[HIGH COURT OF AUSTRALIA.]

HEGARTY . . . . . APPELLANT;
PLAINTIFF,

AND

ELLIS . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 5, 9, 10, 22.

Barton, Isaacs and Higgins JJ.

Mines Act 1890 (*Vict.*), (*No.* 1120), *sec.* 64—*Mines Act* 1897 (*Vict.*), (*No.* 1514), *sec.* 44—*Land Act* 1869 (*Vict.*), (*No.* 360), *sec.* 19—*Water race*—*Land alienated from the Crown in fee simple*—*Licence*—*Lease*—*Selection.*

The term "any land alienated from the Crown in fee simple on or after the 29th day of December 1884," in sec. 64 of the *Mines Act* 1890 (Vict.), as amended by sec. 44 of the *Mines Act* 1897, includes land in respect of which a licence and a subsequent lease from the Crown had been issued under sec. 19 of the *Land Act* 1869 before 29th December 1884, and a Crown grant pursuant to such licence and lease had been issued after that date, and therefore a licence under those sections of the Mines Acts to construct a water race over such land might be lawfully granted by the Crown.

Judgment of the Supreme Court: (*Hegarty* v. *Ellis*, (1908) V.L.R., 100; 29 A.L.T., 167), affirmed.

APPEAL from the Supreme Court of Victoria.

In an action brought in the Supreme Court by Patrick Hegarty against Samuel Ellis, a special case was stated by the parties under Order XXXIV. of the Rules of the Supreme Court 1906, which was as follows:—

"This action was commenced on 11th January 1907 by a writ of summons whereby the plaintiff claimed a declaration that the

decision of the Minister of Mines and of the Warden of the Mining District of Beechworth of 3rd May 1906, whereby the defendant was licensed to cut a water race through certain of the plaintiff's land hereinafter described was *ultra vires*, and an injunction to restrain the defendant from entering upon the said land or cutting or attempting to cut such water race, and the parties have concurred in stating the questions of law arising herein in the following case for the opinion of the Court:—

"1. In the year 1878 a licence was applied for by one James Alexander Barr to occupy Allotment 5A of section 5 Parish of Tallandoon County of Bogong, and in the month of December of the same year a licence was issued to him under the provisions of sec. 19 of the *Land Act* 1869.

"2. Subsequently to securing the said licence, but prior to 29th December 1884, the said Barr obtained a lease of the said allotment under sec. 20 of the said Act.

"3. Shortly before the issue of the Crown grant hereinafter mentioned the said James Alexander Barr transferred all his right, title and interest in the said allotment to one Patrick Duncan.

"4. On 22nd December 1888 a Crown grant of the said allotment was issued to the said Patrick Duncan under sec. 20 of the said Act.

"Subsequently the said Patrick Duncan mortgaged the said allotment to the Bank of Australasia who eventually sold the same to the plaintiff.

"The questions for the opinion of the Court are:—

"(1) Whether the said allotment is or is not land alienated from the Crown in fee simple on or after 29th December 1884 so as to come within the provisions of sec. 64 of the *Mines Act* 1890 as amended by sec. 44 of the *Mines Act* 1897.

"(2) Whether the licence issued to the defendant and mentioned in the writ of summons herein was *intra vires* having in view the provisions of sec. 69 of the *Mines Act* 1897.

"If the Court shall be of opinion in the affirmative of either of the said questions No. 1 or No. 2 then judgment shall be entered for the defendant with his costs of defence.

"If the Court shall be of opinion in the negative of both of the

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said questions then judgment shall be entered for the plaintiff for an injunction to restrain the defendant from entering upon the said allotment or running, cutting or attempting to run or cut a water race through the said allotment and for the costs of the action."

The special case was heard before *Hodges* J. who answered the first question in the affirmative and gave judgment for the defendant with costs: *Hegarty* v. *Ellis* (1).

From this judgment the plaintiff now, by special leave, appealed to the High Court.

Macfarlan, for the appellant. The appellant's land is not land alienated from the Crown in fee simple on or after 29th December 1884. The *Land Act* 1869 contemplates two classes of alienation of Crown lands, viz., alienation by licence and lease (Part II., Division 1), and alienation by auction sale (Part II., Division 2). Under the former class of alienation a licence for three years was issued, and at the end of that period a lease for seven years might be granted with a right in the lessee to obtain a Crown grant, on payment of a certain amount per acre, during the currency or at the end of the seven years. Under sec. 20 of that Act there was a contract between the Crown and the licensee that, on compliance with all the conditions and on payment of certain money, the Crown would grant the land to the licensee. That gave the licensee an equitable estate in fee simple. See *Moore & Scroope* v. *Western Australia* (2); *O'Keefe* v. *Williams* (3); *Kettle* v. *The Queen* (4); *Joy* v. *Curator of Estates of Deceased Persons* (5); *Commissioners of Inland Revenue* v. *G. Angus & Co.* (6). So that the appellant's land was alienated in fee simple before 29th December 1884. The term "land alienated from the Crown in fee simple on or after the 29th day of December 1884" either does not include land alienated by way of licence and lease or, if it does, it only includes such land if the licence, lease and grant were all subsequent to 29th December 1884. As to the second question, sec. 69 of the *Mines Act* 1897 only authorizes the

(1) (1908) V.L.R., 100; 29 A.L.T., 167.
(2) 5 C.L.R., 326.
(3) 5 C.L.R., 217, at pp. 226, 229.
(4) 3 W.W. & aB. (E.), 50.
(5) 21 V.L.R., 620; 17 A.L.T., 144.
(6) 23 Q.B.D., 579.

cutting of a water race upon land in respect of which a mining lease is issued, and by the owner of that mining lease.

Morley, for the respondent. The word "alienated" in sec. 64 of the *Mines Act* 1890, as amended by sec. 44 of the *Mines Act* 1897, has its ordinary meaning of "made over to another"; *Co. Litt.*, p. 118*b*; *Wharton's Law Lexicon*, tit. "Alienation"; *Stroud's Judicial Dictionary*, 2nd ed., vol. I., tit. "Alienation"; In the case of alienation by means of licence and lease and subsequent grant, it refers to the actual transfer when the Crown grant is issued. The word "alienated" is not used consistently in all the sections of the Act of 1890. Where the *Mines Act* 1897 refers to the owner in equity it refers to him specifically. See secs. 67, 69.

Macfarlan, in reply.

Cur. adv. vult.

The following judgments were read:—

June 22.

BARTON J. It is not necessary to state the nature of the action, the facts, or the formal questions for determination, for all these matters are set out in the special case.

The enactments to be interpreted are sec. 64 of the *Mines Act* 1890 (No. 1120), and sec. 44 of the *Mines Act* 1897 (No. 1514), which in amending the first-named section incorporated some intervening amendments.

The first of these two sections, as expressed before its amendment, was almost a reprint of sec. 36 of the *Mining Statute* 1865 (No. 291). As amended by sec. 44 of the *Mines Act* 1897, it would read thus, the amendments being included in brackets, and the portions of sec. 64 not material to the present case being omitted:—"It shall be lawful for the Governor in Council to grant to any person for any term not exceeding fifteen years . . . a licence which shall authorize such person his executors administrators and assigns (except as against Her Majesty) to cut construct and use races . . . through and upon any Crown Lands [or any land alienated from the Crown in fee simple on or after the 29th day of December 1884] whether the

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same shall or shall not have been demised," by mining or mineral lease, "or shall or shall not be occupied by virtue of a miner's right or business licence.

"[The expression 'Crown Lands' in this section shall be deemed and taken to include,

(*a*) any pastoral allotment or grazing area; or

(*b*) any land licensed or leased on or after the 29th day of December 1884 under any Act relating to Crown lands with the right of acquiring the fee simple in such lands; or

(*c*) any Mallee block or Mallee allotment in respect of which a lease or perpetual lease is issued; or

(*d*) any land in respect of which a lease for the cultivation of wattle trees is issued."]

There is no provision here, or indeed elsewhere in the Act of 1897, for compensation to any person through whose land a race authorized to be cut and used is to run, except in the cases of lessees from the Crown under mining or mineral lease and of occupants under miner's right or business licence. But the *Mines Act* 1904 (No. 1961) provides in sec. 12 that unless the consent in writing of the owner, or owner and occupier, to the issue of the race licence be obtained before its issue, then as to any land "alienated from the Crown in fee simple on or after the 29th day of December 1884 or of any land licensed or leased on or after the said date under any Act relating to Crown lands with the right of acquiring the fee simple thereof . . . the compensation for surface damage to be done to such lands by reason of the granting of such licence shall be determined as if such lands were applied for as a mining lease under the provisions of Part II. of the *Mines Act* 1897," &c. The reference is to sec. 76 of the Act of 1897, which deals with the measure of compensation. *Hodges* J., before whom the special case was argued, was of opinion that the plaintiff's allotment is land alienated from the Crown in fee simple after, and not before, the 29th December 1884, and that it comes within the provisions of the amended enactment, by reason of such alienation in fee. He therefore answered the first question in the affirmative, and judgment passed for the defendant, as arranged by the special case, without the necessity

of any answer to the second question. The plaintiff appeals, and claims that both questions should have been answered in the negative, and that judgment should have been entered for him accordingly. First, then, was *Hodges* J. right in answering question 1 in the affirmative?

The plaintiff bases his appeal, so far as it challenges the answer to question 1, on two positions. First, he says that as a licensee and lessee under the *Land Act* 1869 he acquired a title in fee simple in equity before December 1884, and therefore his allotment is not within the section as amended, and so cannot lawfully be subjected to this race-licence. If the Court does not agree with him there, he says that in the section as amended the legislature has used the words "alienated from the Crown in fee simple" in a special sense which it had given to the term in previous enactments, namely, that of out-and-out sale by the Crown *uno ictu*, so to say, and that though he obtained the Crown grant in 1888, yet in the sense in which he contends that the term is here used, this land did not come to him as the result of an "alienation from the Crown in fee simple," so as to lay his allotment open to be subjected to a race-licence. On the other hand, he points out that his allotment is not "land licensed or leased on or after" the date named, so that either way the race-licence was issued without the authority of the law. To take these two positions in order, the first to be dealt with is, that contracts with the Crown made by licence under Part II. Division I. of the Act No. 360, repealed in 1884, gave the selector an immediate fee by force of the Statute. In my view that is not so. The Statute is not dealing with equitable, but with legal estates, and clearly the legal fee is not given by the terms used. The legislature, in the enactment first demanding attention, namely, that mentioned in paragraph 5 (1) of the special case, has said much in negation of the effect the appellant attributes to the contract. Land held as his was before the 29th December 1884 is avowedly "land licensed or leased . . . under an Act relating to Crown lands." The legislature appears to have guarded carefully against any possible claim that the contract, or the licence in which it was embodied, operated to give any estate in fee in the ordinary or legal sense before the right to the grant

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arose. It speaks of the licence and the consequent lease, not as giving that estate, but as giving the right to acquire it: the right which beyond doubt did accrue to have the grant on completion of the conditions, due payment of occupation fees, and payment of balance in cash, or (in the case of lease following licence) payment of balance by way of rent. The legislature further emphasizes this distinction between the grant of the fee and the right to acquire it. It includes land licensed or leased in the expression "Crown lands," and then, by the words which by sec. 44 of the Act of 1897 it inserts after the words "Crown lands" in sec. 64 of 1890, it distinguishes pointedly between "Crown lands," (including leased and licensed lands) and "land alienated from the Crown in fee simple." So far as the scheme of the drafting is concerned, it goes strongly to negative the appellant's first contention. It does not of itself make licensed or leased lands into Crown lands except for the purposes of the Act, but it abundantly shows that it does not mean them to be taken as lands alienated in fee simple. Moreover, the words "the right of acquiring the fee simple" show that, *as long as the lands are licensed or leased*, the fee simple the enactment is dealing with has not yet been acquired, and that must be the fee simple at law, for the terms of the enactment seem to exclude the notion of an equitable fee.

Before leaving the amended section let us see how far it accords with the appellant's second position—namely, that the words "alienated from the Crown in fee simple on or after the 29th day December 1884," are there used in a sense not applying to licence-and-lease contracts such as his own, made under the *Land Act* 1869, but only to out-and-out sales such as auction sales. His argument is that the alienation in fee simple there spoken of is an alienation every step in which, from beginning to end, has taken place since the 29th December 1884, the date on which the *Land Act* and the *Mining on Private Property Act* of that year came into operation. It is undeniable that if the combined sections primarily to be construed do not treat an alienation by licence-and-lease as an alienation in fee made at the time of the licence, which in this case was before December 1884, the grant which the appellant obtained in 1888 is an alienation in fee made

after that date. They do not ostensibly treat the process as an alienation *ab ovo*. But the appellant maintains that land granted in fee after 29th December 1884, as a final consummation of a contract by way of licence dating from before that date, is not "land alienated from the Crown in fee simple on or after," although the grant in fee is issued after, that date. This second position is, perhaps, not consistent with the first, but it must be examined. And I will first inquire whether the amended section is in this respect clear on its face, or whether it contains anything which may give colour to the appellant's attempted construction. Does it point to a possible double meaning of the words in question? To my mind the words are used in that customary sense which means that the property in the land has passed, no matter after what preliminaries, by grant from the Crown to the subject for an estate in fee simple. That is their ordinary meaning, and I find nothing in the amended section to control it. They are words apt to include in their meaning lands the subject of a licence or lease issued before the decisive date, but afterwards made the subject of a Crown grant issued after that date. Such lands have not, during the maturing of the selector's title, acquired any peculiar quality which, when that title ripens into a legal fee, renders them less aptly described by the words "alienated from the Crown in fee simple," than are lands which have been sold at auction, a month before the date of the grant, to the purchaser outright.

Taking then sec. 64 of the Act of 1890, with the amendments made by sec. 44 of the Act of 1897, irrespective of other indications of legislative intent, I am of opinion that its meaning is plain, and on its face it is fatal to both the positions of the appellant under question 1. He had not the fee simple until after 29th December 1884, the date when the Acts Nos. 796 and 812, as to Mining on Private Property and as to Lands, respectively, came into force.

The words "alienated from the Crown in fee simple" have been taken by me in the ordinary sense of a technical expression of the kind. Words must be taken in "the ordinary meaning as applied to the subject matter with regard to which they are used," until you find something which "obliges you to read them

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in a sense which is not their ordinary sense in the English language as so applied." That is stated by *Brett* M.R. as the cardinal rule: *Lion Mutual Marine Insurance Association* v. *Tucker* (1). Whether then we look at the ordinary sense of the expression quoted or at the ordinary meaning of the rest of the amended section, we must adopt the plain meaning unless we have "a context even more plain, or at least as plain—it comes to the same thing—as the words to be controlled." See per *Jessel* M.R.: *Bentley* v. *Rotherham and Kimberworth Local Board of Health* (2).

If we go outside the amended section we are entitled to treat as the whole instrument the *Mines Act* 1897, in which sec. 44 occurs, the *Mines Act* 1890, in which is sec. 64 (this Act embodies the *Mining on Private Property Act* 1884), and the *Land Act* 1869, in its provisions for alienation, under which the appellant's allotment was selected, being also for present purposes the Act referred to in sec. 44 (*b*) of the Act of 1897. I have carefully gone through all these enactments, indeed every statutory provision quoted to us, remembering that the appellant obtained his deed of grant before the Crown had acquired any power to issue a race-licence over private lands, and remembering also how strongly it was urged at the bar that a view adverse to that contended for by the appellant would lead to injustice.

What the contract between the Crown and the selector was in this case, and whether the expressions of the section of 1890 as amended in 1897 are controlled in that regard, will appear upon an examination of the enactments under which the allotment was taken up in 1878. They are to be found in Part II. of the Act of 1869. But first that Part is described in sec. 1 as "*Alienation of Lands*," with these two Divisions set opposite: "(1) *By Licence and Lease*, secs. 16-32; (2) *By Auction*, secs. 33-43." The inference is that the modes of disposal in these Divisions are both alienations, but it does not follow that they are alienations in fee *ab initio*, though that is clear as to Division 2 in view of secs. 34 and 36, and also secs. 4, 11 and 13. The auction purchaser, on payment of not less than 25 per cent. of the price at the time of sale, and of the residue within a month,

(1) 12 Q.B.D., 176, at p. 186. (2) 4 Ch. D., 588, at p. 592.

became entitled to his grant. But turning to Division 1, alienation by licence and lease, secs. 18, 19 and 20 are all that we need at present look at. The selector applied for and obtained a licence on deposit of the fee for a half-year's occupation. The licence gave him an authority to occupy for three years at an occupation fee of two shillings per annum per acre. The licence was to contain several conditions; for the payment of the occupation fee half-yearly in advance (it is called a fee, not purchase money); not to *assign* transfer or *sublet*, on penalty of voidance; for fencing of the whole and cultivation of one tenth; for annulment on non-payment of occupation fees, failure to occupy or failure to improve as prescribed during the currency of the licence; or on any breach of condition or of the Statute. Then came condition (v.) that each licence must contain a condition that upon occupation for 2½ years and fencing, cultivation and improvement, all proved to have been performed within the three years, the selector should be entitled to demand and have a Crown grant on payment of 14s. per acre, or a lease which shall be for seven years "at a yearly rent payable . . . half-yearly in advance of 2s. for each acre, . . . and shall contain the usual covenant for the payment of *rent* and a condition for re-entry on non-payment thereof; and upon the payment of the last sum due on account of *the rent so reserved*, or at any time during the *term* on payment of the difference between the amount of *rent* actually paid and the entire sum of £1 for each acre, the lessee or his representatives shall be entitled to a grant *in fee* of the lands *leased*." The grant was to be subject to such "covenants conditions exceptions and reservations" as the Governor in Council might direct, and the licence itself was to contain "such other conditions and provisions not inconsistent with . . . this Act" as the Governor in Council should approve of and direct to be inserted. It was also expressly provided that no such licence or lease should be deemed to give the licensee, lessee, or any assignee the right to search for or to take any metal.

Now, so far from upholding the contention of the appellant that the selector under these sections gains a fee simple within the meaning of sec. 44 of the Act of 1897 upon obtaining his

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licence, the Statute appears to have repelled any such idea. The licence was an authority to occupy for three years on making half-yearly payments, and the occupation was subject to strict conditions. All these conditions must be completely performed, including six half-yearly payments of 1s. per acre, before a lease could be had, and the Crown might re-enter on default. So it could after the issue of the lease, unless 1s. per acre were paid half-yearly as rent. The time for the acquisition of the legal fee (and I see nothing in this Act to suggest that the Act No. 1514 may have used the term fee simple in any other sense) did not arrive until nothing remained to be done but to demand the grant; that is, until not only all the conditions had been performed but the entire £1 per acre had been paid. That was the contract; and the issue of the grant in 1888, when presumedly the licence had run its three years and the lease its seven years, was an alienation in fee after 29th December 1884, in satisfaction of the "right of acquiring the fee simple" conferred by the licence. That instrument gave the right upon conditions, and whatever consequences equity might attach to the contract, it is for the appellant to make out that sec. 44 (*b*) does not describe the contract and its attributes in the sense known to the common law, and this I think he fails to do. It is not necessary to decide whether or not the contract by licence under secs. 18 to 20 of the Act No. 360 gave the selector a statutory fee in equity. In the case of *Joy* v. *The Curator of Estates of Deceased Persons* (1) *à Beckett* J. seems to have been of the affirmative opinion. At any rate he treated a selector lessee's interest as real estate under his will. But for his opinion I should have been inclined to a different view, and I hold my mind open in view of the possibility of a direct decision becoming necessary hereafter.

Several cases were cited for the appellant, but I do not see that any of them assists us to interpret sec. 44 of the Act No. 1514 in his favour. The "right of acquiring the fee simple" must there mean the right of obtaining the grant in fee, and the Act No. 360, by the provisions I have stated, shows what the selector has to do before he can obtain it. The Act of 1897

(1) 21 V.L.R., 620; 17 A.L.T., 144.

clearly distinguishes between lands "alienated from the Crown in fee simple," and lands "leased or licensed with the right of acquiring the fee simple." If the latter phrase were another way of describing an equitable fee, that would not be to the purpose in the task of construction, because the words "alienated from the Crown in fee simple" would still mean something different from that: something deliberately distinguished not only from Crown lands in the primary sense, but from Crown lands as including lands licensed or leased, but not *yet* the same as these so distinguished from them. The acquisition of the fee simple puts them both in the same class, and when that has happened after 29th December 1884, they are both lawfully open to invasion by race-licences.

Now, as to the second point on which the appellant relies for an answer in the negative to question 1. The meaning of sec. 44 of No. 1514 being plain as to the words "alienation from the Crown in fee simple," is there anything to be found elsewhere to confine its meaning to cases of out-and-out or immediate alienation, and to exclude cases where the process of licence or of licence-and-lease has preceded the Crown grant? It is not enough to distinguish between lands held under licence or lease and lands alienated in fee simple. The appellant would have no difficulty in doing that so far as this section is concerned. He must adduce enactments *dehors* sec. 44 to differentiate between lands once held under licence or lease but now held under grant in fee, like his own, and other lands alienated in fee. He must put this beyond doubt, otherwise the plain meaning of sec. 44 taken by itself puts him out of Court. He has really to show that sec. 44 does not mean what it says in placing on the same footing all lands alienated in fee simple on or after the 29th December 1884. I am clearly of opinion that no provision cited to us affords such a demonstration, and that it does not result from all the cited enactments taken together. I do not propose to go through them. That would not be justifiable. But having come to that clear conclusion I will mention a few provisions which throw a little light on the meaning of sec. 44 generally.

The provision resulting from the amendment of sec. 64 of the Act of 1890 (No. 1120) by sec. 44 of the Act of 1897 (No. 1514) is

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the first extension to private land of the right to obtain race-licences, as apart from mining leases which carried the right to cut races. "Private land" by the former Act meant "any land alienated from the Crown before the 29th December 1884 for any estate in fee simple at law or in equity." It did not include land held under lease or licence from the Crown with an inchoate right of purchase. But by the later Act, No. 1514, sec. 67, Part II. (Mining on Private Property), "Private land" now means (A) "any land alienated from the Crown before the 29th of December 1884 for any estate in fee simple at law or in equity," including church and school lands, (B) "any land alienated from the Crown in fee simple on or after the said date or leased or licensed before on or after the said date under any Act relating to Crown lands with the right of acquiring the fee simple thereof." Here, looking at (A) and (B) together, we find the distinction twice drawn between (1) lands alienated from the Crown in fee simple, and (2) lands licensed or leased under any Act relating to Crown lands with the right of acquiring the fee simple. That distinction is drawn between these two classes of land, first, as to disposal before 29th December 1884, and secondly, as to disposal on or after that date. The one class is alienated in fee, the other not so. But of course the distinction disappears the moment that, either before, on, or after the date named, the holder of the licensed or leased land acquires the fee simple thereof by paying his balance. Then comes the grant, and the land falls into the class of lands alienated in fee simple. Further, land alienated before December 1884 may have been so alienated in fee at law or in equity: sub-sec. (*a*). But land alienated on or after that date does not come within the definition unless it has been alienated in fee simple merely—which with this contradistinction means, in fee simple at law.

What the words "or in equity" mean in sub-sec. (*a*) it is hard to discover, unless, as is most probable, they refer only to the church and school lands. But the sub-section as a whole expressly limits itself to lands alienated in fee before 29th December 1884, so that they have nothing to do with sec. 44. The definition of "owner" in the same section (67) distinguishes the "owner or proprietor of land alienated from the Crown for

any estate in fee simple at law or in equity" from the "licensee or lessee of land under any Act relating to Crown lands with the right of acquiring the fee simple thereof," and thus goes, as indeed does the definition of "private land," to show that the licensee or lessee, while he remains such, is not, in the contemplation of the Mining on Private Property Acts, an alienee in fee simple, even in equity.

Sec. 69 does not affect the present dispute, as it relates only to gold mining leases on private lands, though leases for mining for gold only carry the additional right to cut races on the lands leased. But sec. 76 is material when considered in conjunction with sec. 12 of the *Mines Act* 1904, already quoted. The last mentioned section provides for compensation in respect of race-licences granted, without the written consent of the owner, over "lands alienated from the Crown in fee simple on or after the 29th December 1884, or of any land licensed or leased on or after the said date under any Act relating to Crown lands with the right of acquiring the fee simple thereof." These are, in effect, the words used in sec. 44 of the Act of 1897 to describe the lands over which race-licences may be granted. The compensation is to be determined as if such lands were applied for as a mining lease under Part II. of the *Mines Act* 1897. This brings us to sec. 76 of that Act, which provides the measure of compensation in such case. Sub-sec. (*a*) allows for compensation in respect of private land as defined by sec. 67 (*a*). Sub-sec. (*b*) allows for compensation in respect of private land as defined by sec. 67 (*b*). The first provision is very much more liberal than the second. The difference in favour of land "alienated from the Crown before the 29th of December 1884 for any estate in fee simple at law or in equity," as against land "alienated from the Crown in fee simple on or after the said date or leased or licensed *before* on or after the said date under any Act relating to Crown lands with the right of acquiring the fee simple thereof" shows the higher regard that was paid to the vested interest in land alienated in fee before the starting date of the Mining on Private Property Acts, which regard did not obtain in the case of lands leased or licensed before that date, which are placed in the lower category

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together with lands leased or licensed, and lands alienated in fee on or after that date.

There are many obscurities in the series of Acts in question, and there are instances in which words, such as the word "alienated," carry different meanings in different Acts and even in different sections of the same Act. But I find nothing in the mass of enactments which can be said to be clear enough to control the positive meaning of the amended section which is the subject of question 1.

I agree with *Hodges* J. that that question must be answered in the affirmative.

Under the special case, the judgment already entered for the defendant, the respondent, must stand.

The appeal will therefore be dismissed.

ISAACS J. By sec. 17 of the *Land Act* 1890 and of the Act of 1901 every grant must be antedated to the day when the grantee became entitled to it. The date of the grant, which in this case is 22nd December 1888, represents in law the date when both the legal and the equitable title in fee to the land accrued. Prior to that date the grantee was, as described by the Privy Council in *Attorney-General of Victoria* v. *Ettershank* (1), "an inchoate purchaser of the fee," but he was not absolutely entitled to the fee, or, in other words, the land was not yet absolutely alienated from the Crown to him in fee either at law or in equity. The distinction between alienation from the Crown in fee simple, and a licence or lease granted with the right of acquiring the fee simple is retained down to 1904 by sec. 12 of Act No. 1961, enacted as a proviso to sec. 64 of the Principal Act now under consideration.

The question, however, is whether the words in sec. 44 of the *Mining Act* 1897, incorporated into sec. 64 of the Act of 1890, namely, "land alienated from the Crown in fee simple on or after the 29th day December 1884," are satisfied by such a grant as that of the appellant, or require the whole process of alienation, from the original issue of the licence onwards down to and inclusive of the issue of the grant, to have taken place subsequent to the day mentioned in the section.

(1) L.R. 6 P.C., 354.

Whatever answer be given to that question, some anomaly will exist either of result or construction. I have, on consideration, arrived at the conclusion that to depart from the ordinary signification of the words would introduce greater inconsistencies both in result and construction than arise from adherence to their primary meaning.

To hold that the whole process is referred to by the words, would obliterate the distinction drawn by the legislature itself in several sections of the same Act, viz., sec. 44 between alienation in fee simple on or after 29th December 1884 and a licence or lease on or after that date with the right of acquiring the fee simple ; and in secs 67, 69 and 76 between such an alienation and a similar licence or lease before or after that date. Such a licence or lease ought to be linked with the alienation in fee simple before that date in the three last mentioned sections if the appellant's argument were right. But they have been in every instance separated from such an alienation, and placed in the same category as the alienation in fee on or after the crucial date, for the purposes of fixing the nature of the mining rights which may be granted over the land, and of determining the compensation payable in respect of those rights. If a Crown grant ever in fact issues in pursuance of a licence or lease referred to in secs. 67, 69 and 76, it must necessarily bear date on or after 29th December 1884, and would, in my opinion, be an alienation in fee on or after, and not before, that date within the meaning of those sections.

I do not see, therefore, how a different meaning can with any pretence at consistency of construction be given to words in sec. 44 identical with those in secs. 67 and 69. If there be any unintentional injustice done by the legislature, it must be remedied by amendment; but the Court cannot interpret the words so as to correct it, or to avoid it, without creating much greater inconvenience and difficulties in the practical working of the Act. Had the matter rested simply on the meaning of the word "alienation" I should have thought the appellant's case more probably correct; because alienation has in several sections a special meaning in the Land Acts, as, for instance, in sec. 68 of

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the Act of 1890, and see *O'Keefe* v. *Williams* (1), and *Moore and Scroope* v. *Western Australia* (2); but the expression "alienated in fee" goes beyond mere "alienation," and I see no course open but to give those words their ordinary force. I therefore agree that this appeal should be dismissed.

HIGGINS J. We have had to work our way through a veritable jungle of legislation as to lands and as to mining rights; but the only question in respect of which the appeal is brought is the first question—as to the effect of sec. 44 of the *Mines Act* 1897. Is an allotment of land which was licensed, and afterwards leased, by the Crown, under sec. 19 of the *Land Act* 1869, before 29th of December 1884, and granted in fee simple by the Crown on 22nd of December 1888, "land alienated from the Crown in fee simple on or after the 29th of December 1884" within the meaning of the addendum to sec. 44? If not, the licence to cut races is invalid, and (as is admitted) the injunction must be granted.

This addendum appears first in sec. 44. The rest of that section is in substance a re-enactment of provisions contained in Acts Nos. 1202 and 1251, repealed by the *Mines Act* 1897. At the time that the Act No. 1202 was passed (20th December 1890) there was a power for the Governor in Council to grant a licence to cut races over Crown land (*Mines Act* 1890, sec. 64). It was in sec. 64 expressly provided that the race-licence could be granted even over land held under a mining lease, or by virtue of a miner's right or business licence; but there was no power given to grant a race-licence over an agricultural allotment held under sec. 19 of the *Land Act* 1869, or under the corresponding sections of the subsequent Land Acts. This *Mines Act* 1890 was a mere consolidation of the *Mining Statute* 1865 and its amendments.

But between 1865 and 1897 a momentous change had come into operation, on 29th of December 1884, by the *Mining on Private Property Act* 1884; and this change was reflected in various provisions of the *Land Act* 1884, which was passed so as to come into operation on the same date. By the former Act

(1) 5 C.L.R., 217. (2) 5 C.L.R., 326.

miners were allowed to get mining leases, &c., in respect of private land, paying compensation for deprivation, surface damage, &c.; and by the latter Act it was provided that in every lease of a pastoral allotment or of a grazing area there should be inserted a condition enabling miners to search for gold, to mine, &c., without making compensation (sec. 115, re-enacted in sec. 118 of *Land Act* 1890). This applied to all pastoral and grazing leases granted after 29th of December 1884; and the Act No. 1202 (in 1890) gave an additional boon to miners by enabling the Crown to grant a race-licence over pastoral and grazing leases. Moreover, by sec. 115 of the *Land Act* 1884 (sec. 119 of the *Land Act* 1890), it was provided that "in every Crown grant of *lands alienated in fee simple*, and in *every licence or lease of land demised with the right of acquiring the fee simple thereof*" there should be a similar condition inserted enabling miners to search for gold, to mine, &c.; but compensation had to be paid for surface damage. This applied to all Crown grants made in fee simple after 29th of December 1884, and to all licences or leases of agricultural allotments issued after that date. Now, by the Act No. 1202, the legislature followed up these privileges granted to miners by enabling the Crown to grant them race-licences over (*a*) pastoral or grazing leases, or (*b*) over land held under agricultural licence or lease granted after 29th December 1884. There was no provision for compensation in the case of a race-licence, probably because the interference with the land is not so serious or so lasting as in the case of a mining lease. So far, the privilege of a race-licence was confined to Crown lands or what I may call *quasi*-Crown lands. By *quasi*-Crown lands, I mean lands as to which the Crown had conferred some tenure, but not a fee simple. By the Act No. 1251, the power of granting a race-licence was extended to leases of mallee blocks &c., and leases for wattle cultivation. But sec. 44 of the *Mining Act* 1897 goes beyond the Acts Nos. 1202 and 1251. It allows race-licences to be granted, not only over Crown lands or *quasi*-Crown lands, but over "any land alienated from the Crown in fee simple on or after the 29th day of December 1884." There was already power to enter and search and mine such land (without licence, but paying compensation for surface damage only); now there

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was to be power to cut races if the Governor in Council gave a licence, but without compensation. For ordinary mining purposes, agricultural land licensed or leased before, on or after 29th of December 1884 was to be treated as "private land," and to be within the provisions for compensation (sec. 67); but there was to be no compensation in respect of a race-licence, if the licence or lease were granted after that date. For ordinary mining purposes, land alienated from the Crown *before* 29th of December 1884 for a fee simple "at law or in equity" and land alienated from the Crown in fee simple *on or after* that date, were to be "private land," and within the provisions for compensation (sec. 67); but there was to be no compensation in respect of a race-licence, if the land were "alienated in fee simple" after that date.

What is the meaning of "alienated in fee simple" in sec. 44? I have examined the *Land Act* 1890, and I find the phrase used in several sections; but in no section can I find it used in any sense except as referring to the actual grant in fee simple (see secs. 20, 31, 66, 80, 88, 119), although the same Act recognizes that there may be "alienation for a lesser estate" (sec. 86); and it has to be remembered that the grant when issued bears the date when the grantee became "entitled" to it (sec. 17). See also the phrase as used in the *Mining Act* 1897, secs. 67, 68, 69, 70, 76 (2*b*). In short, the meaning of "land alienated in fee simple" in sec. 119 of the *Land Act* 1890 is maintained in sec. 44 of the *Mining Act* 1897. Sec. 44 of that Act is the complement, the corollary, of secs. 118 and 119 of the *Land Act* 1890. These sections deal with the actual documents issued, whether licences or leases or Crown grants; and so also does sec. 44 of the Act of 1897. The result is, so far, that the land in the present case was land alienated in fee simple after 29th of December 1884, and might be made subject to a race-licence.

The appellant has urged, however, in the Court below, and here, that the "alienation" in this case took place before 29th of December 1884 inasmuch as the licence operated by way of contract between the Crown and the selector, and conferred upon the selector an equitable estate in fee simple as from the date of the licence. I agree with the view taken by *Hodges* J. as to this point—the only point to which he directed his judgment. I am

of opinion that, for the purposes of sec. 44, a contract to alienate in fee simple is not to be treated as an alienation in fee simple. No doubt, there is a contract between the Crown and the selector, that, on compliance with certain conditions and on payment of certain instalments, a grant in fee simple will be made at the end of the term. But care has to be taken in applying the current phrase, to the effect that by a contract of purchase the purchaser becomes in equity the owner of the property. As Lord *Cottenham* L.C. pointed out in *Tasker* v. *Small* (1):—"This rule applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property" (and see *Commissioners of Inland Revenue* v. *G. Angus & Co.* (2).) In other words, as against a miner seeking a race-licence, the selector who holds an agricultural allotment under a licence or a lease cannot claim to be the alienee from the Crown for an estate in fee simple. Even if the cases were more favourable than they are to the appellant with regard to the effect of the contract as an equitable alienation, I should still be of opinion that no such technical refinement was within the meaning of the framers of the *Mining Act* 1897. They used the same phrase as used in existing Acts, and in this Act itself, as referring to the actual grant of the fee simple. Sometimes, as in sec. 67, defining "private land" and "owner," the words are "alienated . . . for any estate in fee simple at law or in equity." These words may refer to land as to which the selector is absolutely entitled to the fee simple, entitled to demand a Crown grant at once unconditionally without making further payments. But it is enough to say that these words "at law or in equity" are not used in sec. 44; and the contrast between licensed or leased lands and lands alienated in fee simple is clearly marked in sec. 67, and in other sections.

I confess that for some time I was strongly inclined to adopt an intermediate view of the words "lands alienated in fee

(1) 3 My. & Cr., 63, at p. 70. (2) 23 Q.B.D., 579.

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simple" in sec. 44, and to treat it as meaning land *in respect of which the whole process of alienation* has taken place after 29th of December 1884; that is to say, to treat the alienation in fee simple as being made by three successive steps—licence, lease, and Crown grant in fee simple. I was impressed with the view that, otherwise, in the case of a man who selects land before 29th of December 1884, the Crown's promise to him—of a grant in fee unencumbered by race-licences—would be broken; his vested right would be impaired; and the presumption is usually strong against such a result. I was impressed also by sec. 44 (*b*) which allows a race-licence to be granted only over such land as has been licensed or leased *after* that date; and it seemed curious that, as to land licensed or leased *before* that date there could be no race-licence so long as the land is under licence or lease, but that there can be a race-licence after the land is held under a grant in fee simple. But, on reconsideration, I have come to the conclusion that there is no such anomaly as I thought to follow from the ordinary interpretation of the words. The licensee under the *Land Act* 1869 took up his selection under an Act which plainly stated (sec. 20 (v.)), that the grant in fee "shall be subject to such covenants conditions exceptions and reservations as the Governor may direct." The *Land Act* 1884, sec. 115, made it *obligatory*, instead of permissive, to insert in every Crown grant in fee simple thereafter issued a condition allowing miners to enter and mine with compensation for surface damage only. The surrounding sections of the *Mines Act* 1897 *in pari materia* contain clear interferences with legitimate expectations and vested rights (cf. secs. 25, 43, 68). If a man had his licence *before* 29th of December 1884, the liability to a race-licence was applicable to his lease issued after that date (sec. 44 (*b*)); why should it not, then, be applicable also to his Crown grant issued after that date? Moreover, the power to grant race-licences did not come into play until 1897; and by that time all the licences and leases granted before 29th of December 1884 were replaced, or ought to have been replaced, by Crown grants in fee simple. Any licensees or lessees who remained licensees or lessees for the thirteen years since 1884 remained so, probably, by the indulgence of the Crown, and could hardly complain if they were

treated in the same way as those who selected land after 1884. At all events, I see no sufficient ground for doing any violence to the plain language of the Act. I cannot find any instance in which the words "alienation in fee simple" have been used in the Acts in the intermediate sense which I suggested; and I find it has frequently been used in the simple sense adopted by the Lands Office in this case. For my part, I am strongly opposed to the practice of introducing refinements into Acts by conjecture however probable, or of qualifying plain words by inference, unless the inference be, in the strict sense, necessary, not merely reasonable.

I am of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellant, *R. L. Cross* for *F. W. Edmondson*, Wodonga.

Solicitors, for the respondent, *Russell & Meares* for *C. W. C. Hodgson*, Chiltern.

B. L.

[HIGH COURT OF AUSTRALIA.]

LYONS . . . . . APPELLANT,
DEFENDANT,

AND

SMART . . . . . RESPONDENT,
INFORMANT.

Costs—Taxation—Appeal from Court of Petty Sessions of a State—Order to review—Limitation on amount of costs—Justices Act 1890 (*Vict.*) (*No.* 1105), *sec.* 148—*Rules of the High Court* 1903, *Part I., Order XLVI., r.* 14; *Part II., sec. IV., r.* 1; *Rules of the High Court of 12th October* 1903, *r.* 3.