Par conséquent, il n'y avait dans l'opposition Rutenberg qu'un simple prétexte. Mais, dès l'instant où cette opposition fut formée, M. Mavrommatis ne put passer outre.

L'approbation de sa concession ne dépendait pas de lui ; elle dépendait exclusivement des autorités palestiniennes, et c'est celles-ci qui auraient dû passer outre. Ah ! elles ont fini par le faire, nous dit-on. Oui, mais elles auraient dû le faire tout de suite ; elles auraient dû exercer immédiatement leurs pouvoirs au lieu de faire traîner pendant de longs mois l'approbation des concessions de M. Mavrommatis et de causer — ainsi que j'aurai l'honneur de vous le montrer très rapidement — le plus grave préjudice à ce concessionnaire.

Ainsi, libre carrière a été laissée pendant de longs mois à M. Rutenberg, alors qu'il eût dû être fait justice de ses prétentions en quelques jours. Son opposition a empêché d'agir les autorités palestiniennes ; elle a retardé l'approbation des concessions Mavrommatis, afin de lasser M. Mavrommatis et de l'amener à composition.

En effet, Messieurs, c'est une guerre d'usure que celle qui a été poursuivie contre M. Mavrommatis. De cette guerre d'usure, je ne prendrai les incidents qu'à partir de la date de la signature des contrats réadaptés. Ce n'est pas qu'il n'y aurait à dire bien des choses avant. Mais je ne veux pas abuser de la bienveillance de la Cour. Je laisse, par exemple, de côté toutes les lenteurs qui retardèrent les débuts de la discussion de la réadaptation par suite des incertitudes sur la qualité des personnes en face desquelles se trouva l'expert désigné par le Gouvernement hellénique ; si bien que, la première démarche ayant eu lieu le 27 avril 1925, la conversation ne put commencer que le 15 janvier suivant.

Qu'avait à faire M. Mavrommatis après la signature de ses conventions ? Il avait à envoyer aux autorités compétentes ses plans définitifs ; il avait à obtenir d'elles l'approbation de ces plans ; il avait à constituer la société qui devait lui

être substituée. Quels délais avait-il à cet effet ? Pour ses plans, il pouvait ne les envoyer qu'au bout de huit mois ; pour la société, il avait un délai total de douze mois.

M. Mavrommatis se hâte de soumettre tout de suite ses plans, sans profiter du délai de huit mois.

Mon éminent contradicteur faisait hier un raisonnement fondé sur l'addition des différents laps de temps impartis au concessionnaire et, supposant — ce qui est prévu comme une éventualité par les textes de la concession — qu'un différend peut compliquer les choses, il vous montrait qu'il faut au moins douze mois et même treize, en additionnant tous les délais, pour arriver à les épuiser tous.

Certes. Mais cette solution est toute théorique, et elle ne peut se produire que si le concessionnaire, justement, n'a pas la précaution de se hâter d'envoyer ses plans. Cette situation ne peut se produire que si le concessionnaire met huit mois entiers à préparer ses plans et qu'il ne les envoie qu'au bout du huitième mois. Mais aucun concessionnaire sérieux n'agira ainsi, car l'approbation rapide des plans est une condition *sine qua non* — je ne parle pas juridiquement, je parle commercialement — de la réalisation d'une concession. Il est clair, en effet, que l'on ne pourra constituer la société à laquelle la concession sera repassée que si cette société peut établir un programme financier. Mais il est certain, d'autre part, que cette société ne pourra établir de programme financier que si elle sait exactement quel capital elle aura à investir dans les travaux qu'elle a à effectuer. Et comment connaîtrait-elle ce capital à investir, si elle n'avait pour cela les plans, et les plans approuvés ? Donc, on ne peut songer à financer une concession qu'après que les plans ont été approuvés. C'est la première chose à faire, et c'est la première phase qui doit être franchie le plus rapidement possible dans la série d'opérations qui s'échelonnent entre le moment où un concessionnaire obtient une concession et celui où il parvient à la voir régulariser complètement par l'agrément du pouvoir concédant à la société qu'il se substitue.

Par conséquent, M. Mavrommatis se hâte d'envoyer ses plans. Les plans sont reçus le 5 mai 1926 à Jérusalem. Le délai de trois mois commence à courir à partir de cette date, et l'approbation aurait dû être donnée le 5 août, dernière limite. Or, à quelle date les plans ont-ils été approuvés ? Le 23 septembre pour la concession d'électricité, le 2 décembre pour la concession d'eau.

Va-t-on nous dire que dès le moment où la concession électricité était approuvée, M. Mavrommatis pouvait commencer à travailler ? Non, car ce serait ne pas tenir compte d'un avenant, d'une convention additionnelle, qui avait été signée le même jour que les contrats principaux et qui stipulait que

M. Mavrommatis aurait la faculté de fondre en une seule les deux concessions au point de vue du régime financier. Cette faculté était, en réalité, une obligation, car aucun groupe financier n'aurait consenti à financer séparément ces deux concessions. Réunies, elles formaient une affaire superbe ; non réunies, elles formaient des affaires viables, mais évidemment beaucoup moins brillantes.

Lorsque la concession électricité a été approuvée, le 23 septembre — par conséquent avec un retard de plus d'un mois et demi sur le délai qui aurait dû être observé, puisque c'est le 5 août, je le répète, que les deux concessions auraient dû être approuvées —, est-ce que M. Mavrommatis a considéré toutes choses comme parfaites ? A-t-il considéré les retards comme effacés ? En d'autres termes, a-t-il ratifié l'attitude des autorités palestiniennes ? A-t-il passé condamnation ? Non.

Pour vous en rendre compte, Messieurs, il suffit que vous vous reportiez à la lettre du 7 octobre 1926 (n° 89 des annexes, page 191) que M. Mavrommatis écrivit alors au sous-secrétaire d'État pour les Colonies. Il acceptait les modifications qu'on lui demandait pour la concession électricité ; mais il demandait l'approbation immédiate des plans d'eau, et il demandait la prorogation de trois mois pour les délais de constitution de la société, prorogation qui avait été promise à sir Hamar Greenwood. Faute de l'approbation des plans de la concession eau et de l'acceptation de la prolongation de trois mois pour l'électricité, en raison des retards occasionnés, les démarches en vue du financement et de la constitution de la société ne pouvaient pas avancer.

Nous sommes donc en présence de graves atermoiements de la part des autorités compétentes, et sur lesquels M. Mavrommatis n'a jamais passé condamnation. En réalité, c'est le 2 décembre seulement que M. Mavrommatis aurait pu marcher, alors que c'est le 5 août, étant donné la date du dépôt des plans (5 mai 1926), que M. Mavrommatis aurait dû avoir la voie libre.

Peut-on donner une explication de ces atermoiements en invoquant une question de drainage ? Non.

En effet, il y a bien eu, au mois d'août, au sujet d'une question de drainage, des négociations entre le Colonial Office et sir Charles Cottier. Mais, Messieurs, notez que ces négociations, auxquelles le Gouvernement britannique s'est référé hier, n'ont rien de commun avec M. Mavrommatis. En effet, sir Charles Cottier n'agit pas au nom de M. Mavrommatis.

Quant à la question du drainage, s'agissait-il donc d'une nouvelle concession ? En aucune façon. Car cette question est prévue à l'article 19 de la concession eau de M. Mavrommatis.

Cet article, dans la littéra C, dit que si le Haut-Commis-

saire ne prend pas les dispositions pour faire établir un système de drainage en même temps que l'exécution des travaux d'eau, et que, de ce fait, la consommation en souffre, les tarifs seront augmentés en proportion.

Donc, durant les négociations, le seul point réel et véritable qui a entravé l'approbation, ce n'a pas été la question du drainage, cela a été la question de l'opposition Rutenberg.

Autre prétexte invoqué à ces atermoiements : le contrat passé par M. Mavrommatis avec lord Gisborough. Que penser de cet autre prétexte ? Le contrat passé par M. Mavrommatis avec lord Gisborough fut signé le 22 janvier 1926, soit un mois environ avant la signature des contrats de réadaptation du 25 février 1926 et dont le texte a été arrêté et signé par les experts en décembre 1925. C'était un contrat tout à fait usuel et normal ; il s'agissait d'un contrat concernant le financement de la concession. Et lord Gisborough intervenait en qualité de *trustee* de la société à constituer.

Ce n'est pas un point spécial à l'Angleterre ni aux affaires anglaises ; comme le dit notre Mémoire, c'est un point absolument conforme à l'usage suivi partout, en matière de concessions. Comme la société prévue ne peut être constituée qu'après l'accomplissement de certaines conditions préalables, notamment l'approbation des plans et l'évaluation des dépenses des travaux ; comme, d'autre part, la société ne peut contracter directement qu'après avoir pris naissance comme personne juridique, on nomme un trustee pour agir à sa place.

Une fois que la société s'est constituée, elle accepte comme siennes les obligations contractées par le trustee, qui s'en trouve déchargé.

C'est ce contrat classique que M. Mavrommatis avait passé avec lord Gisborough. Ce contrat est parfaitement clair ; en toutes occasions où il fut appliqué, lord Gisborough a pris la qualité de trustee. Jamais donc il n'a pu y avoir le moindre doute sur la qualité juridique du co-contractant de M. Mavrommatis.

Néanmoins, on a prétendu incriminer ce contrat en disant qu'il constituait une cession totale des droits de M. Mavrommatis. Il vous sera facile, Messieurs, de vous convaincre que c'est là un grief purement illusoire.

Aussi bien, pendant longtemps, le Colonial Office lui-même n'a pas cru nécessaire de soulever d'objection. Après avoir, comme il était légitime, demandé des renseignements sur la nature de l'accord, il n'a fait aucune observation. C'est seulement plusieurs mois après, vers le moment — notons cette coïncidence — où va expirer la date à laquelle les plans auraient dû être approuvés, que nous voyons de nouvelles demandes d'explications se reproduire et des objections être dirigées contre ce contrat.

Notre Mémoire contient d'ailleurs des éclaircissements complets sur cette question, et je ne fatiguerai pas la Cour plus longtemps sur ce point.

Autre prétexte : le dépôt des plans, nous dit-on, aurait été tardif. Ah ! si vous aviez déposé vos plans le 5 mai 1926, vous auriez pu alors prétendre à en obtenir l'approbation le 5 août ; mais vos plans ont été déposés, à ce moment-là, par qui ? par vous ? Non, par lord Gisborough ; or, celui-ci n'avait pas qualité pour déposer vos plans. Dans ces conditions, nous les avons bien reçus, — nous vous en avons accusé réception, — nous les avons étudiés, nous les avons critiqués, mais nous avons considéré qu'ils n'étaient pas valablement déposés. C'est seulement le 5 septembre que, par votre dépêche, vous avez fait courir utilement le délai de trois mois que nous avions pour approuver vos plans. Voilà, Messieurs, ce qui nous a été dit.

Je ne pense pas que la Cour veuille s'arrêter à cette objection ; si, en effet, la Cour veut bien réfléchir au but de l'opération, elle considérera que les plans étaient valablement déposés à partir du moment où ils parvenaient dûment à la connaissance des autorités palestiniennes.

Qu'y a-t-il d'essentiel dans le dépôt des plans ? Qu'ils parviennent, que l'on sache à quoi ils répondent et pour le compte de qui ils sont déposés. Or, tout cela, on le savait : on savait qu'ils étaient arrivés, — on en a accusé réception, — on savait pour le compte de qui ils étaient déposés, puisque le télégramme d'accusé de réception qui figure aux annexes déclare : « les plans de la concession Mavrommatis reçus » (annexe 39 *bis*). Enfin, ils étaient déposés par lord Gisborough en qualité de trustee.

Ce n'est que le 5 septembre, néanmoins, que l'on a voulu considérer nos plans comme déposés, à la suite d'un télégramme dont vous connaissez les circonstances et sur lequel je ne reviens pas.

M. Mavrommatis s'est-il incliné, d'ailleurs, devant la thèse des autorités palestiniennes « que ces plans n'auraient été déposés valablement que le 5 septembre » ? Non, et il a protesté à diverses reprises ; dans son télégramme du 5 septembre, il ne dit aucunement qu'il considère que ce soit à bon droit que l'on ait considéré les plans comme n'étant pas encore déposés jusque-là.

Voilà donc, Messieurs, toute une série de retards que vous jugerez inadmissibles et qui ne peuvent s'expliquer que par l'opposition persistante du personnage dont j'ai déjà si longuement parlé.

Ces retards, nous dit le Gouvernement britannique, vous ne pouvez pas les incriminer, parce que l'Administration a été affranchie de tous délais. Dans le contrat de concession, le

temps n'était de l'essence du contrat que pour les obligations de M. Mavrommatis ; il n'y avait de condition de délai imposée qu'à lui ; les obligations assumées par le Haut-Commissaire ne constituaient à aucun titre des conditions de l'accomplissement desquelles dépendait l'accomplissement des contrats.

D'abord, nous dit-on, aucun acte du Haut-Commissaire ne pouvait empêcher l'exécution des contrats. Ce n'est pas exact ; pour obtenir une décision de l'expert qui a qualité, lui, pour briser une opposition, il faut se trouver en présence d'une notification de non-approbation des plans.

Si l'Administration ne répond pas, il est impossible de déclencher la procédure de nomination de l'expert ; en d'autres termes, aucun recours n'est possible contre le silence du Haut-Commissaire.

Nous avons connu en France, Messieurs, — ici, vous me permettrez un rapprochement, — une situation tout à fait analogue. Jusqu'à la loi du 17 juillet 1900, il n'existait en France aucun recours contre le silence de l'Administration ; on ne pouvait aller devant les tribunaux administratifs que lorsqu'on avait obtenu une décision qui liât le contentieux. Mais si l'Administration se refusait à répondre, il n'y avait pas de décision et l'on ne pouvait pas aller devant les tribunaux administratifs.

A cette époque-là, on répondait à l'administré français par la phrase rendue populaire par M. Thiers que « l'État est honnête homme », que, dans ces conditions, l'administré doit se soumettre patiemment, que son droit finira bien par être reconnu un jour ou l'autre. . . .

En attendant, l'administré était démuni contre le silence de l'Administration. C'est seulement la loi du 17 juillet 1900 qui a décidé que le silence de l'Administration gardé pendant quatre mois devait équivaloir à une décision de rejet permettant l'introduction d'un recours.

Nous sommes dans une situation semblable dans cette affaire Mavrommatis ; nous pouvons quelque chose contre la non-approbation de nos plans, à une seule condition : c'est que la non-approbation soit formellement exprimée. Au contraire, M. Mavrommatis était démuni contre le silence gardé par les autorités palestiniennes.

La deuxième raison que donne la thèse anglaise pour essayer de démontrer que les obligations assumées par le Haut-Commissaire ne seraient pas des conditions, c'est qu'il est impossible, dit-elle, d'admettre que le Haut-Commissaire ait voulu accorder les concessions à la condition qu'il accomplirait certains actes dépendant de lui seul.

Il est facile de répondre à cette objection. L'obligation du concessionnaire de constituer dans les douze mois sa société d'exploitation est conditionnée par l'approbation des

plans ; donc, l'obligation d'approbation est une condition du contrat.

Je crois avoir montré ainsi que les prétextes donnés pour essayer de justifier les retards subis par l'approbation des plans ne peuvent pas être retenus comme des raisons valables.

En réalité, ces retards ne pouvaient s'expliquer par aucune bonne raison, mais simplement par le profit qu'en escomptait celui qui en était l'instigateur. Ces retards devaient exercer psychologiquement sur M. Mavrommatis une influence déprimante et l'amener peut-être à accueillir ces tractations dont j'ai eu l'honneur de soumettre à la Cour, ce matin, le si subjectif compte rendu. Ces retards paralysaient la constitution de la société ; ils mettaient le concessionnaire dans le cas, peut-être, d'être déchu à un moment donné, par l'expiration des délais ; enfin et en tout cas, ces retards rendaient de plus en plus difficiles et même presque impossibles la constitution de la société et l'obtention des appuis financiers nécessaires.

Le refus d'approbation du Colonial Office à cause de l'opposition de Rutenberg a été, Messieurs, la raison de la rupture de ce contrat qui avait été signé, dès les premiers jours après la réadaptation des concessions, entre M. Mavrommatis et lord Gisborough, et le groupe Jackson.

La preuve vous en est fournie par le télégramme de MM. Lane & Cottier au Haut-Commissaire pour la Palestine, en date du 3 septembre 1926 (annexe n° 69, page 178) :

« J'ai le regret de vous informer que la réclamation déposée par M. Rutenberg sur El-Audja et le retard à prévoir en ce qui concerne le système de drainage pour Jérusalem ont empêché les démarches de Jackson. »

Ici, Messieurs, ils mêlaient deux questions ; ils mêlaient une question de drainage qui concernait simplement Cottier, ainsi que je vous l'ai montré tout à l'heure, avec l'affaire d'El-Audja et l'opposition de Rutenberg à propos d'El-Audja, affaire qui, elle, intéressait directement le concessionnaire, ses bailleurs de fonds et ses entrepreneurs.

Ces retards ont eu une influence désastreuse dont vous trouverez les témoignages indubitables dans les pièces que nous vous avons produites : l'attestation de la grande maison financière MM. C. Birch, Crisp & Co. (annexe n° 119, page 219) dans laquelle ces messieurs, bien connus comme financiers, comme émetteurs, comme placeurs d'emprunts très importants (leurs références figurent aux pages 215 à 218), déclarent à M. Malcolm, agent de M. Mavrommatis :

« Comme vous le désirez, je vous confirme ce que je vous ai dit à l'automne : ma maison considérait ces concessions comme une bonne affaire, mais naturellement nous ne pouvions

pas entreprendre de financer ces concessions à cause des retards dans l'approbation des plans, du temps inadéquat et de l'incertitude sur l'attitude des autorités. »

Dira-t-on que ceci est postérieur aux événements mêmes puisque la lettre est datée du 18 janvier 1927 ? Je ne pense pas qu'une maison de cette importance puisse donner des certificats de complaisance, d'autant plus qu'elle se réfère expressément à des entretiens qui ont eu lieu à l'automne.

Mais, si cette objection était faite, il serait facile de la lever au moyen d'une série de lettres contemporaines des événements, lettres prouvant que d'autres groupes importants ont refusé de financer les concessions, bien qu'ils considérassent l'affaire comme excellente, eux aussi à cause des retards, à cause de l'incertitude dans laquelle eux aussi se trouvaient sur l'état d'esprit des autorités.

Je n'analyserai pas la longue correspondance qui figure dans le dossier entre M. Mavrommatis et une banque française importante, la banque Bauer, Marchal et Cie ; tous ces documents figurent aux annexes. Je me permets, si la Cour veut bien m'y autoriser, d'en indiquer simplement la référence : lettres nos 97, 100, 101, 104, 105, 106, 108, 110, et enfin n° 111 : je demande simplement la permission de lire cette dernière, dont le ton est extrêmement significatif.

« Cher Monsieur,

« Comme suite à notre lettre du 12 courant, » écrivent MM. Bauer, Marchal et Cie à M. Mavrommatis, « nous devons vous faire part en toute franchise, que nos amis viennent de nous aviser qu'ils sont fort mal impressionnés par les délais successifs que vous avez sollicités pour la régularisation de votre dossier, alors qu'ils pensaient que tout était virtuellement au point. » [La Cour verra qu'il s'agit de l'approbation des concessions.]

« Il font valoir qu'ils n'ont pas l'habitude de considérer des affaires qui ne sont pas déjà tout à fait en ordre, et que, dans ces conditions, ils ne désirent pas continuer davantage à s'occuper de la vôtre.

« Nous sommes infiniment contrariés d'avoir reçu une telle réponse, qui, nous devons vous le déclarer, nous paraît tout à fait justifiée. Veuillez bien considérer notre intervention comme terminée, car nous ne voudrions pas nous exposer à recevoir de nouvelles observations désobligeantes pour nous. »

Vous voyez, Messieurs, à quelle désagréable situation M. Mavrommatis se trouvait réduit auprès de ses appuis financiers les plus sérieux, comme la maison Bauer, Marchal et Cie,

dont les références figurent également au dossier, du fait des retards prolongés des autorités compétentes.

Enfin, on passe outre à l'opposition de M. Rutenberg, pour accorder l'approbation de la concession Mavrommatis, mais seulement lorsque le financement en est devenu impossible, lorsque l'affaire, par suite de ces retards, par suite du discrédit jeté sur elle du fait de l'incertitude sur l'attitude des autorités compétentes, a été brûlée sur la place de Londres, et brûlée jusque sur la place de Paris.

Étant donné ces faits, peut-on dire que les autorités palestiniennes, et à la suite les autorités britanniques, aient rempli leurs obligations internationales découlant du Protocole XII ? Je ne le crois pas. Or, ce sont ces obligations que vise l'article 11 du Mandat.

D'autre part, tous les actes mentionnés sont des actes des autorités administratives, sur quelques suggestions qu'elles aient pu agir, et ces actes ont leur source dans les pouvoirs de *public control* de l'article 11. Nous avons donc, Messieurs, fait la preuve que nous devions.

Pourtant, l'incompétence est soutenue devant vous. J'entendais hier le très éminent représentant du Gouvernement britannique vous dire qu'il avait eu l'honneur de se présenter à quatre reprises devant votre haute juridiction et que c'était la première fois qu'il soutenait une exception d'incompétence.

Permettez-moi de rappeler, Messieurs, que, si je feuillette le texte de l'Arrêt n° 2, dès le début du point de droit, je trouve ces lignes :

> « C'est d'une exception tendant à son dessaisissement que la Cour permanente de Justice internationale est appelée par le Gouvernement de Sa Majesté britannique à connaître, au seuil de l'instance soulevée par l'affaire des concessions Mavrommatis en Palestine. »

Ce n'était pas l'éminent représentant actuel de la Grande-Bretagne qui avait soutenu cette objection ; mais elle avait été soutenue déjà devant la Cour au nom du Gouvernement britannique.

Messieurs, le Gouvernement hellénique vous demande en pleine confiance de rejeter cette objection, comme vous l'avez fait la première fois. Les obstacles mis à l'exécution des concessions Mavrommatis réadaptées ont été opposés par les autorités compétentes dans la limite de leurs attributions telles qu'elles résultent de l'article 11 du Mandat, et ces actes constituent des infractions aux obligations internationales assumées par l'État mandataire.

Il ne me reste plus, pour avoir achevé la série des observations que j'ai eu l'honneur de vous soumettre, à dire que quelques mots de l'argument concernant l'obligation d'épuiser

les autorités judiciaires nationales avant de pouvoir se présenter devant la Cour.

Le Gouvernement hellénique conteste la valeur, à la fois au point de vue scientifique et au point de vue pratique, de la règle dont le Gouvernement britannique allègue l'existence. Le Gouvernement hellénique maintient la position qu'il a eu l'honneur de prendre dans la procédure écrite. Nous ne discuterons donc pas plus avant cette question de l'épuisement nécessaire des voies judiciaires, nous en tenant aux applications fournies par écrit.

Mais un point appelle des observations nécessaires, point qui se présente d'une façon un peu nouvelle par rapport à celle dans laquelle il se présentait au moment de la procédure écrite. Le Gouvernement britannique nous avait dit : « Présentez-vous devant les autorités palestiniennes ! » A quoi nous avions répondu : « Mais, si nous nous présentions devant les autorités palestiniennes, est-ce que nous ne pourrions pas être évincés avant même d'avoir pu soumettre une observation quelconque à ces autorités ? » Et nous faisions valoir le texte de l'ordonnance qui est reproduite aux annexes (page 301).

Hier, le Gouvernement britannique a apporté à cette barre un engagement préalable du Haut-Commissaire d'autoriser M. Mavrommatis, s'il le jugeait à propos, à accéder devant les juridictions palestiniennes. C'est de cette offre que je voudrais dire quelques mots.

Est-ce là, Messieurs, le résultat de cinq années de luttes, soutenues par M. Mavrommatis, que ce consentement donné par le Haut-Commissaire, qui est apporté ici comme une concession de la dernière heure ? Ce n'est même pas une porte que l'on ouvre toute grande : c'est une porte simplement entre-bâillée. Elle est pleine de réticences et de réserves, la formule de cette déclaration du Haut-Commissaire. A quoi, en effet, est limité cet accès aux tribunaux ? Il est limité à l'hypothèse où il s'agit d'une action relativement à des délais indus, c'est-à-dire uniquement à des questions de droit administratif, de droit interne. Tout ce qui touche à la question du droit international est exclu par avance du débat. Or, Messieurs, vous savez que c'est là l'essentiel dans cette question. Est-ce que le Gouvernement hellénique pourrait donner à son ressortissant le conseil de se contenter de cette concession *in extremis* ? Est-ce que le Gouvernement hellénique pourrait dire à M. Mavrommatis, qu'il a le devoir de protéger : « Abdiquez votre droit ; admettez que votre concession n'est plus qu'un titre de droit interne, de droit municipal ; oubliez que cette concession est d'origine internationale ; laissez le bénéfice que vous avez à ce droit internationalement acquis par une concession d'origine turque ; abandonnez la protection internationale dont bénéficie ce droit par les principes du droit

international commun, les principes de la succession des États ; répudiez le bénéfice de la compétence de la plus haute juridiction du monde. » Est-ce là ce qu'on vient demander au Gouvernement hellénique de dire à son ressortissant ?

Eh bien, Messieurs, cela, il ne le dira pas. M. Mavrommatis et le Gouvernement hellénique, qui a pris fait et cause pour lui, ont entre les mains un titre international, internationalement protégé par le droit résultant des articles 11 et 26 du Mandat de saisir votre juridiction ; non seulement ce droit existe, mais ce droit a déjà été reconnu ; il a été proclamé à la face du monde par l'Arrêt n° 2. Et vous nous proposez d'aller devant la juridiction palestinienne, fournir caution, gravir péniblement tous les échelons des instances successives, pour je ne sais quel résultat aléatoire ! Non, Messieurs, le Gouvernement hellénique est devant cette Cour et il y reste avec le plus profond respect et la plus grande confiance.

L'action qu'il a introduite n'est pas une action légère, une action vexatoire ; il est pénétré d'un profond respect — il ne craint pas de le dire — pour le Gouvernement du grand pays qui est momentanément son adversaire, et l'attitude modérée qu'il a constamment observée au cours des longues négociations préliminaires à ce débat judiciaire le montre.

Je demande la permission, en terminant, de vous fournir la preuve (et, pour ne pas être suspect de partialité, c'est à votre Arrêt n° 2 que j'emprunte ce témoignage) de la modération du Gouvernement au nom duquel j'ai l'honneur de me présenter. Voici, Messieurs, ce que je relève à la page 14 de votre arrêt. Après avoir déclaré que « les lettres en date du 22 janvier et du 2 février 1923, adressées par M. G. Agar Robartes, du Foreign Office, à M. Melas, secrétaire de la Légation de Grèce à Londres, avaient fait voir au Gouvernement hellénique que le Gouvernement britannique était peu disposé à poursuivre avec lui une négociation directe au sujet de la réclamation de son ressortissant », votre arrêt ajoute ces lignes que je confie à vos méditations :

> « Un an après, le 26 janvier 1924, la Légation de Grèce à Londres s'est adressée au Foreign Office aux fins de savoir si, dans l'opinion du Gouvernement britannique, « il n'était pas possible de satisfaire aux réclamations de « M. Mavrommatis » ou de les soumettre à l'arbitrage soit *d'un membre de la Haute Cour de Justice*, soit d'un tribunal *dont le président*, à défaut d'accord entre les Parties, *serait désigné par ce Gouvernement lui-même.* »

Voilà, Messieurs, la proposition qui a été faite par le Gouvernement hellénique au Gouvernement britannique ; elle résulte du texte même de votre arrêt. Je ne veux rien ajouter au rappel de ce fait.

3.

SPEECH BY Mr. PURCHASE

(representing the Greek Government)

AT THE PUBLIC SITTING OF SEPTEMBER 10th, 1927 [1].

May it please the Court; this is not the speech I intended to have delivered, but a very compressed speech framed for the purpose of saving very considerably the time of the Court, and I sincerely hope that the method we ventured to adopt in order to bring about this result has not been inconvenient to this high tribunal. If so, I can only say, in extenuation, that it has effected its purpose and that it will shorten the proceedings by some hours. I do not intend, therefore, to refer to the correspondence in detail, but to content myself with a few observations connected with the law.

The Greek Government maintains that the question of jurisdiction depends upon and is governed by international law. It is quite correct that the Agreements of February 25th, 1926, state that questions of construction of the document are to be interpreted by English law; but that applies to the concessions when they are in working order, as effective contracts. It cannot be said that they are in that condition yet. I should like to deal with some of the contentions of the Attorney-General respecting English law. In dealing with the question of consideration (page 27), he states that it would be a *reductio ad absurdum* to suggest that the forfeiture of an insurance policy would entitle the assured to recover the premiums paid. That is not a correct analogy, for the bargain with the assured is that he should be insured against certain risks, and until forfeiture he has had the advantage of his contract. The insurance company is not likely to and in fact cannot forfeit the policy except for a serious misstatement which was calculated to and did deceive. It is noted that the British Government adopts the definition of "consideration" given by the Greek Government, but declares that a failure of consideration only gives rise to an action for damages. The Greek Reply deals with this matter and shows that for the breach of a condition which is something which is of the essence of the contract, or goes directly to the substance of the contract, and is a vital characteristic of it, the injured Party has the right to treat the contract

[1] Documents quoted in this speech:
Greek Case; see Part III, No. 2, pp. 109-175 of this volume.
Annexes to the Greek Case; see Part III, No. 2 *a*, pp. 176-450.
British Preliminary Objection; see Part III, No. 4, pp. 451-468.

as completely broken. It has not the right to repudiate the contract, as suggested by the Attorney-General, but of treating the contract as repudiated, namely, repudiated by the High Commissioner. This is illustrated by the case of *Wallis* v. *Pratt, Law Reports*, 1910, 2 King's Bench Division, pages 1012 and 1013, and the position is supported by Section 11 of the Sale of Goods Act, 1893. On page 28 of the transcript it is stated that it is a rule of English law that extrinsic evidence may not be given of a contract; but in Anson, there are given ten pages of exceptions to this general rule. In Halsbury's *Encyclopædia*, paragraph 1050, page 524, it is stated that a written agreement must, however, be construed in all cases with reference to the surrounding circumstances and that parol evidence is accordingly admissible of the circumstances of the particular case, and surely this is such a contract as should admit the evidence of surrounding circumstances. On page 33 the Attorney-General seeks the assistance of equity in support of his argument respecting the waiver of time condition by reason of further negotiations upon the part of M. Mavrommatis. There is a very good maxim in equity, that he who seeks equity must do equity, and the British Government's consistent attitude towards M. Mavrommatis does not, on that ground, show that they are entitled to invoke the assistance of equity. Another very good maxim in equity is *vigilantibus non dormientibus æquitas subvenit*, and the person who, as the High Commissioner has done, has prejudiced M. Mavrommatis by long delays upon vital matters, would not reap much advantage from that principle in a court of equity. But what is this principle of waiver? It does not seem to have been correctly stated, for the case which has been cited in support of the Attorney-General's attitude is the case of *Webb* v. *Hughes* which is an authority in which a contract for the sale of land was dealt with. Waiver, under the law of contracts, is a well-known principle, and is stated by Anson as the method of the discharge of a contract. In Chapter XII he puts forth this elementary proposition that a contract may be discharged by agreement between the Parties that it shall no longer bind them. That is waiver, or rescission, of a contract. It is further stated that discharge by waiver requires a mutual abandonment of claims, or else a new consideration for the waiver, and quotes the case of *King* v. *Gillett*, in 7 *Meeson* & *Welsby*, page 55, in which it is laid down that there must be a proposition to exonerate on the part of the plaintiff, acceded to by himself, and this in effect will be a rescinding of the contract. By no stretch of the imagination can it be suggested that this is what has occurred in M. Mavrommatis' case, nor can it be advanced that arrangements respecting the purchase price for the sale of land

which in England, as in all countries, is a complicated chapter of statute law, is an analogy for what has arisen under the case with which the Court is concerned. Every attempt was made for a settlement and solution of the problem both by M. Mavrommatis and by friends who acted independently of him; but in no sense can it be argued that he ever waived his rights.

This brings me to the last point upon which I should like the privilege of making a few observations. On page 17, the Attorney-General, referring to the arrangements with Lord Gisborough, said that before they received the agreement the Colonial Office had never been informed of the terms of the agreement. My answer is that it was no concern of the Colonial Office, and that is admitted in a letter from the Colonial Office dated April 17th, 1926, Annex No. 34, page 129, in which it was stated that the appointment of Lord Gisborough was not subject to Mr. Amery's approval. The concessions demand that the plans shall be deposited for approval and that the company shall be formed and that its statutes shall be approved by the Crown Agents for the Colonies. There is no stipulation whatever that any other arrangements which the concessionnaire may have to make shall be subject to the approval of the Crown Agents for the Colonies. Therefore it was not necessary to secure their approval before making an arrangement with a trustee for the company. A trustee is the proper person to arrange a matter of this character because, by English law and by foreign law, it is impossible to make a contract with a company which is not formed, and therefore it is customary to arrange for the intervention of a trustee who is merely acting as an intermediary or agent between the concessionnaire and the company which is to be formed. This is the usual practice, and the Crown Agents for the Colonies are not concerned with these points. It is therefore not correct in English or continental law to talk about a conditional transfer to a proposed company, as the Attorney-General does, for before such a company is in existence no transfer can be made to it, conditional or otherwise. It is quite true that Lord Gisborough deposited the plans, but he did so as the trustee for the company and on behalf of M. Mavrommatis. In ordinary practice a trustee is a man who acts in the capacity of agent both for the vendor and for the purchaser which, in this case, is the company which is to be formed. The point to be noted with regard to the plans is that they were deposited on May 5th and were so deposited by Lord Gisborough. There is nothing in the concessions to suggest that that deposit is an irregular one, nor is there anything in the concessions to demand that there must be a particular method

of depositing—sending by post, or by registered post, or delivered not by the Agent, but by the person himself. All these things are left to the concessionnaire. What is very important to remember is that these plans were marked "M. Mavrommatis' plans". The Attorney-General airily dismisses the matter in a few lines and the conclusion one would reach from his observations would be at most that a mere technicality had been committed. What, in such circumstances, should have been the attitude of the Colonial Office? Surely it should have been to call the Parties together in order to repair the alleged technicality. The courts have constantly expressed the view that they are not going to use a technicality against a defendant. From the point of view of M. Mavrommatis it was a very serious matter and so he interviewed the Solicitors to the Colonial Office (Annex No. 61, page 171) and, moreover, he asked the Colonial Office for an interview in order that he might meet the wishes of the Colonial Office in this matter, when the deadlock occurred. But this was curtly refused; see Annex No. 64 of August 26th, 1926, page 173. It might be mentioned that any objection to the deposit of the plans under the Gisborough contract could not be an objection to them when that contract ceased to exist, and withholding approval of the water plans for three months afterwards cannot be justified in the light of the fact that the details of the plans had already been approved for some months by the authorities in Palestine with the engineers representing M. Mavrommatis. That is brought out in the letter of M. Mavrommatis dated December 24th, 1926, Annex No. 116, page 212, in which he says that the plans had already been agreed for six months, and yet they had only just been approved. The Attorney-General terms the document "an out-and-out assignment". Such a term is not known in English law, however apt it may or may not be as a description. The Solicitors to the Colonial Office, in their letter of July 21st, 1926, Annex No. 52, page 158, describe it as "nothing more nor less than an absolute assignment", "but it is so drafted", they add, "as to have the appearance of being such an agreement as you described in your letter to us of March 15th last", which was an ordinary assignment. We are to assume that the drafting is correct, but that they have come to the conclusion that it is an absolute assignment. It is a transfer to a trustee for a company, and that M. Mavrommatis was doing his best to form that company is clear from the correspondence and, moreover, one of the first steps of his Agents was to approach the Colonial Office for the purpose of making all speedy arrangements to form a company, as may be seen from the letter of January 19th, 1926, more than one month before the contracts were signed with the Crown

Agent for the Colonies, but after the terms of them had been agreed; see Annex No. 15, page 69. That the trustee is acting in this way is set out in express terms in Clause 14 to Annex No. 18, on page 78, and Clause 12 to Annex No. 18 *bis*, on page 81, both of which contracts came into the possession of the Colonial Office about the same date as the Gisborough contract, and, be it noted, it took the Colonial Office two months (see letter of May 18th, 1926, Annex No. 42, page 151) to come to the decision that this was an absolute assignment because they never gave that declaration until that period of time had elapsed after they had received these contracts which they specially demanded, and they demanded them by reason of an arrangement which had been suggested by Messrs. Lane & Cottier, the Solicitors for Lord Gisborough, and Messrs. Jackson & Co., an arrangement which had nothing whatever to do with M. Mavrommatis, for he was not a Party to it. That was the reason why these contracts were handed over to the Colonial Office; for otherwise they were not concerned with them until the Memorandum and Articles of Association were considered. The usual practice when the Memorandum and Articles of Association of a company are agreed is to mention in the former and provide in the latter that the directors shall adopt the preliminary agreement with the trustee and subsequently for the company to make a definite contract with the concessionnaire, and when this is done, to release the trustee. There are only two assignments known to English law, namely legal and equitable, and other terms are misdescriptions. The word itself merely means a transfer. The longer word does not make it a mysterious or secret or *mala fide* arrangement. There is no necessity to view it with suspicion. An absolute assignment, in the sense of being an out-and-out purchase, the document in question could not be for various reasons. At common law, with certain statutory exceptions which do not apply to this case, neither the benefit nor the burden of this contract could be absolutely transferred in such a sense unless with the consent of the High Commissioner. By the text of the Agreements of February 25th, 1926, under 4*a*, such an out-and-out sale, as the terms utilized by the British Government would seem to denote, would not be permitted. These considerations are all present to the minds of the trustee, the contractors, the solicitors and the engineers in the city of London. Is it conceivable that they all entered into an arrangement which they were not entitled to make either under the common law or under the concession by virtue of which they were to enjoy the benefits of their contracts? It cannot be termed an absolute transfer, for it contained an option, and what is more, it has been cancelled and ceases to exist. Is it not

abundantly clear that the Colonial Office hastened to misconceive the document because they were irritated by the opposition of Mr. Rutenberg to the demand for the El-Audja source, which opposition is admitted for the first time by the British Government in the generous statement, which was made by the Attorney-General in this Court, that Mr. Rutenberg had no right to oppose M. Mavrommatis' water scheme. All along the Colonial Office have maintained that the deadlock occurred by reason of M. Mavrommatis' fault, and in the very last or nearly the last letter which the Colonial Office wrote to him when the case was in the hands of the Greek Government, they still maintained their childish attitude: "it is your own fault" (see letter dated April 26th, 1927, Annex No. 133, page 247). So irritated were they, that they made the contract with Lord Gisborough merely a pretext for delaying the approval of the plans. The result has been disastrous for M. Mavrommatis, as may be seen from the correspondence in detail.

4.

REPLY BY SIR DOUGLAS HOGG

(representing the British Government)

AT THE PUBLIC SITTING OF SEPTEMBER 10th, 1927[1].

May it please the Court. I listened yesterday morning to an address, of which I hope I may be allowed to say the eloquence and the persuasive force left nothing to be desired, in which the representative of the Greek Government began by explaining his view as to the effect of the judgment of the Court already given in the matter of the Mavrommatis concessions (Judgment No. 2). I listened to the development of his contention as to what were the international obligations owed to M. Mavrommatis by the British Government and as to the rights which M. Mavrommatis enjoyed vis-à-vis that Government. I shall have presently a few observations to make to the Court with regard to those contentions. I listened finally in the morning to a discussion as to the differences which had arisen between the Parties with regard to the Greek contention that Mr. Lees had recommended the British Government to refuse to Mr. Rutenberg the Jordan concession to which he was entitled until he withdrew the claims which he was not entitled to make under his Jaffa concession. I do not desire to recapitulate the formal statement of Mr. Lees that no such memorandum as is mentioned in the Reply was ever promised or made: I would merely remind the Court that not only does Mr. Lees deny that he ever made such a memorandum, but you have the fact that the Colonial Office formally denies that it ever received such a memorandum, and the fact further that after a careful search no trace of any such memorandum can be found anywhere at all.

I had expected after the adjournment yesterday to hear during the afternoon in what way it was alleged that the British Government had exercised the power of public control conferred upon it by Article 11 of the Mandate in a manner inconsistent with the rights of M. Mavrommatis as defined by the Greek Government. I hope that I shall be acquitted of any disrespect for the argument to which I listened in the afternoon if I say that my hopes were disappointed. Instead of a discussion upon the legal question of jurisdiction, with which alone I understand the Court to be at present concerned,

[1] Documents quoted in this reply:
Greek Case; see Part III, No. 2, pp. 109-175 of this volume.
Annexes to the Greek Case; see Part III, No. 2*a*, pp. 176-450.
British Preliminary Objection; see Part III, No. 4, pp. 451-468.

I heard a series of most eloquent suggestions and criticisms heaping scorn upon the Colonial Office and its contentions and upon the humble representative of my Government here to-day, dealing with the merits of the dispute which it is sought to bring within the competence of the Court, suggestions eloquent enough indeed to explain how the brilliancy of the French advocates is able victoriously to win verdicts in the teeth of facts—but criticisms which, however calculated to create an atmosphere of prejudice, seemed to me at least to have little relevance to the decision which the Court is asked to take. We were told, for example, that the British Government was wrong in contending that the inability of the contractors to proceed with the construction of the work was in any way affected by the question of drainage. It was said by my opponent that under Clause 19 (*c*) of the Water Concession, on page 91 of the Annexes, the right to raise the price if the use of water was restricted owing to the absence of drainage was especially foreseen. How this question can possibly affect the question of jurisdiction, I am at a loss to understand. The only comment I would desire to make, since the point is referred to, is that it was precisely the provision in Clause 19 (*c*) which, in the view of the contractors who were going to carry out the works, would have raised the price of water to a figure which would be prohibitive of its use, and which for that very reason, according to the letter of June 30th, 1926, page 163, rendered it in their opinion evident—I am quoting from the letter—"that some drainage scheme for Jerusalem is positively essential in order to permit of the construction of the works and free use of water. Lord Gisborough has been advised that if an adequate drainage system is not available to carry off the water, the supply which is capable of being utilized and disposed of under present conditions would be comparatively so small as to render the charges therefore prohibitive." And I would remind the Court too that the very telegram on page 178, Annex 69, to which my opponent himself referred as evidencing the reason for the failure of Messrs. Jackson to proceed, gives as one of the two reasons the delay in providing the drainage system for Jerusalem.

I have heard my opponents dismiss the objections raised to the contract with Lord Gisborough as not being raised by the Colonial Office in good faith. My opponent yesterday told the Court that the Colonial Office raised no objection at first, and he said that the contract was a usual and necessary contract since it was essential to have a contract with a trustee when the company was not in existence. My friend Mr. Purchase this morning has been developing that argument at considerable length—indeed he will perhaps forgive me if I say that he seemed to me to be reproducing for the benefit

of the Court that careful argument upon the merits which no doubt he was in the course of preparing when the Preliminary Objection was filed. That it is necessary to have a contract with a trustee has never been disputed; and the Colonial Office, as my opponent truly says, raised no objection when they were told that such a contract had been made; and indeed they stated on page 129, as Mr. Purchase has correctly reminded us, that they were not concerned with the name of the trustee or the fact of his appointment. What is neither usual nor necessary nor indeed precedented, so far as I know, is for the contract with a trustee to take the form, not of an agreement to transfer to the company when formed, but an absolute assignment out-and-out to the trustee by the document itself, coupled with a power of rescission by the assignor in certain conditions. As I said on Thursday, so far as I know and so far as I am informed by those who know better than myself, there is no precedent for carrying out such a transaction in such a way. The Court will remember that when the Colonial Office ascertained not the fact of an agreement but the terms of the Agreement in May, 1926, it was then for the first time that they raised the objection that this was contrary to the concessions and to the agreement with the High Commissioner. Again I am at a loss to understand that the question whether the objection was well-founded or not can influence the decision which the Court has at present to take, as to whether the dispute to be determined is one within its competence or no. We were told then that the Court would not uphold the objection raised as to the deposit in May by Lord Gisborough because, it was said, the plans were in fact deposited on that date and it matters not by whom the deposit was made. Again I am completely at a loss to understand what possible relevance that has to the matter which we are arguing to-day. I will only say that to me at least it would seem to be of vital importance that the High Commissioner, when asked to approve the plan for the execution of works by M. Mavrommatis, should know that the plans were available for the execution of the works if they were carried out, and that so long as there was a dispute between M. Mavrommatis, Lord Gisborough, Messrs. Lane & Cottier, Sir John Jackson, Ltd., and I know not who else, as to the rights to obtain or retain possession of the plans, it might be very important to be sure that the deposit was validly made on behalf of M. Mavrommatis. While he was claiming in the letters, No. 50 on page 157, No. 63 on page 173, No. 66 and No. 67 on page 175, that the plans should be returned to him and that Lord Gisborough should not be allowed to assert any right or interest in them, it was obviously impossible for the High Commissioner to proceed

with the determination as to whether the plans were the ones which he could properly approve. But that one can argue before whatever court may be competent to entertain the suit when the suit is discussed on its merits. To-day we are not discussing whether we are right or wrong in saying that September and not May is the date of deposit. What we are discussing is whether this Court is the right court to entertain that question.

We were then told that it was not possible to obtain the decision of the expert under the contract as to whether the plans were rightly disapproved until some kind of decision had been reached by the High Commissioner and a recent amendment of the French law was cited to illustrate that. I can understand that that again may be a question of importance when we come to assess the quantum of damage that M. Mavrommatis has sustained. But how it can possibly throw any light on the question which this Court is being asked at present to determine, I am completely at a loss to understand.

Finally, it was said yesterday afternoon that the delay in deciding upon the plans rendered the formation of the proposed company more and more difficult; and letters were read from Messrs. Birch, Crisp & Co. and letters from MM. Bauer, Marchal & Cie to indicate that this had been the result of the delay. I recall that precisely similar letters from the same two firms were read in 1925, and I need only refer as an example to the letter on page 432, Act 56 of Series C., No. 5, and to the letter on page 313 and page 314 of Series C., No. 7, Annex No. 41, which concludes:

"Pour les motifs allégués par notre lettre en date du 2 décembre 1921, nous étions obligés à notre regret d'abandonner à tout jamais le financement de vos susdites concessions."

That eternity seems to have been limited when there again appeared to be a prospect of M. Mavrommatis claiming damages. But again, while I can understand that that evidence might be material on the question of damages, I do not understand what possible relevance it has to the question of jurisdiction. The jurisdiction cannot depend upon the amount of injury inflicted upon M. Mavrommatis by any alleged wrongful act of the British Government or the Palestine Government. It depends upon whether such wrongful act was committed in the exercise of the powers conferred under Article 11 of the Mandate and whether at the same time it constituted a breach of international obligations undertaken by the mandatory Power.

One observation, and I think one only, which was made yesterday afternoon, seemed to me to be important. My

opponent agreed with me that the objection raised by Mr. Rutenberg to the use of the El-Audja waters for the purpose of M. Mavrommatis' water concession was ill-founded and was not justified by the terms of his concession. I accept that view and I rely upon that fact as being conclusive of the present case. But I think, while I agree with my friend in the results, that in fairness to the High Commissioner and to the Colonial Office whose good faith has been so vigorously assailed, I ought to say that I do not agree—in fact, I differ entirely with his deduction—that it follows that Mr. Rutenberg's objection ought at once to have been overruled when it was raised. If the Court is good enough to refer to the Rutenberg concession of September 12th, 1921, which is to be found in Series C., No. 5, at page 334, it will be found on page 335 that Article 2 is the material article, and Article 2 is in these terms:

> "The High Commissioner, by virtue of his office hereby grants to the Concessionnaire for the period of 32 years from the day of the date hereof an exclusive concession for the utilization of the waters of the Audja Basin in Palestine for the purpose of generating by such water power and utilizing and supplying within the concession area electrical energy and for utilizing the said water for the purpose of irrigation with liberty for the Concessionnaire during the said period to produce and supply electrical energy within the concession area by any other means than water power."

The view which the Colonial Office has consistently taken of that article is that it confers upon Mr. Rutenberg an exclusive right to the use of so much of the El-Audja waters as is sufficient to meet the requirements for the purposes of irrigation or the generation of electricity within the district of Jaffa during a period of 32 years, but that it does not confer upon him the exclusive right to use the waters of El-Audja if and in so far as they are not required for those purposes. It is said by those representing M. Mavrommatis that the quantity for the purposes of the water concession was only some twelve thousand cubic meters per day and that the abstraction of that quantity from a total estimated output of 150 to 200 million gallons—I take the figures from the report on page 132—would leave sufficient to meet all the possible requirements of Mr. Rutenberg under his concession. I think a cubic meter is 220 gallons, so that 150 million would be roughly 680.000 cubic meters. I agree with that view, and it is on that ground that the approval was ultimately given on December 2nd. But it is quite another thing to say that the approval ought to have been given at once or

that the conclusion that there was sufficient could be reached without a careful study of what was the quantity actually available, of what was the method of abstraction proposed under the water concession, of what would be the effect produced upon the total area of supply, of the quantities which might conceivably be required by Mr. Rutenberg for irrigation and electricity purposes during the next thirty-two years in the district of Jaffa. Unless and until all these questions have been ascertained and carefully studied, it would not be possible, of course, to say whether Mr. Rutenberg's 1921 concession did or did not justify the claim which he put forward that the El-Audja waters should not be diverted for the drinking of Jerusalem. When they were investigated, it was ultimately decided that there was no justification for that claim, and on that ground, the use of the waters by M. Mavrommatis was ultimately agreed to.

I come back therefore to the argument upon the question of law, confident that the Court will not be influenced by a question of prejudice, however skillfully introduced, however forcibly urged, and that it will not prejudge the merits against my own country because I confine myself to the point at issue, to the exclusion of matters which cannot properly be investigated at the present stage. The argument yesterday morning commenced by a citation from pages 19, 23, 26 and 28 of Judgment No. 2, in which the questions upon which the jurisdiction of the Court depended were defined. I accept absolutely these definitions. Whether we take the first one on page 19, that the question before the Court is that the Mavrommatis concessions in themselves are outside the scope of Article 11, that the question before the Court is whether, by granting the Rutenberg concessions the Palestine or British authorities have disregarded international obligations assumed by the Mandatory, or whether we take alternatively the one on page 26, if the Administration has, by granting the Rutenberg concessions, committed a breach of the obligations accepted by Great Britain under Protocol XII, there has been an infringement of the terms of Article 11 of the Mandate which may be made the subject of an action before the Court under Article 26. But I have listened in vain to know which Rutenberg concession does infringe M. Mavrommatis' rights and which therefore has been granted in disregard of the obligations assumed by the Mandatory. My opponent sought to base an argument upon some words upon page 20 of the judgment. I do not know that I disagree with the conclusion, which he reaches, that it is possible that there might be measures other than the grant of public concessions which amount to an exercise of public control; for instance, the direct administration of the public resources by the State itself.

But at the same time I think it is perhaps advisable, in the interests of accuracy, to clear up a misconception which seems to me to underlie this part of the argument. If the Court will be good enough to refer back to its Judgment No. 2, it will see that on page 20 it was dealing with the contention put forward by the British Government. The British Government had contended that the phrase "public control" only covered cases where the Government took over and directed an undertaking of one kind or another, and the Court found that that was too narrow a meaning to place upon those words and that there might be an exercise of public control by the mandatory Power, even if the act relied on were only the grant of a concession to some individual, provided, as the Court says, that that grant was accompanied by measures which amounted to an exercise of public control, such, for instance, as the illustration which the Court itself gives, the right to reserve to the Government the supervision of the financial operations of the concessionnaires. In other words, the Court is not saying that some measures less than a grant of public concessions mean the exercise of public control, but that while every grant of a concession may not necessarily amount to an act of public control, the grant may amount to such an act, if it is accompanied by measures which can be so construed. However, again I think that the discussion on this point is largely an academic one because I have not heard it suggested that there has been any measure amounting to an exercise of public control which has been taken either by the Palestine or by the British Government, other than the grant of concessions to Mr. Rutenberg.

Having discussed the judgment, my opponent went on to discuss what was the nature of the rights enjoyed by M. Mavrommatis. He said, if I correctly appreciate his argument, that since the concessions of 1914 were, by virtue of Protocol XII of the Treaty of Lausanne, among the international obligations undertaken by the Mandatory, and since by Article 5 of that Protocol these concessions must be readapted, it follows that the new concessions granted, in lieu of the old ones, must equally be considered as international obligations within Article 11 of the Mandate. Again, I am not sure that that conclusion, if it were correct, would materially injure my position in the present case. But I venture to submit to the Court it is not correct and that it involves a confusion in the sense in which the term "international obligations" is being used. It is quite true, as the Court has decided, that by accepting Protocol XII to the Treaty of Lausanne, the British Government has bound itself to readapt the Jerusalem concessions which had been granted in 1914. That obligation to readapt those concessions is an international obligation accepted by the Mandatory, and that

obligation was, in my respectful submission, completely fulfilled on February 25th, 1926, when the Palestine Government granted to M. Mavrommatis concessions which he himself accepted as being a satisfactory performance of that undertaking and in consideration for which he irrevocably abandoned the concessions which he theretofore held from the Turkish authorities. After that date the Mandatory had completely satisfied the obligation undertaken by it under the Protocol and had given to M. Mavrommatis direct concessions, covering the water and electricity supply of Jerusalem which were the subject matter of the 1914 Turkish concessions, carrying with them the right to insist on the fulfilment of those concessions in accordance with their terms, by the authorities of Palestine, carrying with it, of course, also the right, if that fulfilment was denied, of bringing an action in the courts of Palestine to claim the damages which had been sustained. My opponents developed an argument in which they said that although these concessions, by their express terms, were to be construed according to the laws of England, yet that provision applied only to their minor clauses and that since they were granted in pursuance of a promise to readapt the Turkish concessions of 1914, the question whether the concessions remained in existence continued to be a question of international law. I confess that I find it just a little difficult to follow this reasoning or to appreciate the exact sense in which the term "international law" is there being used. Under the original concessions of 1914, certain conditions were imposed upon M. Mavrommatis, conditions, among other things, with regard to the deposit of plans. They will be found in Series C., No. 5, pages 135 and 211. If M. Mavrommatis had made default in carrying out these conditions and if it had come before any tribunal, municipal or international, for decision, whether or not these concessions were still valid, the only law which the tribunal, whatever it was, could have applied in order to determine the question, would have been the Turkish law. The tribunal would have asked itself whether, according to Turkish law, the effect of what M. Mavrommatis had failed to do was to annul the concession. Similarly, if M. Mavrommatis commits a breach of the conditions contained in the concessions of 1926, and there is referred to any tribunal, municipal or international, the question whether that breach forfeits the concession, that question has to be determined by construing the contract according to the English law which governs it. There is, so far as I know, no rule of international law which defines the conditions in which contracts are determined or which decides, for instance, whether the terms of a contract as to time are, or are not, of the essence of the contract. The only rule of international law, if such

a question arises, is that the domestic law governing the contract must be looked at and applies to the document which has to be construed, and in the present case the domestic law which has to be applied is, by the express terms of each concession, the English law.

Then, my friend Mr. Purchase developed an argument in which he said that these concessions had never been effectively granted because on certain conditions they might have been forfeited, and he criticized the analogy which I ventured to put before the Court of an insurance policy. He said that that was not a true analogy because in the case of an insurance policy the assured had the benefit of the policy until forfeiture, and he said, further, that there could only be forfeiture for misrepresentation of a material fact which induced the contract. In fact, the commonest case of forfeiture of the benefits of an insurance policy arises not from misrepresentation in the inception of the contract, but from failure by the assured to carry out his obligation to pay the premiums. I suppose in every jurisprudence one knows constantly of cases in which insurance policies have lapsed and been forfeited although large sums may have been paid under them by reason of the fact that the premiums have not been kept up, and in the present case the concessionnaire has the benefit of the concessions unless and until, under the terms of the contract, the concessions are forfeited. We even know that M. Mavrommatis got several thousands of pounds on January 22nd, 1926, from Lord Gisborough and caused large expenditure by Lord Gisborough over the preparation of these detailed plans upon which so much reliance has been placed, and those reports which have been placed before the Court, all of which he claims, and I gather claims rightly under his contract, belong to him because Lord Gisborough's contract has been determined.

He has the benefit of the contract of 1926 none the less that by the terms of that contract in certain events he would lose the benefit of the concessions.

My opponent went on to discuss the position with regard to the waters of El-Audja. I agree certainly with the conclusion which he reached that a decision on that point is not relevant to the present argument and therefore I do not pursue it at any length. But I think I may indicate that there does not seem to be very much between my view and that which was the view of certainly some of the evidence put forward by the Greek Government. It cannot, of course, be true to say that M. Mavrommatis at any date before the transfer of the plans of December 2nd, 1926, had a right to the use of the waters of the El-Audja. He could only have obtained that right by virtue of one or other of his concessions, that of

1914 or that of 1926. His concession of 1914 gave him no such right, since under Clause 5 of that concession he had no right to the use of any source other than the two named sources, except by the decision of the Turkish Minister of Works who, it is common ground, was never asked to agree to El-Audja. It cannot be that he has any right to the waters of El-Audja under the concession of 1926 because equally by Clause 6 of that contract the selection of the source is absolutely made subject to the approval of the High Commissioner. It follows therefore, of course, that there could have been no claim by M. Mavrommatis that any breach of either concession had been permitted if he had been refused permission to use the waters of El-Audja for the purpose of his concession. But I agree at once that the use of El-Audja as a possible source for the concession of 1926 was in contemplation at the time that that contract was executed. Where I differ is only in the suggestion that it was promised to him in the course of the negotiations. If a reference be made to the letter on page 236, Annex No. 128, which is the document put in evidence by my opponent, it will be seen that the terms of that letter make it abundantly clear that there was no agreement that El-Audja should be used, but only that the use of El-Audja was contemplated as possible. I would only remind the Court at this stage of the last sentence of the letter which discussed other possible sources: "Mr. Lees more than once during the negotiations" not "agreed" but "expressed the opinion, that provided the Government were satisfied that the El-Audja was the proper source to be selected, other interests in the springs would not be allowed to stand in the way." As I have said, that opinion turned out to be well-founded; but that passage is absolutely inconsistent with the suggestion that Mr. Lees had agreed at some date during the negotiations that El-Audja was to be the source used. Similarly, the reference to the prices to be charged in the terms of the concession itself does not prove any such agreement; and I hope the Court will forgive me if I just repeat my argument upon that point, because it seems to have been misunderstood by my opponent and therefore, possibly, I did not make it clear to the Court. I agree absolutely that the engineers' report on page 135, to which I referred in my arguments, which speaks of other sources than El-Audja as being the same in capital cost, is not referring to the sources in the neighbourhood of Jerusalem, but is referring to the more distant sources in the Jordan valley. That was not the point which I was making. The Court will remember that the Greek Government contention was that since the prices in Clause 19 (page 91) of the concession had been fixed by reference to a capital cost which was approximately the capital cost required

if El-Audja were used, that proves that the Parties had agreed that El-Audja should be the source used. My answer was that it would show nothing of the kind, since the Parties knew at the time that there were other sources which might possibly be used, and the use of which would involve possibly the same capital cost. That argument is not affected at all by the point that those other sources are different from the sources contemplated in 1914, just as El-Audja itself is different from the sources contemplated in 1914. Once you establish that there are several sources, the cost of which will be approximately equal, then the fact that the cost in question is that used for provisionally fixing the price does not demonstrate that any one of those particular sources is chosen; it only demonstrates that the Parties contemplate that one or other of those sources will be chosen and not that they have agreed upon any particular one.

It was stated by my opponent that the letter from Messrs. Lane & Cottier on page 153 of the Greek Government Annexes showed that Mr. Lees had agreed to the use of the El-Audja because it was stated at the top of page 154 that the experts are of opinion "that that source is the most economical and most convenient", and it was suggested that the experts in that context include Mr. Lees. If it did, it would not show an agreement that El-Audja should be used. But in fact a reference to the letter shows that this was a mistaken view. The experts are referred to in the letter first on the previous page in the fifth line, where an appointment is asked for for the following day at which Sir Charles Cottier, the writer of the letter, would be accompanied by certain of the interested Parties and their experts. Obviously, that does not mean Mr. Lees, who was in Palestine, whereas this letter was making an appointment for next morning in London. Messrs. Rofe & Son of course were the experts referred to and employed by Messrs. Lane & Cottier, and that is shown on page 154, in the middle of the page, where the same phrase is used: "We are advised by the experts that the amount of potable water which would be so taken would be a very small fractional part of the whole yield" and so on, obviously there referring to their own experts, that is, Messrs. Rofe & Son, to whom they had made allusion at the beginning of the letter.

With regard to this minor point, there remains only the letter exhibited yesterday from Sir Hamar Greenwood, who informed the solicitors of the "understanding" on which the concessions were signed If it were necessary to investigate that matter further, I should have to ask leave to call Mr. Lees, who is in Ceylon, and to cross-examine Sir Hamar Greenwood, who is, or was, a lawyer, and who, as an English lawyer, would never use the phrase "an understanding" if he

meant a contract; because it is a familiar practice in our Courts to pull up a witness if he makes use of the term "understanding" for the precise reason that it is an ambiguous term. But I am content to assume the position to be as stated in the letter which I have already quoted on page 236, that there was no agreement, but that El-Audja was contemplated as one among other possible sources, and that Mr. Lees had no doubt that if the Government were satisfied that El-Audja was the proper source, they would not allow that source to be put aside. I agree with my opponent that the point cannot be considered material, if for no other reason, for these two: Firstly, that the concession itself stipulates that the High Commissioner can approve the source, and therefore is inconsistent with one particular source being chosen and agreed upon; and secondly, because whatever else this claim may be, it is not a claim for failure to permit the use of the El-Audja waters.

But whatever the obligations undertaken by the Mandatory towards M. Mavrommatis, in order to constitute a breach which is within the competence of the Court, the breach has to arise by the exercise of the powers of public control conferred under Article 11. It is not suggested (and, of course, could not be suggested) that the failure of the High Commissioner to express his approval or disapproval was in itself an exercise of the powers of public control conferred by Article 11, because the right to approve or disapprove is conferred not by Article 11, but by the contract between the Parties; and I do not think it is suggested that in itself a failure to express an opinion would be an exercise of the powers within Article 11: quite obviously that would come within the phrase on page 19 of the judgment: "The Mavrommatis concessions in themselves are outside the scope of Article 11." The complaint, if it rests there, is a complaint of breach of the Mavrommatis concessions, and not a complaint of breach by the wrongful exercise of a power conferred by Article 11. What is said, so far as I understand it (and I think it is important that we should have it definitely stated), is, that the only thing that is said to constitute an exercise of the powers conferred by Article 11 was the grant of the Jordan concession to Mr. Rutenberg on March 5th, 1926.

Now, if I am right in that, I can only repeat that that was admittedly not in disregard or in breach of M. Mavrommatis' right, because it is conceded that that concession in no way conflicts with M. Mavrommatis' rights. What is sought to be urged is not that the concession conflicted in any way with M. Mavrommatis' rights, but that, if we had refused to exercise our power of public control under Article 11 by granting the concession which, the Court will

remember, we were bound to grant by virtue of the Agreement of September 21st, 1921, then it is said that the result would have been that Mr. Rutenberg would have abandoned his wrongful opposition to the use of the El-Audja waters under his Jaffa concession. In the first place I would venture to submit that it is at least highly doubtful whether Mr. Rutenberg would have done anything of the kind. What I think he would have done would have been to bring an action against the High Commissioner, claiming specific performance of the Agreement of September 21st, 1921, and the grant of the concession to which he was entitled under that agreement. The Court will remember that in the only record to which reference has been made as to Mr. Rutenberg's attitude—the long letter to which my friend referred on page 184 in Annex 82, reporting this conversation with Mr. Rutenberg—Mr. Rutenberg showed no reluctance to bring actions against the Government ; on the contrary, he said, not "I can influence the Government", but "I am going to claim from the Court an injunction to restrain the Colonial Office granting you approval of the El-Audja source unless you come to an agreement with me". So that he had no hesitation in going to the courts to enforce a right which he thought he had ; and I should have thought that the probable result of a failure by the High Commissioner to carry out his obligations to Mr. Rutenberg under the Agreement of September 21st, 1921, would have been the issue of a writ by Mr. Rutenberg claiming specific performance of that agreement, to which, of course, the High Commissioner would have had no answer. But this, of course, is all in the nature of speculation ; no one could tell what Mr. Rutenberg would or would not have done. All that it is necessary for me to submit to the Court is that the grant of a concession which did not conflict with M. Mavrommatis' rights, and to which Mr. Rutenberg was already legally entitled, could not be an exercise of the powers conferred by Article 11 in a way inconsistent with M. Mavrommatis' rights ; and if that be so, then it follows that the claim breaks down because, as my friend concedes, (and as the Court has decided) it is not enough to show that M. Mavrommatis' concessions have been broken. It is essential, in order to invoke the jurisdiction of the Court, to prove that they have been broken, as the Court says, by the grant of concessions to Mr. Rutenberg—I am content at this moment to say, by the exercise of the powers conferred by Article 11 in a way inconsistent with M. Mavrommatis' rights.

Just a word or two now with reference to the points of English law to which Mr. Purchase alluded this morning. He dealt with my argument that declarations as to the

intentions of the Parties in entering into a contract are not admissible in English law to construe a contract; and he said that there were some exceptions set out in Sir William Anson's book to that rule. I agree there are. None of them have any relevance to any point which we are here discussing. He said that you could give evidence of the surrounding circumstances; but I am quite sure that Mr. Purchase himself would not venture to assert to any court in which an English judge is sitting, that the power to give evidence as to the surrounding circumstances includes a power to give evidence of statements made by the Parties as to what they meant or as to their intention.

Then he dealt with the point which I ventured to stress on Thursday that M. Mavrommatis, having gone on negotiating after August 5th, could not now treat the failure to approve the plans by August 5th as being a breach of a condition of the contract, and Mr. Purchase cited a passage from Anson in which he discussed waiver as being a rescission by mutual consent. I am not dealing here with a question of a waiver of a contract; what I am dealing with here is the waiver of a particular term in the contract or of a right alleged to be conferred by the contract to treat a particular term as vital to its existence, and the case which I cited is only one of a series which might be given, which shows that where a person, after the time has elapsed for the performance of a particular term, chooses to go on negotiating with the other contracting Party with regard to that matter, he cannot then suddenly determine the contract because the time has passed for its performance, but he must give reasonable notice if he intends to do anything of the kind.

Finally, I would like to say a word as to the point which concluded our Preliminary Objection as to the necessity for first exhausting the rights of the injured subject in the municipal courts. My opponent was good enough to speak sarcastically of the letter from the High Commissioner which was put in by me at the sitting on Thursday. I think that he hardly does justice to the position. The rule which we had invoked is a rule which is admirably formulated and explained in the passages cited in our objection and in Section 381 of Dr. Borchard's book, and it is a rule that local remedies must be exhausted before an international claim may properly be instituted. The Greek Government replied to that argument that, under the Palestine Ordinance, it was necessary to obtain the consent of the High Commissioner before instituting proceedings. That, of course, was no reply, because the Greek Government ought to have gone on to say that their national had applied for that consent and been unable to obtain it, and that therefore his remedy was in effect exhausted.

In fact, it is not suggested that any such application had been made. But in order to satisfy the Court that there was no merit in the objection, we obtained from the High Commissioner a written statement of his willingness to consent to the claim for damages for delay in giving his decision upon the plans, if such a claim was instituted in the courts, and in truth that was and, so far as I know, is to-day the only claim which M. Mavrommatis is seeking to enforce,—damages which he says he suffered by reason of the delay of the High Commissioner in approving his plans within the stipulated three months. If there is any other claim or *prima facie* claim for damages which M. Mavrommatis or his advisers can formulate, I have no doubt that the High Commissioner would be prepared to give his consent. But surely it is idle to sneer at the consent which has been given as being wholly inadequate when M. Mavrommatis has never tried to get any consent at all, and when we produced a consent to the only claim of which we have any knowledge.

My opponent was good enough to conclude his observations by way of showing his disapproval of the British Government and its unworthy representative by a jeer at the observations with which I commenced my argument, that this was the first time in four cases that I had objected to the jurisdiction of the Court. I am quite sure that none else present at the hearing could have imagined that I was suggesting that the British Government had never raised a plea to the jurisdiction, because I went on immediately to cite the judgment in which that plea had been raised and in which it had been upheld as to half of the claim which was being put forward. That the British Government has a sincere and unfeigned respect and appreciation for the great value to international peace of the services of this Court, I do not think can be doubted by anyone who recalls the history of the Court and the occasions upon which the British Government has not hesitated to ask the assistance of the Court in matters in which very grave disputes between States have been involved. That a British lawyer should be lacking in appreciation of the Court would seem incredible, especially when one remembers the contribution, if I may be allowed to say so, which my nation has made both to the personnel of the Court and to the authority and dignity of its proceedings. But in truth, this plea cannot be disposed of by any attempt to confuse or prejudice the issues or to disparage the motives of the Government whom I represent in raising the issue which has to be determined. Apart from the numerous objections which appear in our preliminary document which I had the honour of insisting upon in my pleading on Thursday, in my submission this objection must be sustained first of all because

the claim is one for an alleged breach of an obligation to decide upon plans within three months of their deposit, and that obligation is not an international obligation accepted by the Mandatory, but a contractual term of the Agreement of February 25th, 1926, and secondly, and most decisively of all, because that breach, if it existed, and if it were a breach of the international obligations accepted by the Mandatory, does not constitute an exercise of the power of control conferred by Article 11 of the Mandate, and the exercise of that power alluded to and consisting of the grant of Mr. Rutenberg's concession on March 5th, 1926, is not in derogation of any right which M. Mavrommatis had internationally or municipally, since it is common ground that the concession so granted in no way infringed his rights.

In conclusion, I desire to thank the Court most sincerely for the great patience with which they have listened to what, I fear, has necessarily been a rather lengthy argument, and to ask them to accept my assurance that, in inviting the Court to pronounce itself incompetent to entertain this suit, I am not doing anything in derogation of the profound respect which I feel for the Court's authority and which I know my Government entertains for its proceedings.