[HIGH COURT OF AUSTRALIA.]

COLON PEAKS MINING CO. NO LIABILITY APPELLANTS;

AND

THE COUNCIL OF THE WOLLONDILLY SHIRE . . . . . } RESPONDENTS.

BARTLETT AND ANOTHER . . . . APPELLANTS;

AND

THE COUNCIL OF THE WOLLONDILLY SHIRE . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 18; *Nov.* 20, 21, 22; *Dec.* 21.

Griffith C.J., Barton and O'Connor JJ.

Local Government—Rates—Rating of mine—Lease from Crown of mine on private lands—Reservation of minerals, Effect of—Mine situate on Crown land—Method of valuation—Unimproved capital value of land or output of mine—Construction of Statute—"And" read as "or"—Meaning of "land"—Natural meaning limited by context—Local Government Act 1906 (*N.S.W.*) (*No.* 56), *secs.* 132 (1), 144—*Mining on Private Lands Act* 1894 (*N.S.W.*) (57 *Vict. No.* 32).

The appellants were the lessees from the Crown, under the *Mining on Private Lands Act* 1894, of mines situated on land which had been granted to M. by the Crown, subject to a reservation of all minerals. Under the lease the appellants had the exclusive right to occupy a portion of the surface, and to mine under the land. Land tax upon the whole of the land had been assessed and paid by M.

Sec. 132 of the *Local Government Act* 1906 provides that, in the case of a mine situated on private land, the unimproved capital value of such land shall be assessed at the amount of the capital sum for which the fee simple estate in the land would sell, or, in the case of mines other than coal or shale mines, at the option of the Council, the unimproved capital value of the mines shall be assessed upon the annual output of the mine.

Held by *Griffith* C.J. and *Barton* J. (*O'Connor* J. dissenting,) that, under sec. 132 (2) (*c*), in the case of a lease from the Crown of a mine situated on private land, a distinction was intended to be drawn between the words "land" and "mine," and that the rate payable by the appellants as lessees of the mine should be assessed, under sub-sec. (*b*), upon the annual output of the mine, and could not be assessed, under sub-sec. (1), upon the unimproved capital value of the land inclusive of the minerals.

Where land is granted by the Crown with a reservation of all minerals, the minerals are not Crown lands within the meaning of sec. 132 (2).

The word "and" cannot be read as "or" in the expression "mine situate on Crown land and held from the Crown" in sec. 132 (2) (*b*).

Decision of the Supreme Court: *Bartlett* v. *Wollondilly Shire Council*, 10 S.R. (N.S.W.), 767, reversed.

APPEALS from the Supreme Court of New South Wales.

These were two appeals by special leave from the decision of the Supreme Court on special cases. The question raised by appeal in each case was the proper method of assessment, under sec. 132 of the *Local Government Act* 1906, of portions of land held and used as metalliferous mines by the appellants, as lessees from the Crown under the *Mining on Private Lands Act* 1894. The mines in each case were situated on land of which one H. C. Manning was the grantee from the Crown subject to a reservation of minerals.

In the Colon Peaks case the appellants had a lease of 57 acres, part of Manning's conditional purchase of 1,243 acres. The unimproved capital value of the 1,243 acres was assessed by the respondent Council at £1,243, and the rate assessed thereon was duly paid by Manning. The unimproved capital value of the 57 acres held by the appellants was assessed at £50,000, the improved capital value at £85,000, and the annual value at £8,500. The valuer in his evidence stated that he arrived at these figures by taking the value of the land as a mine. The appellants contended that the valuation was excessive, inasmuch as sub-sec. (2) (*c*) of

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sec. 132 of the *Local Government Act* 1906, under which the assessment was made, did not apply to the land in question; and if it did, did not authorize the Council to take into consideration, in the exercise of the options given therein, the value of the minerals in the land. The appellants appealed against the assessment to the District Court, and Hamilton, Acting D.C.J., struck out the assessment.

In the second appeal the appellants also had a lease from the Crown of portion of the land granted to Manning. The assessment was made upon the same basis as in the first appeal. In this case the amount in dispute was under £10,000, and the appeal from the assessment was heard by a Court of Petty Sessions under sec. 138 of the *Local Government Act*, and was dismissed.

From both these decisions appeals were brought to the Supreme Court, which upheld both the assessments: *Bartlett* v. *Wollondilly Shire Council* (1). Special leave was granted to appeal in each case. Both appeals were heard together.

Knox K.C. and *Rolin*, for the appellants in the first case and *Knox* K.C. and *Windeyer*, for the appellants in the second case. The strata containing the minerals being reserved from the grant of the land to Manning, the mines are situated on Crown land within the meaning of sec. 132 (2) (*b*) of the *Local Government Act*. Where a lease is granted with a reservation, the portion of the land reserved, in this case the minerals, remains the property of the Crown. The right reserved by the Crown by the reservation of minerals in the grant to Manning, under sec. 7 of the *Crown Lands Act* 1884, was a right of property or absolute ownership: *Duke of Hamilton* v. *Graham* (2). The surface land and the underlying minerals are separate tenements severed in title. In *Attorney-General* v. *Brown* (3) a grant from the Crown reserved all mines of coal, and it was held that veins of coal excepted from the grant were properly the subject of an information of intrusion, as a corporeal hereditament remaining in the Crown. In *Attorney-General* v. *Great Cobar Copper Mining Co.* (4) the defendants took up land for copper mining, and it was held

(1) 10 S.R. (N.S.W.), 767.
(2) L.R. 2 H.L., Sc., 166.
(3) 2 S.C.R. (N.S.W.) App., 30.
(4) 21 N.S.W. L.R., 351.

that the gold in the copper ore belonged to the Crown, though the copper ore could not be mined without raising the gold. Land may be held in separate tenements horizontally as well as vertically: *Batten Pooll* v. *Kennedy* (1). Any layer or stratum containing minerals belongs to the Crown, and is Crown lands. Secondly, the words "situate on Crown land and held from the Crown" in sec. 132 (2) (*b*) should be read as "situate on Crown land or held from the Crown." If "and" is not read as "or" the words following down to the word "holding" are unnecessary. If a mine is on Crown land it must be held from the Crown. This principle of construction was adopted in *Golden Horseshoe Estates Co.* v. *The Crown* (2). The distinction intended to be drawn here is between a mine on Crown land and a mine on private land. Thirdly, this is not a mine "situate on land other than Crown land as defined in the *Crown Lands Act* 1884" within the meaning of sec. 132 (2) (*c*). Crown lands are defined by sec. 4 of the Act of 1884 as "lands vested in Her Majesty and not permanently dedicated to any public purpose or granted or lawfully contracted to be granted in fee simple under this Act or any of the Acts hereby repealed." If neither of these three alternatives is adopted, and the assessment can be made under sub-sec. (*c*), then, if the Council elect to rate the land, and not the mine, the basis of valuation under sec. 132 (1) is the value of the land irrespective of the minerals. The Council cannot add the value of the mine to the value of the land. Their contention is that the unimproved capital value of the land is what the mine would sell for. But in both sub-secs. (*b*) and (*c*) a distinction is drawn between the words "land" and "mine." If the Council assess the mine, the assessment must be based upon the annual output of the mine under sub-sec. 2 (*b*). If they assess the mine as land, they cannot include the value of the minerals. The legislature has provided that the land and the mine in a case of this kind shall be regarded as separate properties. Coal and shale mines are treated as in a class by themselves because they can be proved, and the value of the coal is a mere matter of calculation. Therefore, as the value is more certain, and the mine more valuable, an option is given to the Council to assess it under sub-

(1) (1907) 1 Ch., 256. (2) (1911) A.C., 480.

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sec. 132 (1). In the case of other metalliferous mines their value is uncertain until they have been worked and proved, and the assessment is based on the output. Sec. 144 (2) has no application to a lease from the Crown.

Langer Owen K.C., and *Piddington*, for the respondents. In determining the meaning of sec. 132 of the *Local Government Act*, as applicable to this case, it is necessary to look at the history of the legislation upon this subject. Prior to 1894 there was no express power given to the Crown to deal with minerals on private land; even though the minerals had been formally reserved from the grant. In that year the *Mining on Private Lands Act* was passed. It gave the Crown power to grant the exclusive right to occupy the surface of private lands, and the right to mine under the land. The land, both above and below the surface, was treated as put in the exclusive possession of the Crown lessee. The *Municipalities Act* 1897 (No. 23), made no reference to mines expressly, but its rating provisions clearly were intended to include both land and mines. A difficulty then arose with regard to the proper method of rating mines. In 1905 the *Shires Act* 1905 (No. 33), was passed, and, by sec. 29, for the first time introduced a basis of assessment for the rating of mines. It also introduced for the first time the principle of the unimproved capital value. In that Act "land" and "mine" were treated as interchangeable terms. Sec. 29 was amended by sec. 58 of the *Local Government Extension Act* 1906 (No. 40). This was repealed and consolidated by the *Local Government Act* 1906. The appellants' lease in this case is in the ordinary form under the *Mining on Private Lands Act*. It is a lease of the surface and the land beneath the surface for the purpose of mining. Under sec. 132 of the *Local Government Act* the words "land" and "mine" are used interchangeably. By sub-sec. (2), (*c*) the Council may rate the land or the mine at their option. If the land contains minerals, the value of the land includes also the value of the minerals. This is not a mine situate on Crown land, as the land forms part of a conditional purchase. Sub-sec. (*b*) deals with the valuation of all mines on Crown land other than coal or shale mines. Sub-sec. (*c*) was

intended to include all cases not covered by (*b*). The Court will not adopt a highly technical construction of the word "land," but will assume that the legislature intended that it should be given its ordinary meaning, as including not only the surface but anything under or above it. There is nothing in the other parts of the Act, or in the previous legislation *in pari materia*, to suggest that its ordinary meaning should be restricted. The object of the sub-section is to define the basis upon which land containing minerals is to be assessed. Land is not defined in the *Local Government Act*, but the definition of land in the *Interpretation Act* of 1897 would include the minerals, and no contrary intention has in this case been shown. There is no such distinction in the sub-section between the use of the words "land" and "mine" as would justify the appellants' argument. Sub-sec. (*c*) gives the Council an option as to the method of valuation, but the Court will not assume that the legislature also intended to give them the right to choose the taxpayer and the subject matter of the tax.

Cur. adv. vult.

Dec. 21.

GRIFFITH C.J. read the following judgment:—The appellants in these cases are lessees from the Crown under the *Mining on Private Lands Act* 1894 of mines situated on land of which one H. C. Manning is the grantee from the Crown. The question for decision is the basis upon which their mines are to be assessed under the *Local Government Act* 1906.

Before the *Crown Lands Act* 1884 Crown grants of land in New South Wales did not usually contain any express reservation of minerals. Royal mines were, however, held to be reserved or excepted by the common law. By sec. 7 of that Act it was provided that all grants of land issued under the authority of the Act should contain a reservation of all minerals in the land. No provision for working minerals so reserved was made until 1894, when the *Mining on Private Lands Act* was passed. The scheme of that Act (now replaced by Part IV of the *Mining Act* 1906 without material alteration) was that all private lands, *i.e.*, lands which the Crown had granted or contracted to grant in fee,

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should be open for mining for silver and gold, and that private lands containing a reservation of all minerals should be open for mining for all minerals. For this purpose the Governor might grant a lease of the private land "to be effectual either on and below the surface, or on one or more limited portions of the surface and below the whole area, or to be effectual below the surface only, for the purpose of mining thereon or thereunder." (Sec. 11). Provisions were made for compensation to the owner of the land for actual damage, and he was to be entitled to an annual rent of 20/- per acre for land actually occupied by the lessee.

In the case of grants not containing a reservation of minerals the owner of the fee simple was also the owner of the minerals, and the whole property was held under a single title—the Crown Grant; while in the case of grants containing such a reservation there were two independent titles—one to the land excepting the minerals, the other to the minerals, to which the grantee had no title, and the property in which remained in the Crown until demised under the Act.

In 1906 there were many mines in New South Wales held under both kinds of title.

There were also many mines situated upon Crown lands, and held, in accordance with the provisions of the Mining Acts, under lease or licence from the Crown.

Another class of mines was mines of coal or shale, to which the provisions of the *Mining on Private Lands Act* did not apply. They were either the property of the freeholder, or, if situated upon Crown lands, held under mining leases granted by the Crown.

To summarize: there were four kinds of mines:

1. Coal and shale mines;

2. Mines for minerals other than coal or shale situated on Crown lands;

3. Mines for minerals other than coal and shale situated on private lands granted without reservation of minerals;

4. Mines for minerals other than coal and shale situated on private lands granted with a reservation of minerals.

This was the state of the law and of the facts when the *Local Government Act* 1906 was passed, which introduced the system

of rating upon the unimproved capital value of land. The difficulty of assessing mines for rating purposes had been felt in all the Australian States, whether the basis of valuation taken was the annual or the unimproved capital value, and various devices had been adopted for meeting it.

There was little previous legislation on the subject in New South Wales, and none of general application to the whole State, except an experimental Statute, the *Shires Act*, which had been passed in December 1905 but had not come into practical operation.

Sec. 131 of the *Local Government Act* 1906 provides that all land shall be rateable with certain exceptions. Secs. 150 and 151 provide that in every year the Council of the local authority shall make a general rate of not less than one penny in the pound on the unimproved capital value of all rateable land in its area. By sec. 144 the amount of any rate under the Act is payable by the owner, except in the case of land held under lease or licence from the Crown, in which case it is to be paid by the holder of the lease or licence, and with another exception not material in this case. In the case, therefore, of a mine situated upon private land and held under lease from the Crown the leaseholder, and not the owner of the land, is the person liable for the rate upon the mine.

The mode of ascertaining the unimproved capital value is prescribed by sec. 132. The duty of the Court is to construe the Act as they find it, uninfluenced by any *a priori* ideas as to what might be fair or satisfactory rules to be prescribed in any particular case. Much of the argument addressed to us was I fear, an appeal, no doubt unintentional, to such ideas. I proceed, therefore, with an open mind to inquire what the legislature has said on the subject.

Sub-sec. (1) provides that:

"The unimproved capital value of land (other than land held as described in sub-sections two and three of this section), is the amount of the capital sum for which the fee simple estate in such land would sell, . . . assuming the actual improvements (if any) had not been made," with certain prescribed deductions not material to be stated. This provision has no application to

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"land held as described in sub-sections two and three," with respect to which other rules are prescribed in these sub-sections.

Sub-sec. (2) deals with mines, sub-sec. (3) with land held under lease or licence from the Crown for purposes other than mining.

Before examining the provisions of sub-sec. (2) in detail I should point out that the term "mine" is defined by sec. 3 to mean "land used or held for any mining purpose," including "the surface of any land occupied exclusively in connection with or for the purposes of the mine: Provided that, in the case of a mine occupied under a lease, licence, or other mineral holding, such land is situate within the boundaries of the lease, licence, or holding."

Here we find a distinction drawn between mines and land, using that term in the sense of a portion of the earth's solid substance with all its contents. If the land, using the term in that sense, and the mine are held under separate titles they are regarded as distinct entities. It is clear, also, that the term "mine" is used in the sense of a mine in actual or immediately prospective operation, including in that phrase any mining tenement held under a lease or licence from the Crown.

Paragraph (*a*) of sub-sec. (2) provides that the unimproved capital value of a mine of coal or shale is to be a sum dependent upon the average of the three preceding years' output or, at the option of the Council, may be assessed under sub-sec. (1), *i.e.*, on what may be called an acreage value.

The case of a coal or shale mine held under lease from the owner of the fee is specially dealt with by sec. 144 (2).

Paragraph (*b*) of sub-sec. (2) provides that the unimproved capital value of a mine situate on Crown land and held from the Crown under a gold mining, gold-dredging, or other mineral or mining lease or licence or mineral holding (except for coal or shale mining purposes) is a sum equal to 20 per cent. of the average annual saleable value to the mine-owner of the three preceding years' mineral output, or, if the land is not being principally worked as a mine, the capital value of the property with the improvements, if any, thereon, after deducting the value of all buildings, fencing, machinery and dredging or other plant

and the sum expended during the three preceding years solely in opening up the mine.

Paragraph (*c*) is as follows:—"Where a mine is situated on land other than Crown land as defined in the *Crown Lands Act* of 1884, the unimproved capital value of such land shall be assessed under sub-section one, or, at the option of the council, the unimproved capital value of the mine shall be assessed on the basis of the annual output under paragraph (*a*) or paragraph (*b*) of sub-section two of this section according as the mine is worked for the purpose of mining, for coal or shale, or for any other mineral." It will be observed that the mine is assumed to be "worked," that is, to be an open mine.

It is to be noted that both in paragraph (*b*) and paragraph (*c*) a clear distinction is drawn as in the definition of the term "mine," between the mine and the land on which it is situated.

The reason for such a distinction in the case of Crown land is apparent.

In the case of a mine upon private land two cases needed to be dealt with: (1) where the land and the mine are held under a single title, *i.e.*, where the grant does not contain a reservation of minerals, and (2) where the land and the mine are held under separate titles, *i.e.*, where the grant does contain such a reservation, in which case the minerals are the property of the Crown, and the mine is the property of the Crown lessee, the land with the exception of the minerals being the property of the grantee.

In the latter case the value of the land to the grantee does not in any way depend upon the minerals, while in the former case it includes the value of the minerals.

Secondly, it is to be noted that the Council have an option, namely, to assess the unimproved capital value of the land, (in a prescribed manner), or to assess the unimproved capital value of the mine (in another prescribed manner), but they must do one thing or the other.

If they elect to value the land, the amount to be assessed is the amount of the capital sum for which the fee simple estate in the land would sell. That amount would, of course, be estimated inclusive or not inclusive of the value of the minerals, according as they are not or are excepted from the grant, and the rate is

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payable by the owner. If the Council elect to assess the mine they must adopt the basis prescribed in paragraph (2), and the rate is payable by the lessee.

The respondents in the present case claim to combine both methods, and to assess the value of the mine as equal to the unimproved capital value of the land together with the minerals, as if both were held under a single title. They claim, in effect, to treat the terms "land" and "mine" in paragraph (*c*) as synonymous.

In considering this argument it will be convenient to examine the provisions of sec. 132 as applicable to the different classes of mines. In the case of mines for coal or shale on freehold land, there is a unity of title. In this case the Council may assess the land, including the minerals, on what I have called an acreage value, or they may adopt the basis of valuation prescribed by sub-sec. (2) (*a*), which depends on the output. The rate in either case is payable by the owner of the freehold, subject to sec. 144 (2).

In the case of mines (other than of coal or shale) situated on land granted without a reservation of minerals the owner of the freehold is also the owner of the mine and the council apparently has a similar option.

In the case of such mines situate upon land granted with a reservation of minerals, there are, as already pointed out, two distinct tenements—the land without the minerals, and the mine. The owner of each tenement is liable for the rate imposed upon it. If the mine, although leased, is not open, or if, being open, there is no output from it such as to afford a satisfactory basis of assessment, the council may assess the value of the land, which in that case is the only subject matter capable of being valued. If there is an output which can be made the basis of valuation they may elect to assess the mine on that basis, and the rate is payable by the owner of the mine, that is, the lessee. In this case he is put on precisely the same footing as a Crown lessee of a mine situated on Crown land, which, if one may say so, is what might be expected, since the rights and liabilities of the lessee in each case are practically identical.

The principle of sec. 132, so far as regards open mines other

than coal and shale mines, is that the output, and not the price at which the whole property, land and minerals together, would sell, shall be taken as the basis of valuation, so that the mine owner shall be rated upon actual results and not upon speculative value. The reason for such a distinction between coal and shale mines and other mines is obvious. In the case of mines which are not producing any output, or as to which the alternative method allowed by paragraph (2) would be ineffective, the local authority would derive no revenue from the property unless they were allowed to have recourse to the owner of the land, who is in receipt of £1 an acre rent and has a beneficial ownership which may fairly be rated. Accordingly they may at their option have recourse to him.

This being the plain construction of the Act, and since the only property of which the appellants are the owners consists of the mines of which they are respectively the lessees and are to be deemed the owners, (sec. 144), it is impossible, in my opinion, to hold that, if the council elect to assess the value of the mines with a view of making the appellants liable as owners of them, they can do so on any other basis than the output as prescribed in paragraph (*b*). They cannot, therefore, include the value of the freehold as if the appellants were the owners of the freehold, including the minerals, under a single title.

But this is what they have done.

The construction for which they contend would enable them at their option to treat the mine owner as if he were the owner of the freehold without reservation of minerals. No reason can be suggested for such a construction, which is contrary to the literal meaning of the words used, and would introduce an extraordinary and inexplicable distinction between two classes of Crown lessees of mines, according as the mine is on Crown land or private land.

The proviso which allows a departure from the output basis under sub-sec. (2) paragraph (*b*) in certain cases throws no light on the construction of paragraph (*c*), which adopts the departure as well as the rule in cases to which it is relevant.

The learned Chief Justice of the Supreme Court held that under the circumstances the Council had the option of applying

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the provisions of sub-sec. (1) paragraph (*a*) to the case. I agree. But, if they do so, they must assess the value of the freehold at the amount for which the freeholder Manning could sell it, which does not include the value of the minerals. In that case they do not assess the value of the mines, upon which alone the appellants are liable to be rated.

I am quite unable to accept the contention that minerals excepted from a Crown grant are Crown lands within the meaning of paragraph (2). Nor am I able to accept the argument that in the phrase "a mine situate on Crown land and held from the Crown" &c. the word "and" should be read "or." But the view which I take of the construction of paragraph (*c*) renders these contentions unimportant.

For those reasons I think that the appeals should be allowed.

BARTON J. I am of the same opinion, but desire to add a few observations. The *Crown Lands Act* 1884, sec. 7, prescribed that all grants of land issued under the authority of that Act (among which grants was that of Manning's 1,243 acres) should contain a reservation of all minerals in such land to the Crown. That Act being in force when Manning obtained his grant, and both it and the *Mining on Private Property Act* 1894 being in force when these appellants obtained from the Crown their leases of 80 acres and 57 acres respectively, they have a clear leasehold title to so much of the reserved minerals as the Crown purports to have demised to them, as well as to the areas of surface demised therewith. In respect of so much of the land and its contents, then, Manning has no title, even as a reversioner.

The subjects of these leases are of course mines within the meaning of the *Local Government Act* 1906, which, in sec. 3, defines a mine as "land held or used for any mining purpose," and declares that "land so used or held is a mine." Under the definition a mine "includes all underground workings, and all . . . plant; all buildings (not being dwelling houses), works, and the surface of any land occupied exclusively in connection with and for the purpose of the mine," &c.

For the purpose of valuation these mines, being "situate on land other than Crown land as defined in the *Crown Lands Act*

of 1884," and not being mines of coal or shale, are within sec. 132, sub-sec. 21 paragraph (*c*) of the *Local Government Act*. When a mine is so situate, "the unimproved capital value of such land shall be assessed under sub-section one, or, at the option of the Council, the unimproved capital value of the mine shall be assessed on the basis of the annual output under paragraph (*a*) or paragraph (*b*) of sub-section two." Purporting to exercise the option thus given them, and to assess these holdings as "land" under sub-sec. 1, and not as mines on the basis of the annual output, the Council have included in their assessments the unimproved capital value of land and minerals together as a selling value. The appellants contend that the Council had no right to include the value of the mines in the assessment under sub-sec. 1, and the appeals will succeed if that contention be sustained. If it be not sustained they will fail.

The word "land" as used in the *Local Government Act* bears sometimes its full meaning as that which a man owns *usque ad coelum et ad inferos*, and sometimes a meaning qualified by the collocation in which it is found. In sec. 131 it clearly bears its full meaning so as to embrace every kind of land that is made rateable. In sec. 132, sub-sec. 2, it is used at one time to include mines and in other places to exclude them; although by the definition mines are land of a special kind. In my opinion the real question is not whether mines are land, as of course they are, but whether in sub-sec. 2 paragraph (*c*) the term "such land," that is, "land other than Crown land as defined," &c., is used in a sense which justifies the inclusion of the value of a mine situate upon it in an assessment of the value of "such land" when made in exercise of the option allowed.

Now in paragraph (*b*) there is something to show that where the value of a mine is to be included in the assessment of land, the legislature has known how to express that intention. That paragraph defines the unimproved capital value of a mine situate on Crown land and held from the Crown under one of the tenures there mentioned, and the first branch of it applies, as the second branch shows, where the property is being worked as a mine. In the second branch the unimproved capital value is defined, "where the land is not being principally worked as a mine," as

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"the capital value of the *property* with the improvements (if any) thereon, less the value at the time of the valuation of all buildings," &c., and less the sum spent during the previous three years by any lessee or licensee solely in opening up the mine.

This passage shows that the legislature has expressed its meaning beyond doubt where it has really intended that the value for assessment shall include the mine. In such a case it speaks of the *value of the property*, accomplishing its object by that inclusive term.

But in paragraph (*c*) it not only uses the words "land" and "mine" with what, in any other instrument or writing, would appear at once as an antithetical significance, but although paragraph (*c*) immediately follows the second branch of paragraph (*b*), it abstains from the use in (*c*) of any term which would denote an intent to include both "land" and "mine" in one assessment. Taking the antithesis and this abstention together, I can hardly avoid the conclusion that "land" was used to describe the holding considered apart from its mineral contents, and the term "mine" to describe land used or held as a mine, including so much of the surface as the lessee holds for mining purposes. In the former case the exercise of the option enables the assessment to include only the land so considered, and in the latter case the assessment will cover only the mine considered as such, including, of course, the surface held and used in connection with it, without which it could not be a mine.

It seems to me that this construction is strengthened by the consideration that in sub-sec. 1 the land of which the unimproved capital value is to be determined on a purchase basis is "other than land as described in sub-secs. 2 and 3."

It is true that this construction may render the assessment of land not principally worked as a mine possible only under the second branch of paragraph (*b*). Even there it is contemplated apparently that the mine dealt with is being worked as such, though not necessarily to the exclusion of other uses of land. But it is by no means unreasonable to suppose that the legislature did not intend to hamper the mining industry by imposing heavy burdens on land held for its purposes until such land was so far developed by mining as to produce some output or (as

in the second branch of paragraph (*b*)) to render the mine in some real sense "a going concern."

For these reasons, in addition to those advanced by the Chief Justice, I am of opinion that both appeals should be allowed.

O'CONNOR J. read the following judgment:—The questions raised on these two assessments are identical. I shall deal with the Colon Peaks case because it is in respect of that that the judgment of the Supreme Court was delivered. The subject matter of the assessment was 57 acres held and used by the company as a metalliferous mine, and was part of a Crown portion of 1243 acres, the minerals on which had been reserved by the Crown. The company's title was a lease from the Crown under the *Mining on Private Lands Act* 1894. It conferred on the company the exclusive right both to the surface of the block of 57 acres and to the minerals lying under it for the purposes of the lease. Manning, the owner of the conditional purchase joined in the lease and received a small rental in respect of whatever interest was in him under the Mining on Private Lands Acts. In respect therefore of this block of 57 acres and the minerals underlying it, no one but the company had any right of possession or use during the currency of the lease. The respondent shire, taking the view that the property thus worked and used as a mine by the company was rateable, that it came within sub-sec. 2 (*c*) of sec. 132 of the *Local Government Act* 1906 and that they had the option of rating it either on the basis of the annual output of the mine or under sub-sec. (1) of sec. 132, made their assessment on the latter basis, including within it the value of the minerals as well as of the surface. The Supreme Court on appeal from a District Court Judge, who had determined that the value of the surface only was to be considered, decided that the Shire Council had taken the right view and upheld the assessment. This Court is now asked to review that decision. I regret that I cannot take the same view of the questions submitted as the other members of the Court. The case turns upon the interpretation of sub-sec. 2 (*c*) and sub-sec. 1 of sec. 132 of the *Local Government Act* 1906. Discarding matters of form, two substantial questions are raised, first,

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whether the property assessed comes within paragraph (*c*), secondly, if it does, whether the respondents were entitled to include the minerals underlying the land in assessing the unimproved value of the land under sub-sec. 1.

As to the first question Mr. *Knox* contended that the property came within paragraph (*b*) and not within paragraph (*c*), reasoning that as minerals were reserved the stratum of earth containing them was reserved also and so remained Crown lands, and that the mine constituted by the working of those minerals was situated on Crown land within the meaning of paragraph (*b*). It cannot be denied that where appropriate language is used, as in the case of the *Duke of Hamilton* v. *Graham* (1), minerals underlying the surface may be reserved or leased in such form that the person entitled to work the minerals may as against all the world be entitled to possession of the stratum in which the minerals lie. Indeed it may be assumed for the purpose of considering this contention that in this case the Crown by reserving the minerals had retained the right of possession of the stratum in which they lie. But that does not by any means constitute the stratum "Crown lands" within the meaning of paragraph (*b*) of sub-sec. 2 of sec. 132. It is clear that the expression "Crown land" in that context is used with the meaning it ordinarily bears in Statutes of New South Wales relating to public lands, that is to say, in the sense of land of the Crown the alienation and other disposal of which is regulated by the various Statutes relating to Crown lands. This view is supported by the use in paragraph (*c*) of the words "other than Crown land as defined in the *Crown Lands Act* of 1884," an expression adopted apparently to express the antithesis of the idea embodied in the words "situate on Crown lands" in the preceding paragraph. The contention which would put the appellants' mine under paragraph (*b*) rather than under paragraph (*c*) must, therefore, in my opinion, fail. Indeed, I think it cannot be seriously questioned that the appellants' mine comes within the class of mines in respect of which paragraph (*c*) lays down the principle of assessment, and I take it, therefore, as established that the mine, being situate on land other than Crown land as defined in the

(1) L.R. 2 H.L., Sc., 166.

Crown Lands Act of 1884, comes within paragraph (*c*). That being so, the Shire Council had the option of assessing the tenement either on the basis of the unimproved capital value of the land as if the land were being assessed under sub-sec. 1, or on the basis of the unimproved capital value of the mine as shown by the annual output, as under paragraph (*b*). The Shire Council adopted the method first mentioned, and in accordance with sub-sec. 1 made their assessment as if the title were fee-simple instead of leasehold. Sub-sec. 1 directs that course to be taken in all cases where it is applied and no objection to the assessment is raised on that ground. The matter really in controversy is what is to be included in the assessment of the land. Is it to be valued as mineral land, as in cases where the owner of the surface is also the owner of the minerals underlying the surface, or is it to be valued as land without the minerals, as if the surface only belonged to the person assessed? The determination of the question which of these methods ought to have been adopted by the Shire Council in applying sub-sec. 1 to the assessment in question, depends upon the meaning to be attached to the word "land" in paragraph (*c*). It is a well-established rule of interpretation that, unless something to the contrary appears, it will be taken that the legislature expressing its will in a Statute uses words in their ordinary meaning. There is no authority needed for the statement that "land" in its ordinary sense means not only the surface of the ground, but also anything (except gold or silver mines) on or over or under it "*usque ad inferos*." In the *Local Government Act* 1906 it is certainly in general used in that sense. The power of rating conferred on the Shire Councils is to rate lands and interests in lands. Sec. 131 in declaring what land is rateable does not specifically mention mines. But they are clearly included within the word "land." The whole Act assumes the mines in land to be taxable as land. Sec. 3 defines a "mine" to be land used or held for any mining purpose and includes in the definition "the surface of any land occupied exclusively in connection with and for the purposes of the mine" declaring that land so used or held is a mine. The inclusion of mines, however, that is to say, minerals underneath the surface, in the word

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"land" is expressly recognized in sub-sec. 2 in all its paragraphs. That sub-section has for its object the laying down of the principles on which land containing mines, in other words land having minerals which are being worked under the surface, is to be assessed. There is no definition of "land" in the *Local Government Act* 1906, but the *Interpretation Act* of 1897, sec. 21, enacts that in all Acts, unless the contrary intention appears, the word "land" shall include messuages, tenements and hereditaments, corporeal and incorporeal of any tenure or description whatever may be the estate or interest therein. In the application of sub-sec. (1) to any particular case the meaning to be attached to the word "land" will depend upon the subject matter of the assessment. Whether in any particular assessment the surface only is to be included or whether the value of the underlying minerals may be taken into consideration must depend upon what is the tenement or holding to be assessed. But it cannot be denied that where the tenement to be assessed does include underlying minerals the word "land" in sub-sec. (1) is wide enough to include them. It has not been questioned that in the case of an owner in fee simple who held both surface and minerals the value of the latter must be included in an assessment of the unimproved value of the land under sub-sec. (1). Nor could it be doubted, apart from the provisions of paragraph (*c*), that, where the title is a mineral lease from the Crown, and the lessee has the exclusive right of using the surface and working the minerals for the purposes of the lease, the value of the minerals would have to be taken into consideration in assessing the holding, and that the lessee as owner by virtue of sec. 144 would be liable to pay the tax on that basis.

All cases in which mineral lands are awaiting development, or have not yet become mines would be liable to assessment under sub-sec. (1) on that footing. The appellant company, however, contend that once the mineral lease has become a mine that method of valuation can no longer be followed, that the word "land" in paragraph (*c*) is used in the narrow sense of the "surface land" and that, consequently, unless the Shire Council chooses to adopt the output basis of assessment, the mineral value of the tenement cannot be included. In interpreting a

general word such as "land" it will be usually taken, as I have pointed out, that the legislature has used it in its ordinary meaning. That of course gives only the *primâ facie* meaning and it may have to be modified by other considerations. Turning first to paragraph (*c*) and considering its object and its language it is to be noted that its object is to lay down the principle on which metalliferous mines situated on land other than Crown land are to be assessed. The words that have created the difficulty are these:—"The unimproved capital value of such land shall be assessed under sub-section one." Looking at the earliest lines of the paragraph "such land" must mean the land on and in which the mine is situated. Looking at the word "land" in that context, as it stands, and construing it in its ordinary meaning it includes the minerals under the surface as well as the surface. Reading the first part of the section therefore in accordance with the plain ordinary meaning of the language which the legislature has used, the first option to the Shire Council is to assess the land on and in which the mine is situated, including in that assessment all that the word "land" in its ordinary meaning covers, that is to say, minerals as well as surface. That interpretation also gives effect to what I have pointed out is the object of the section—the assessment of the mine, in other words, the portion of the land which contains the mineral and the workings —the portion which alone give it its value as a mine. That is in my opinion the only interpretation which carries out the intention which the legislature has plainly expressed.

I turn now to the contention of the appellant company, namely, that the word "land" in the part of the paragraph (*c*) which I have quoted, has been used by the legislature, not in its ordinary meaning, but in the restricted sense of "the surface of the land." No doubt it is often found from an examination of the context in which a word stands, from a consideration of the object of the section in which it occurs, and of the whole Statute, that effect cannot be given to the intention of the legislature if the word is interpreted in its ordinary sense. In such a case the Court will adopt such restricted or modified meaning of which the word is capable as will render the enactment effective to carry out the intention of Parliament. The word "land" is, no doubt, capable

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of the restricted meaning for which the appellant company is contending, but in my opinion there are no reasons to be gathered from the context, from the words of the paragraph, from its object, or from the language and purpose of the Statute as a whole, which can justify the reading of the word with that restricted meaning. It is contended that in paragraph (*c*) a sharp distinction is drawn between the land on which a mine is situated and the mine itself. I cannot find in the paragraph any distinction between the use of the word "land" and the use of the word "mine," such as the appellants rely on. The value of the land containing the mine is directed to be the basis of assessment under one option and the value of the annual output of the mine is to be the basis under the other. It was necessary for the purpose of describing these options to distinguish between the product of the mine and the land containing the mine. But the subject matter of each method of assessment is the same, namely, the mine, and there is certainly no indication of an intention to use the word "land" in a sense so restricted as to limit the option of the Shire either to an assessment on the basis of the output of the mine, or to an assessment of the land in which they would be obliged to leave out of consideration the minerals which give it its value as a mine. Not only does the context give no ground for the interpretation suggested by the appellant company, but its adoption would tend to defeat the plain object of the paragraph in many instances. It is well known that, for various reasons, a mine of substantial market value may not have for some years an output on which an assessment can fairly be based, either because it is not being worked, or because development work only is going on, or because for any reason it does not suit the mine owner to have an output. In such a case, if the special and narrow meaning of the word "land" were adopted, the only assessment open to the Shire Council would be one based on the value of the land surface—in most cases trifling in comparison with the value of the tenement taken as a whole. It was, no doubt, the possibility of there being either no output, or a comparatively small output, from a mine for considerable periods that suggested to the legislature the conferring on the Shire the option of assessing

the mine on its value as land containing minerals where a fair assessment could not be made on an output basis.

I think it must be assumed that, in permitting that alternative method, the legislature intended to confer on the Council a real and not an illusory power of arriving at the real value of a mining tenement. It is not denied that an alternative method of assessment really effective is conferred on the Shire Council under paragraph (*a*). There the word "land" is not used. The alternative to assessment based on the output is enacted in these words, "or, at the option of the Council such unimproved capital value shall be assessed under sub-section one of this section." "Such unimproved capital value" refers to the first words of the paragraph, "The unimproved capital value of a mine of coal or shale." So that the option conferred may be fully expressed in the following terms:— "Or at the option of the Council, the unimproved capital value of the mine shall be assessed under sub-section one." There the word "mine" is obviously used as synonomous with "land," otherwise sub-sec. 1 would not be applicable, showing that in that paragraph "mine" has the meaning of "land," and must mean land in its ordinary sense—land *ad inferos*, surface and minerals together. In other words, land and mine in that paragraph are used as convertible terms, and, in my opinion, the same words have been used in paragraph (*c*) in the same way as convertible terms to express the same subject matter of assessment, namely, the land containing the mine. The provisions of paragraph (*a*), regarded from another point of view, also support the interpretation relied on by the respondents. When the mining tenement assessed is a lease from the Crown the lessee must pay the tax whether the mine is of coal or shale within paragraph (*a*), or of some metal under paragraph (*c*). In an assessment under paragraph (*a*) where the Shire Council adopts the basis of assessment under sub-sec. 1, the lease must be assessed on the fee simple value of the land, and in the assessment of the land the mineral value as well as the value of the surface must be included. I am unable to see that any reason has been or can be shown from the language of paragraph (*c*), or from a consideration and comparison of the scope and objects of the two paragraphs, taken separately or together, why the principle of assessing land under

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sub-sec. 1 should be applicable when the substance mined is coal or shale, but should not be applicable when the substance mined is some metal which brings the mine under paragraph (*c*). No valid reason has been shown, nor in my opinion can be shown, for any such distinction. It was argued on behalf of the appellant company that the principle of sec. 132, so far as regards open mines, is that the output, and not the price at which the whole property in land and minerals together would sell, shall be taken as the basis of valuation, so that the mine owner shall be rated upon actual results, and not upon speculative value, and that the reason for making such a distinction as to coal and shale mines is obvious. In my opinion there is nothing in sec. 132, or in any part of the Act, to suggest the intention on the part of the legislature to lay down any such principle or to draw any such distinction. Indeed, it is only by assuming the interpretation contended for to be the true interpretation of paragraph (*c*) that such a principle can be gathered from the provisions of sec. 132. The fact that the minerals mined in mines coming under paragraph (*a*) are different in substance from those mined in mines coming under paragraph (*c*) is to my mind entirely irrelevant to the question under consideration. If the contention of the appellants is sustainable, when once a mine has had an output it can be assessed in effect in no other way than on the output, whatever the output may be, and however poorly it may represent the value of the tenement. There would, of course, be the option to assess the surface of the land, but that, as I have pointed out, would in most cases afford no measure of the value of the mine. There is, in my opinion, nothing in the Statute which justifies an interpretation which would bring about such a result. I entirely concur in the statement by my brother the Chief Justice that it is duty of the Court to construe the Act as we find it, uninfluenced by any *a priori* ideas as to what might be fair or satisfactory rules to be prescribed in any particular case, and, bearing that principle in mind, I think we have no right to assume that the legislature intended to draw any distinction between different classes of mines other than it has expressed by the language of sec. 132. The only intention to be gathered from the section in my opinion is that the Shire Council should

be empowered to ascertain the real unimproved value of the tenement to be assessed.

For these reasons I have come to the conclusion that the legislature has used the word "land" in paragraph (*c*) in its ordinary meaning, namely, the meaning which is capable of including minerals as well as surface where minerals and surface are part of the same tenement, and, as in this case, in the hands of the same owner. I agree, therefore, with the learned Judges of the Supreme Court that the assessment under consideration was made on the right principle and think the appeal should be dismissed.

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Appeal allowed.

Solicitor, for appellants, *A. W. E. Weaver.*
Solicitors, for respondents, *Pigott & Stinson.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

COCK AND ANOTHER . . . . . APPELLANTS;

AND

AITKEN AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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SYDNEY, *Dec.* 18, 19, 22.

Griffith C.J., Barton and O'Connor JJ.

Will—Tenant for life and remaindermen—Capital and income—Payment of annuities—Apportionment—Rate of interest—Appeal from High Court to Privy Council—Order of High Court discharged on point not appealed from—Re-affirmance of previous decision of High Court—Construction of will—Direction to make payments out of residuary trust moneys and to pay residue of income to C.—Ambiguity in will—Interpretation by codicil.