Privy Council Appeal No. 129 *of* 1920.

The Commonwealth of Australia - - - - - - *Appellant*

v.

Hazeldell, Limited - - - - - - - - *Respondents*

and

The Attorney-General of New South Wales - - - - *Intervener.*

FROM

THE HIGH COURT OF AUSTRALIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JULY, 1921.

Present at the Hearing:

VISCOUNT CAVE.
LORD DUNEDIN.
LORD ATKINSON.
LORD SHAW.
LORD PHILLIMORE.

[*Delivered by* VISCOUNT CAVE.]

This is an appeal by special leave from a judgment of the High Court of Australia dismissing an appeal by the present appellants, the Commonwealth of Australia, from a judgment of the Full Court of the Supreme Court of New South Wales which had reversed a judgment of Mr. Justice Ferguson in their favour.

The question for decision is as to the right of the respondents to the limestone in 56 acres of land at Mount Fairy, New South Wales, and arose in the following manner: By a Crown Grant dated the 12th April, 1886, the land had been granted to Thomas Shanahan (the predecessor in title of the respondents) in fee simple, subject to a reservation of all minerals which the land contained. In the month of April, 1915, the appellants, the Commonwealth of Australia, by notice under the Lands Acquisition Act of the Commonwealth (No. 13 of 1906) compulsorily acquired the land for the purpose of obtaining material for use in connection with buildings to be erected for the Commonwealth. The respondents claimed £100,000 as compensation for the loss of their interest as tenants in fee of the land (which contains a valuable bed of limestone), and the further sum of £600 as damages for severance; but the appellants, who contended that the respondents had no property, or no valuable property, in the limestone, made a statutory offer of £1,200 only in satisfaction of the respondents' claim. The offer was

refused, and the respondents commenced this action for compensation.

The trial judge, Ferguson, J., upheld the appellants' contention and awarded to the respondents the sum of £1,200 only, which was agreed to be the value of the land without the limestone. But on appeal the Full Court (Cullen, C.J., and Sly and Gordon, JJ.), ordered a new trial, and on further appeal their decision was affirmed, though on somewhat different grounds, by the High Court of Australia (Griffith, C.J., and Rich, J., Gavan Duffy, J., dissenting). It is against this decision that the present appeal is brought.

In order to make clear the contentions on both sides it is necessary to refer to the terms of the grant and to certain legislation leading up to and following upon it.

By the Crown Lands Alienation Act, 1861, of New South Wales (25 Victoria, No. 1) it was enacted that Crown lands (with an exception for lands in or near towns and villages) should be open for conditional sale by selection as follows: Any person might tender to the Land Agent for the district a written application for the conditional purchase of any such lands, not being less than 40 acres nor more than 320 acres, at the price of 20*s*. per acre, and might pay to such Land Agent a deposit of 25 per cent. of the purchase-money, and if no other like application and deposit for the same land should be tendered at the same time, such person was to be declared the conditional purchaser thereof at the price aforesaid. At the expiration of three years from the date of conditional purchase of any such land, or within three months thereafter, the balance of the purchase-money was to be paid and a declaration was to be made as to the improvement of the land and the residence of the purchaser or his alienee upon it; and thereupon a grant of the fee simple, but with the reservation of any minerals which the land might contain, was to be made to the then rightful owner. This Act contained no definition of "minerals." The limit of 320 acres imposed by the Act was subsequently increased to 640 acres.

On some date not stated, but which was prior to the passing of the statute next referred to, Thomas Shanahan duly applied under the Act of 1861 for the conditional purchase of a plot containing 640 acres, and including the land in question in this action, and paid the deposit, and he was declared the conditional purchaser of such plot.

By the Crown Lands Act, 1884, of New South Wales (48 Victoria, No. 18) the Crown Lands Alienation Act, 1861, was repealed and new provisions were made for the purchase of Crown lands by selection; but the repeal section (Section 2) declared that the repeal should not of itself prejudice or affect any proceeding matter or thing lawfully done or commenced or contracted to be done under any repealed enactment, and that notwithstanding such repeal all rights accrued and obligations incurred or imposed under or by virtue of any of the repealed enactments should, subject to any express provision of that Act

in relation thereto, remain unaffected by such repeal. The Act also contained the following provisions :—

> " Section 5. Crown lands shall not be sold, leased, dedicated, reserved or dealt with except under and subject to the provisions of this Act, and nothing in this Act shall affect the provisions of any Act regulating mining on Crown lands. . . .
>
> " Section 6. The Governor on behalf of Her Majesty may grant, dedicate, reserve, lease, or make any other disposition of Crown Lands, but only for some estate, interest or purpose authorized by this Act and subject in every case to its provisions. No Crown Grant issued after the commencement of this Act shall be expressed or purport to be in trust for private persons or purposes.
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> " Section 7. All grants of land issued under the authority of this Act shall contain a reservation of all minerals in such land, and shall contain such other reservations and exceptions as may by the Governor be deemed expedient in the public interest. . . ."

Section 4 of the same Act declared that, unless the context necessarily required a different meaning, the expression " minerals " should mean and include coal and certain other minerals therein specified (not including limestone) and any other substance which might from time to time be declared a mineral within the meaning of that Act by proclamation of the Governor published in the Gazette. No proclamation declaring limestone to be a mineral within the meaning of this Act has been published.

Although Shanahan had been declared the conditional purchaser of his plot before the passing of the Act of 1884, the Crown grant of the land to him was made after the passing of that Act and was dated the 12th April, 1886. By this document, after recitals to the effect that Shanahan claimed to be entitled in respect of a purchase by conditional sale without competition, under the thirteenth section of the Crown Lands Alienation Act of 1861, to the parcel of land thereinafter described, and that the purchase money had been duly paid and the necessary declarations made, the land was granted to Shanahan, his heirs and assigns, subject to a reservation to the Crown of " all minerals which the said land contains," with power to work them. The grant also reserved to the Crown such parts of the land as might thereafter be required for public ways, canals or railroads, and also all sand, clay, stone, gravel, timber, &c., which might at any time thereafter be required by the Government of the Colony for the construction and repair of public ways, bridges or canals, or for naval purposes or railroads, with the right of taking and removing all such materials. Shanahan's title under this grant subsequently became vested in the respondents.

The Mining Act, 1906, of New South Wales (6 Edward VII, No. 49) provides (by Section 46, Sub-section (2)), that " if the Crown grant of any private land contains, or if not yet issued will when issued contain, a reservation to the Crown of all minerals, the said land shall also be open to public mining under this Part (*i.e.* Part IV of the Act, relating to public mining) for all minerals." The interpretation section of the same Act (Section 3) declares that, unless the context or subject-matter otherwise indicates, " minerals " means silver and certain other minerals therein

specified (not including limestone) "and any other substance which may from time to time be declared a 'mineral' within the meaning of this Act by proclamation of the Governor published in the Gazette." A proclamation published under this Act and dated the 12th August, 1907, declared limestone to be a "mineral" within the meaning of the Act.

On the respondents' action for compensation coming on for trial, the respondents tendered evidence to show the value of the limestone under the land compulsorily acquired; but the learned Judge rejected that evidence, holding that even if the limestone was not reserved by the grant, it was by virtue of the Mining Act of 1906 open for public mining, and was therefore of no value to the respondents. He accordingly gave judgment for the respondents for £1,200 only. On appeal the Full Court held that the Act of 1906 had no application to minerals not reserved by a grant, and that the question to be decided was whether the word "minerals" in the reservation contained in the Crown grant to Shanahan did or did not include limestone. They further held that, having regard to a series of authorities (of which the latest is *Barnard-Argue-Roth-Stearns Oil and Gas Company* v. *Farquharson*, L.R., 1912, A.C. 864), this question was a question of fact to be determined on a consideration of the date of the grant and the circumstances then existing, and ordered a new trial in order that evidence on these points might be adduced. The Full Court was of opinion that, as Shanahan had become a conditional purchaser under the Act of 1861, the Act of 1884 had no application to the grant. On further appeal to the High Court of Australia, the majority of that Court, while agreeing with the Full Court as to the effect of the Mining Act of 1906, held that the grant to Shanahan, having been made after the passing of the Act of 1884, must be construed with reference to that statute, and that, having regard to the definition of minerals contained in that Act, the limestone was not reserved, but passed to the grantee. They therefore dismissed the appeal and confirmed the order for a new trial; but it is obvious that, having regard to the reasons given by the High Court for their judgment, it would be assumed on the new trial that the limestone belonged to the respondents and the only question would be as to the value of the land with the limestone. It is against this decision that the appellants have appealed to His Majesty in Council.

Having regard to the above statement, it will appear that the questions to be determined on this appeal are two in number, viz: (1) whether the reservation of minerals in the grant of 1886 had the effect of reserving the limestone, and (2) if not, whether the effect of the Mining Act of 1906 of New South Wales and the Proclamation issued thereunder was to render the limestone open to mining by the public and of no value to the grantee.

If the first question fell to be decided on the terms of the grant alone and without reference to the Act of 1884, it is plain that there must be a new trial in order to ascertain whether having regard to the facts and circumstances existing at the date of the

grant and the meaning then given to the word "minerals," the reservation of minerals included the limestone. This is the effect of a number of decisions of the House of Lords and this Board, including *Lord Provost of Glasgow* v. *Farie* (1888, L.R. 13, A.C. 657), *North British Railway Company* v. *Budhill Coal and Sandstone Company and others* (L.R. 1910, A.C. 116), *Caledonian Railway Company* v. *Glenboig Union Fireclay Company* (L.R. 1911, A.C. 290), *Symington* v. *Caledonian Railway Company* (L.R. 1912, A.C. 87), and *Barnard-Argue-Roth-Stearns Oil and Gas Company Limited* v. *Farquharson* (L.R. 1912, A.C. at p. 869). But if the grant is to be treated as issued under the Act of 1884, no such question can arise; for that Act provided that all grants of land issued under the authority of the Act should contain a reservation of all minerals in such land, and the expression "minerals" was defined in terms which excluded limestone. In their lordships' opinion the grant should be treated as issued under that Act. Section 5 of the Act of 1884 provided expressly that Crown lands should not be dealt with except under and subject to the provisions of that Act; and Section 6 provided that Crown land might be granted, but only for some estate, interest or purpose authorized by that Act and subject in every case to its provisions. Further, the grant to Shanahan, although not in terms referring to the Act of 1884, contains provisions which indicate that it was intended to take effect under that Act. The grant contained, in addition to the reservation of minerals, a reservation of such land as might thereafter be required for public ways, canals and railroads, and also a reservation of all sand, clay, stone, gravel, timber, &c., which might be required by the Government for the public purposes therein described; and these reservations, while proper to be made under Section 7 of the Act of 1884, find no justification in the earlier Act. If indeed it were proposed to grant to a conditional purchaser under the Act of 1861, something less than he was entitled to under that Act, a question might arise whether, having regard to the saving for existing rights contained in Section 2 of the Act of 1884 his contractual rights could be so cut down against his will; but any such question would be properly raised by the grantee at the time of the grant, and not by the grantor many years after its completion. And it would be inequitable, while leaving the grantee bound by reservations as to public ways, &c., which could only have been made under the later Act, to extend the reservation of minerals by reference to the earlier statute. In their Lordships' opinion, therefore, the reservation of minerals, having been made under the Act of 1884, must be construed in accordance with the definition of "minerals" contained in that Act, and accordingly does not include the limestone.

It may be added that the terms of the grant show that there was no intention of reserving the limestone, for if the whole bed of limestone had been reserved, there would have been no need to reserve the right to take stone for certain limited public purposes. To this it was answered that, as the Act of 1861 required all

minerals to be reserved, the limestone (if a mineral) could not legally be granted away, and no intention to grant it could have effect; but, if the grant is construed as operating under the Act of 1884, no such objection arises, and effect can be given to the manifest intention of the parties to the deed.

There remains the question whether the effect of the New South Wales Mining Act of 1906 was to render the limestone, though not reserved under the grant, open to public mining; and on this question also their Lordships are in agreement with the decision of the High Court. If the Act were construed as throwing open to public mining minerals granted by the Crown to private purchasers, the effect of it would be to alienate private rights without compensation; and it has been repeatedly held, as by this Board in *The Commissioners of Public Works (Cape Colony)* v. *Logan* (L.R. 1903, A.C. 355), that such an intention should not be imputed to the Legislature unless expressed in clear terms. No such clear intention appears in the Act of 1906. Section 46 (2) of that Act provides that, if the Crown grant of any private land contains a reservation to the Crown "of all minerals," the land shall be open to mining under the Act "for all minerals"; and it cannot be that the expression "all minerals" twice used in this short sentence means one thing in the hypothesis and another thing in the conclusion. Either the word "minerals" must in each case be construed in accordance with the definition in the Act, in which case the reservation in the grant of 1886 did not comply with the condition; or—and this appears to be the better view,—the expression "all minerals" where secondly used means "all minerals so reserved." In either case the provision has no application to the limestone, which was not reserved by the grant.

The same result may be reached in another way. Section 70 of the Act of 1906 declares that the owner of any private land may mine therein for any mineral not reserved to the Crown, and the expression "mineral" here used would under the Proclamation of 1907 include limestone. Section 46 (3) provides that no application for an authority to enter and mine shall be granted to a member of the public in respect of any land in or upon which any person other than the applicant is at the time of the application entitled to search or prospect for any mineral. From these provisions taken together, it follows that the grantee under the deed of 1886 is entitled to get the limestone as not reserved, and that no authority to get it can be granted under the Act to a member of the public. Mr. Justice Ferguson met this argument by pointing out that Section 70 was not in the original Act from which Section 46 was taken; but both sections are contained in the Act of 1906, which must have effect accordingly.

For the above reasons it appears to their Lordships that the Act of 1906 has no application to the limestone in question; and this being so it is unnecessary to consider whether, if it did so apply, the respondents would nevertheless be entitled to some compensation as owners of the limestone subject to the contingency of a licence being granted to a member of the public.

Their Lordships will humbly advise His Majesty that this appeal fails and should be dismissed, and that the appellants should pay the respondents' costs of the appeal including those caused by the intervention. The Attorney-General for New South Wales, who intervened and supported the appellants' contention, will bear his own costs.

In the Privy Council.

THE COMMONWEALTH OF AUSTRALIA

v.

HAZELDELL, LIMITED (*Respondent*), AND THE ATTORNEY-GENERAL OF NEW SOUTH WALES (*Intervener*).

DELIVERED BY VISCOUNT CAVE.

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