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circumstances as they existed when he commenced his proceedings, that he was not bound to proceed further with the transaction. Having established his necessary facts, his status is clear. The case of *Cullen* v. *Knowles* (1) is a clear authority.

In the result, the appeal should be dismissed with costs.

[*Note.*—As to the third question see per Lord *Wrenbury* in the case of *Bradley* v. *Newsum, Sons & Co. Ltd.* (2), the report of which was not available to us until after this judgment was delivered.—*I.A.I. G.E.R.*]

Appeal dismissed with costs.

Solicitor for the appellants, *R. W. Fraser.*

Solicitors for the respondents, *Pigott & Stinson*; *Dodds & Richardson*; *R. W. Fraser.*

B. L.

(1) (1898) 2 Q.B., 380.

(2) 119 L.T., 239, at p. 250.

Aff *Commonwealth v Hazeldell Ltd* (1921) 29 CLR 448

Foll *Securities Exchanges Guarantee Corp v Aird* (2001) 38 ACSR 185

[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH . . . . . APPELLANTS; DEFENDANTS,

AND

HAZELDELL LIMITED . . . . . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 19, 20; *Dec.* 5.

Griffith C.J., Gavan Duffy and Rich JJ.

Land—Acquisition by Commonwealth—Compensation—Minerals—Reservation of all minerals in Crown grant—Right of public to mine for "all minerals"—Substance proclaimed a mineral—Limestone—Lands Acquisition Act 1906 (*No.* 13 *of* 1906), *secs.* 26, 37—*Crown Lands Alienation Act* 1861 (*N.S.W.*) (25 *Vict. No.* 1), *secs.* 13, 18—*Crown Lands Act* 1884 (*N.S.W.*) (48 *Vict. No.* 18), *secs.* 2, 4, 5, 6, 7—*Mining Act* 1906 (*N.S.W.*) (*No.* 49 *of* 1906), *secs.* 3, 45, 46.

Sec. 13 of the *Crown Lands Alienation Act of* 1861 (N.S.W.) provided that certain Crown lands should be open for conditional sale; and sec. 18 provided that, at the expiration of three years from the conditional sale and after payment of the purchase money and compliance with certain other conditions, a grant in fee simple should be issued to the purchaser "with reservation of any minerals which the land may contain." Sec. 2 of the *Crown Lands Act of* 1884 (N.S.W.) repealed certain Acts including the *Crown Lands Alienation Act of* 1861, but enacted that the repeal should not "(iii.) Prejudice or affect any proceeding matter or thing lawfully done or commenced or contracted to be done under the authority of any enactment or regulation hereby repealed," and provided that "(*b*) All rights accrued and obligations incurred or imposed under or by virtue of any of the said repealed enactments shall subject to any express provisions of this Act in relation thereto remain unaffected by such repeal." By sec. 4 the word "minerals," unless the context necessarily required a different meaning, was defined to mean and include coal, kerosene shale and any of certain named metals or any ore containing the same, "and any other substance which may from time to time be declared a mineral within the meaning of this Act by Proclamation of the Governor published in the *Gazette*." Sec. 5 provided that "Crown lands shall not be sold leased dedicated reserved or dealt with except under and subject to the provisions of this Act," &c. Sec. 6 provided that "The Governor on behalf of Her Majesty may grant dedicate reserve lease or make any other disposition of Crown lands but only for some estate interest or purpose authorized by this Act and subject in every case to its provisions." Sec. 7 provided that "All grants of land issued under the authority of this Act shall contain a reservation of all minerals in such land and shall contain such other reservations and exceptions as may by the Governor be deemed expedient in the public interest." No Proclamation under sec. 4 had ever been made.

Held, by *Griffith* C.J. and *Rich* J. (*Gavan Duffy* J. dissenting), that a Crown grant issued after the passing of the *Crown Lands Act of* 1884 pursuant to a purchase by conditional sale under sec. 13 of the *Crown Lands Alienation Act of* 1861 should, in an action between strangers to which the Crown in right of New South Wales was not a party, be construed in accordance with the provisions of the Act of 1884, and, therefore, that a reservation in such grant of all minerals which the land contains should be interpreted as a reservation of all minerals within the definition in sec. 4 of that Act.

By sec. 3 of the *Mining Act* 1906 (N.S.W.), the word "minerals" is defined to mean, unless the context or subject matter otherwise indicates, certain specified substances "and any other substance which may from time to time be declared a 'mineral' within the meaning of this Act by Proclamation of the Governor published in the *Gazette*." Sec. 45 provides that in Part IV. of the Act "the word 'minerals' shall not include coal or shale, nor shall coal or shale be included within the substances which may be declared minerals by Proclamation of the Governor." Sec. 46 (2) provides that "If the Crown grant of any private land contains, or if not yet issued will when issued contain, a

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reservation to the Crown of all minerals, the said land shall also be open to mining under this Part for all minerals."

Held, by *Griffith* C.J. and *Rich* J. (*Gavan Duffy* J. dissenting), that the word "reservation" in sec. 46 (2) of the *Mining Act* 1906 means a clause which at the date of the Crown grant had, under the law as then in force, the legal effect of a reservation, and that the word "minerals" in both places in which it is used in the section means the substances mentioned in sec. 3 excepting those mentioned in any Proclamation under sec. 3.

Held, therefore, by *Griffith* C.J. and *Rich* J. (*Gavan Duffy* J. dissenting), that where pursuant to a conditional sale under sec. 13 of the *Crown Lands Alienation Act of* 1861 a Crown grant of certain land had been issued in 1886 containing a reservation of all minerals which the land might contain, and after a Proclamation under sec. 3 of the *Mining Act* 1906 that limestone was a mineral the Commonwealth had acquired the land under the *Lands Acquisition Act* 1906, in an action for compensation under sec. 37 of that Act the claimant was entitled to give evidence as to the value of the limestone contained in the land.

Quære, by *Griffith* C.J. and *Rich* J., whether, even if the land were open to the risk of being invaded by private persons in search of limestone under the *Mining Act*, the value of the limestone should not be taken into account in estimating compensation.

Decision of the Supreme Court of New South Wales: *Hazeldell Ltd.* v. *The Commonwealth*, 18 S.R. (N.S.W.), 342, affirmed.

APPEAL from the Supreme Court of New South Wales.

On 12th April 1886 a Crown grant of about 640 acres of land in New South Wales was issued to Thomas Shanahan, which recited that Shanahan claimed "to be entitled, in respect of a purchase by conditional sale without competition, under sec. 13 of the *Crown Lands Alienation Act of* 1861" to the land; that the declaration required by sec. 18 of that Act had been made; that the Minister for the time being charged with the administration of the public lands was satisfied that all things required by law to be done to entitle Shanahan to a grant in fee simple subject to the reservations hereinafter contained had been done and performed, and that the purchase money payable for the land had been duly paid. The Crown grant contained the following provisions:—"Provided nevertheless and We do hereby reserve unto Us Our heirs and successors all minerals which the said land contains with full power and authority for Us Our heirs and successors and such person or persons as shall from time

to time be authorized by Us Our heirs and successors or by the Governor for the time being of Our said Colony to enter upon the said lands and to search for mine dig and remove the said minerals with full right of ingress egress and regress for the purposes aforesaid Provided also and We do hereby further except and reserve unto Us Our heirs and successors all such parts and so much of the said land as may hereafter be required for a public way or public ways canals or railroads in over and through the same to be set out by Our Governor for the time being of Our said Colony or some person by him authorized in that respect And also all sand clay stone gravel and indigenous timber and all other materials the natural produce of the said land which may be required at any time or times hereafter by the Government of Our said Colony for the construction and repair of any public ways bridges or canals or for naval purposes or railroads or any fences embankments dams sewers or drains necessary for the same together with the right of taking and removing all such materials And also the right of full and free ingress egress and regress into out of and upon the said land for the several purposes aforesaid or any of them." On 21st August 1907 a Proclamation was published in the New South Wales *Government Gazette* declaring limestone, shale, marble, mica, pitchblende and fire-clay to be "minerals" within the meaning of the *Mining Act* 1906. On 20th January 1914, after certain mesne transfers, the land was transferred to a company called Hazeldell Ltd. By notification in the *Commonwealth Gazette*, published on 10th April 1915, the Commonwealth acquired 56 acres of the land under the *Lands Acquisition Act* 1906, and by a writ issued on 27th June 1916 Hazeldell Ltd. instituted an action for compensation against the Commonwealth in the Supreme Court of New South Wales claiming £100,000 as compensation, alleging that the land contained rich and extensive deposits of limestone and shale. The Commonwealth, by their defence, alleged that the sum which they had offered, namely, £1,200, exceeded or was equal to the compensation to which the plaintiffs were entitled. The action came on for hearing before *Ferguson* J. Evidence was tendered on behalf of the plaintiffs as to the extent and value of the limestone, but the evidence was rejected, and thereupon by consent the amount of compensation was

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formally determined at £1,200. On motion by the plaintiffs the Full Court set aside this determination and ordered a new trial: *Hazeldell Ltd.* v. *The Commonwealth* (1).

From that decision the Commonwealth now, by leave, appealed to the High Court.

Knox K.C. (with him *Alec Thomson*), for the appellants. At the date of the acquisition by the Commonwealth the land was, under sec. 46 (2) of the *Mining Act* 1906, open to the public for mining for limestone, and therefore the respondents, having no exclusive right to the limestone, are not entitled to compensation in respect of it. The meaning of sec. 46 (2) is that, if the Crown grant contains in words a reservation of "all minerals," then the land is to be open to mining for all the substances mentioned in the definition of "minerals" in the Act and all substances which may from time to time be declared to be minerals. The Legislature in enacting sec. 46 (2) had in mind that most of the alienations of Crown land were for agricultural and pastoral purposes only, and that the Crown grants in such cases contained in terms a reservation of "all minerals"; and the intention was that in all such cases the land should be open to mining for all minerals which came within the definition or might thereafter be brought within it. If the word "minerals" is interpreted as meaning, in both places where it occurs in sec. 46 (2), minerals as defined by the Act, then there are no cases to which the sub-section can apply, for there are no Crown grants which either in words or in effect reserve those minerals. The Crown grant of the land was issued under the *Crown Lands Alienation Act of* 1861; for, although it was issued after the *Crown Lands Act of* 1884 was passed, by sec. 2 of the latter Act all rights and obligations acquired under or imposed by the former Act were to remain unaffected. The reservation in the Crown grant of "all minerals which the said land contains" is therefore unaffected by the definition of "minerals" in sec. 4 of the Act of 1884. Limestone is a mineral within the reservation in the Crown grant. The proper test of whether a substance is a mineral is that laid down in *Hext* v. *Gill* (2), namely, whether it is a substance which can be got from

(1) 18 S.R. (N.S.W.), 342. (2) L.R. 7 Ch., 699, at p. 712.

under the surface of the earth for the purpose of profit. See also *Lord Provost and Magistrates of Glasgow* v. *Farie* (1); *Earl of Jersey* v. *Guardians of the Poor of Neath Poor Law Union* (2); *Attorney-General* v. *Salt Union Ltd* (3).

Campbell K.C. (with him *Pike* and *Ferguson*), for the respondents. The result of the interpretation put for the appellants upon sec. 46 (2) of the *Mining Act* 1906 is to confiscate minerals which are not included in the reservation in the Crown grant, and which therefore are vested in the grantee. Such an effect will not be given to an Act unless there is no escape from it (*Minister of Railways and Harbours of the Union of South Africa* v. *Simmer and Jack Proprietary Mines Ltd.* (4); *Western Counties Railway Co.* v. *Windsor and Annapolis Railway Co.* (5)). There is nothing in the context of the Act which requires a different meaning to be given to the word "minerals" where it first occurs in sec. 46 (2) from that of the same word where it secondly occurs in that sub-section. The definition in sec. 3 of the word "minerals" is exhaustive (*Dilworth* v. *Commissioner of Stamps* (6)). The intention of the Legislature in enacting sec. 46 (2) was to permit mining on private land for all minerals which were reserved to the Crown in Crown grants. That is shown by the history of the legislation. See *Mining Act of* 1889 (53 Vict. No. 20), sec. 2; *Mining on Private Lands Act of* 1894 (57 Vict. No. 32), secs. 3, 11; *Mining Laws Amendment Act of* 1896 (60 Vict. No. 40), secs. 2, 5, 9; *Mining on Private Lands (Amendment) Act* 1902 (No. 101 of 1902), sec. 3. The words "all minerals," therefore, in both places where they occur in sec. 46 (2) mean all minerals the property in which has been reserved to the Crown. That sub-section applies to grants under the *Crown Lands Alienation Act of* 1861 as well as to grants under the *Crown Lands Act of* 1884. As to grants under the former Act the question is whether as a fact the substance in question was a mineral at the time of the grant, and as to grants under the latter Act the question is whether as a fact the substance was at the time of the grant a mineral within the definition. Limestone never was

(1) 13 App. Cas., 657.
(2) 22 Q.B.D., 555.
(3) (1917) 2 K.B., 488, at p. 492.
(4) (1918) A.C., 591, at p. 603.
(5) 7 App. Cas., 178.
(6) (1899) A.C., 99.

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a mineral within the contemplation of the Legislature. It is a substance which is obtained not by mining but by quarrying. The distinction is drawn in several Acts. See *Crown Lands Occupation Act of* 1861 (25 Vict. No. 2), sec. 8; *Lands Acts Amendment Act* 1875 (39 Vict. No. 13), sec. 38; *Crown Lands Act of* 1884, sec. 90. Not being a mineral at the time this Crown grant was issued, the limestone passed to the grantee, and sec. 46 (2) of the *Mining Act* 1906 has no application. [Counsel also referred to *Barnard-Argue-Roth-Stearns Oil and Gas Co.* v. *Farquharson* (1).]

Knox K.C., in reply.

Cur. adv. vult.

Dec. 5.

The following judgments were read :—

GRIFFITH C.J. AND RICH J. This is a claim by the respondents for compensation for the value of land taken by the Commonwealth for public purposes. The land contains large quantities of limestone. At the hearing of the claim they tendered evidence as to its quantity and value. The evidence was objected to by the appellants on two grounds: first, that the plaintiffs had no exclusive right to the limestone any more than any other subject of the Crown in New South Wales, and it therefore could not be taken into consideration in estimating the compensation; second, that the limestone was a mineral reserved to the Crown in right of New South Wales.

We will deal with the second point first, as it may have a material bearing on the Statute relied upon in support of the first.

The claimants' title to the land is under a Crown grant, dated 12th April 1886, of land which had originally been taken up under the *Crown Lands Alienation Act of* 1861. At this date grants were required to be issued in accordance with the *Crown Lands Act of* 1884, which confirmed existing contracts, but provided (sec. 5) that Crown lands should not be sold, reserved or dealt with, except under and subject to the provisions of that Act. Sec. 6 provided that the Governor might grant, reserve or otherwise dispose of Crown lands, but only for some estate, interest or purpose authorized by that Act, and subject in every case to its provisions. Sec. 7

(1) (1912) A.C., 864, at pp. 869, 871.

provided that all grants issued under the authority of the Act should contain a reservation of "all minerals" in the land.

The term "minerals" when used in the Act was, by sec. 4, to mean and include coal and kerosene shale and any of certain specified metals, and any other substance which might from time to time be declared a mineral within the meaning of the Act by Proclamation of the Governor. No such Proclamation has ever been issued.

The Act of 1861 had required (sec. 18) that a grant should contain the "reservation of any minerals which the land may contain."

It has been suggested that the grant of 1886, although made under the Act of 1884, must be taken to have been made under the Act of 1861, and must be construed accordingly. It is also suggested that the reservation prescribed by the Act of 1861 was larger than that prescribed by the Act of 1884. If this is so, it may be that in a suit between the Crown and the grantee the grant might be rectified, or it may be that the Act of 1884 would be construed as a partial relinquishment of possibly larger powers of reservation conferred by the Act of 1861. But we are of opinion that in a suit between strangers to which the Crown, in right of New South Wales, is not a party, no question can be raised as to the propriety of the words used, and that the Court is bound to construe the grant as it finds it, so that the rights of the parties of which the Court must take cognizance are those which are ascertained by construing the language of the grant actually issued. It was so held by the Judicial Committee in the case of *Osborne* v. *Morgan* (1). It appears from the provisions already quoted that the Crown had no power either to grant land or make any reservation from a grant, except in accordance with the law. The reservation, and the only reservation, authorized was of "all minerals in such land," and the meaning of the word "minerals" was defined, as already stated, in words which obviously did not include limestone. If there were room for doubt, sec. 90 of the Act of 1884, in which the substance limestone is specifically dealt with by that name, puts the matter beyond question. Any further reservation would therefore have been unauthorized by law, and cannot be presumed to have been intended.

If, in a Statute authorizing a grant of any subject matter, the

(1) 13 App. Cas., 227.

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power is conferred by the use of a particular word with a meaning defined by the Statute itself, it cannot be contended that a grant of a subject matter described by that word can extend to any other subject matter not included in the definition. This seems quite obvious, and we cannot see any reason why the same rule should not be applied to an authorized or prescribed reservation.

The grant in question contained the words "We hereby reserve unto Us . . . all minerals which the said land contains." For the reasons already given, we think that these words must be construed as meaning all minerals within the definition of the Statute. If we are right in this conclusion, the reservation in the deed of grant did not operate to reserve limestone from the land granted, which accordingly passed to the grantee subject to any exception of minerals specially excepted in the grant (*Real Property Act* (26 Vict. No. 9) secs. 12 and 3).

We pass to the other point. The appellants contend that, whether the property in the limestone passed or did not pass to the grantee, it is subject to the provisions of the Mining Acts, and that under those Acts any person holding a licence from the Crown (of New South Wales) has a right to mine for and carry away limestone on private land. They rely upon sec. 46 (2) of the *Mining Act* 1906, which is as follows: "If the Crown grant of any private land contains, or if not yet issued will when issued contain, a reservation to the Crown of all minerals, the said land shall also be open to mining under this Part for all minerals." It is contended that the test established by this section is not whether any specified mineral is or is not reserved to the Crown, but whether the deed of grant contains words purporting to reserve, *eo nomine*, all minerals. This gives a construction which would make the proprietary rights of the grantee dependent upon the words used in an ancient grant, without regard to the meaning which the words so used had at the date of the grant.

The respondents maintain that the words "contain a reservation to the Crown" mean "contain a provision expressed in words which, if now used in a grant, would, in the opinion of the Court, have the effect of effectually reserving to the Crown," whatever the form of words may be.

We pause for a moment to say that the meaning of the language of a grant, which is a record of a present transaction, must be determined as at the date of the grant, and that a subsequent change, however arising—by lapse of time, changed circumstances, gradual modifications of usage, or otherwise—cannot affect the meaning of the grant itself (*Lord* v. *Commissioners for the City of Sydney* (1)).

It may be, indeed, and it is boldly contended, that power may be given to the Governor to alter the meaning of the words in a grant or reservation so as to increase or diminish the quantity of the estate originally granted. Without disputing the absolute power of Parliament to make such an extraordinary enactment, we only remark now that any language of the Legislature so relied upon must be clear and explicit to produce such an effect.

We proceed to examine the provisions of the *Mining Act* of 1906. This Act, like others which preceded it and are repealed by it, did not purport to deal with rights of property as between the Crown and the subject, but only with the powers of the Crown in respect of subject matter reserved to it. Sec. 3 defines the term "mineral" as meaning and including certain metals and mineral substances and also "any other substance which may from time to time be declared a 'mineral' within the meaning of this Act by Proclamation of the Governor published in the *Gazette*." It will be observed that the definition is for the purposes of that Act only. In our opinion, the only effect of such a Proclamation is that it alters the meaning of the definition of the term "mineral" in the Statute as from the date of the Proclamation so far as regards any further action in respect of minerals, but that the Proclamation has no effect upon the question whether any specific substance is reserved to the Crown by an earlier grant.

From an early time, many, but not all, deeds of grant had contained reservations of minerals, and, after the Act of 1861, all had contained reservations of gold. Further reservations were not unknown, but for some time no practical provision was made for enabling the Crown to exercise its reserved rights in the granted land. It will be sufficient to begin with the *Mining on Private Lands*

(1) 12 Moo. P.C.C., 473, at p. 497.

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Act of 1894 (57 Vict. No. 32), which contained a scheme empowering mining wardens to authorize holders of a miner's right or mineral licence to enter upon private land which is subject to the Act, and to mine thereon for minerals. This Act applied only to certain minerals other than gold, which were defined to be silver, lead, tin, and antimony (sec. 2). Sec. 3 of the Act prescribed that "where the Crown grant contains, or if not yet issued would when issued contain, a reservation to the Crown of all minerals which the said land contains, such land shall be open to mine thereon or thereunder for silver, lead, tin, and antimony, in addition to gold."

The construction of the words "where the Crown grant contains . . . " raised a question similar to that already adverted to, which arises under sec. 46 of the later Act of 1906, and we say nothing further on the point at present.

The Act No. 101 of 1902 enlarged the list of minerals in respect of which authority might be issued by the warden. In that Act the test was "whether the land in question was open to be mined upon for silver, lead, tin, and antimony, in addition to gold," which carries the matter no further.

The next Act is the Act of 1906, already quoted, which is a consolidation Act and repealed all the earlier Mining Acts.

It is apparent on the face of all these Acts that the purpose of the Legislature was to enable practical use to be made of the reserved rights of the Crown to minerals, which rights had previously been merely nominal. There is nothing in the Acts to indicate that the Crown intended to authorize a subject to mine upon private land for minerals which had not been reserved to the Crown.

It is said, however, that it is sufficient that the deed of grant should contain the words "We reserve all minerals," whether these words meant or did not mean, at the time of the grant, all or any specific inorganic substances, provided that the Governor thinks fit to declare them minerals. This argument is founded on the interpretation clause of the Act of 1906 already quoted. A Proclamation declaring limestone to be a "mineral" within the meaning of that Act had been made by the Governor in August 1907.

In the phrase "reservation of all minerals" contained in section 46 (2), the word "reservation" means, in our opinion, a clause

which at the date of the grant had, under the law then in force, the legal effect of a reservation.

The contention of the appellants is, in substance, that upon the issue of the Proclamation of August 1907, the meaning of the words "all minerals" where used in the grant of 1886, which, in that year, did not and could not lawfully mean or include limestone, became altered, and that these words had a new meaning in future. If this is the law, persons in the position of the respondents may be suddenly and arbitrarily and without compensation dispossessed of valuable rights of property. It is a settled rule of construction that such an intention cannot be imputed to the Legislature unless expressed in unequivocal terms incapable of any other meaning (*Western Counties Railway Co.* v. *Windsor and Annapolis Railway Co.* (1); *Commissioner of Public Works (Cape Colony)* v. *Logan* (2)).

On examining the words of sec. 46 (2) of the Act of 1906, the words "all minerals," which are twice used, appear to have been used in each instance in the same sense; and it appears that the object was to confer upon the subject rights coextensive with those of the Crown. We do not think that, where secondly used, they can be construed as conferring upon individuals adverse rights over private property not possessed by the Crown. It may be observed that sec. 70 of the Act speaks of "mineral not reserved to the Crown," recognizing at least the possibility of such a state of things existing. The answer that is made to this argument is that the words "We reserve all minerals" are a common form, and that there is no known instance of any reservation to the Crown of all minerals except by those words, so that if the respondents' construction is adopted the provision may be futile. Such a result is not unprecedented, but we do not think the possibility of it would be sufficient to exclude the rule laid down in *Logan's Case* (2). The provision would not, however, be futile, for, if the fact be that no Crown grant of land in existence contains a reservation in fact of all minerals *eo nomine*, it may be provided that future Crown grants shall contain such a reservation: or the slip, if it be one, can perhaps be remedied by legislation.

Upon any construction of sec. 46 (2) the term "all minerals"

(1) 7 App. Cas., 178. (2) (1903) A.C., 355.

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where secondly used in the section must denote and include all such physical entities, except coal (sec. 45), as are comprised in that designation, including those mentioned in the Proclamation. But, according to the appellants' suggested construction, the same words, where firstly used, do not refer to physical entities at all, but refer to the term "all minerals" as an etymological expression which may be found in a deed of grant, without regard to their meaning as there used. This is not consistent with ordinary canons of construction.

Before concluding, we would remark that sec. 46 (2) only deals with the case of the reservation of "all minerals." If the words of the clause of reservation are "all minerals," and the test to be applied is not the fact of reservation but the form of words used, the question still remains whether at the date of the grant in which the words are used the substance in question was a mineral or not. On that point we think that the true test is to be found in the judgment of the Judicial Committee in *Farquharson's Case* (1): "The only question for decision is, what, having regard to the time at which this instrument was executed, and the facts and circumstances then existing, the parties to this deed intended to express by the language they have used, or, in other words, what was their intention touching the substances to be excepted as revealed by that language"; and not the test proposed by *Mellish* L.J. in *Hext* v. *Gill* (2). *Lord's Case* (3), already quoted, is to the same effect.

We should add that it is by no means clear to us that, even if the land were open to the risk of being invaded by private persons in search of limestone under the *Mining Act*, it would follow that the value of the limestone ought not to be taken into consideration in estimating compensation. Enormous areas of land in New South Wales are subject to similar risks, but we have never heard it suggested that the practical effect has been to reduce the value of those lands to prairie value, although the matter would be one for consideration in estimating the compensation.

The appeal must, therefore, be dismissed with costs.

(1) (1912) A.C., at p. 869. (2) L.R. 7 Ch., at p. 712.
(3) 12 Moo. P.C.C., 473.

GAVAN DUFFY J. In my opinion the judgment of *Ferguson* J. is undoubtedly correct. He decided that the plaintiff company was not entitled to be compensated for the loss of the limestone contained in its land as if it were the absolute owner of such limestone, but that regard must be had to the fact that its value to the plaintiff company was affected by the provisions of the *Mining Act* 1906. The plaintiff company derives its title to the land in question from a Crown grant issued to one Thomas Shanahan in the year 1886, which reserved to the Crown all "minerals which the said land contains." The learned Judge assumed for the purpose of his judgment that the grant had been issued under the authority of the *Crown Lands Act of* 1884, but he thought that he was not at liberty to attribute to the word "minerals" in the Crown grant the meaning which was assigned to it in that Act by sec. 4. He was of opinion that it was unnecessary to consider whether limestone was included in the reservation of all minerals in the Crown grant, because he thought that if a Crown grant of private land purports to contain a reservation of all minerals such land is open to mining for limestone under Part IV. of the *Mining Act* 1906, and to that extent interferes with the grantee's proprietary interest in the limestone, if any such interest exists. I do not desire to dissent from this view of the law, but the facts of the case render it unnecessary to express any judicial opinion upon it. I think the learned Judge assumed too much in favour of the plaintiff company. The Crown grant, though issued after the passing of the *Crown Lands Act of* 1884, was not and could not have been made subject to its provisions. Before the year 1884 the land had been conditionally sold under the provisions of sec. 13 of the *Crown Lands Alienation Act of* 1861, and under sec. 18 of that Act the purchaser was entitled, at the expiration of three years from the date of the conditional purchase and on the performance of certain specified conditions, to have issued to him a grant of the fee simple but with the reservation of any minerals which the land might contain. Before the period of three years had expired the *Crown Lands Alienation Act of* 1861 was repealed by the *Crown Lands Act of* 1884, but the new Act did not deal with the issue of Crown grants with respect to existing conditional purchases except by sec. 2, which declared

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that the repeal should not of itself prejudice or affect anything contracted to be done under the authority of the repealed enactment, and provided that, notwithstanding such repeal, all rights accrued and obligations incurred or imposed under or by virtue of any of the said repealed enactments should, subject to any express provisions of this Act in relation thereto, remain unaffected by such repeal. Secs. 5, 6 and 7, which were relied on by the plaintiff company, have no reference to grants issued in pursuance of a conditional purchase under the *Crown Lands Alienation Act of* 1861. When we examine the Crown grant itself, we find that it purports to be issued wholly under the authority of the *Crown Lands Alienation Act of* 1861. It is intituled "A grant of land purchased by conditional sale without compensation"; it recites the conditional sale and the purchaser's claim to the land under sec. 13 of the *Crown Lands Alienation Act of* 1861 and the performance of the conditions required by sec. 18 of the Act, and thereupon proceeds to grant the said land to Thomas Shanahan for an estate in fee simple but reserving "all minerals which the said land contains," which is a proper method of describing a reservation made under the authority of sec. 18 of the *Crown Lands Alienation Act of* 1861. The *Crown Lands Alienation Act of* 1861 contains no definition of the word "minerals," and therefore it cannot be contended that the word "minerals" in the grant is fettered by any statutory definition.

Sec. 46 (2) of the *Mining Act* 1906 is as follows: "If the Crown grant of any private land contains, or if not yet issued will when issued contain, a reservation to the Crown of all minerals, the said land shall also be open to mining under this Part for all minerals." Sec. 3 enacts that, unless the context or subject matter otherwise indicates, the word "minerals" means certain specified substances and any other substance which may from time to time be declared a "mineral" within the meaning of the Act by Proclamation of the Governor published in the *Gazette*. Sec. 45 provides that under Part IV. of the Act the word "minerals" shall not include coal or shale, nor shall coal or shale be included within the substances which may be declared minerals by Proclamation of the Governor. Limestone has been declared a mineral within the meaning of the Act by Proclamation of the Governor, and it is therefore a mineral

within the meaning of sec. 46 (2) unless the context or subject matter otherwise indicates. The word "minerals" is used twice in sec. 46 (2), first in the phrase "If the Crown grant of any private land contains . . . a reservation to the Crown of all minerals," and secondly in the phrase "the said land shall be open to mining under this Part for all minerals." I think the word "minerals" when first used in the sub-section should not be fettered by the statutory definition. In my opinion the sub-section must be construed as dealing either with grants which purport to reserve to the Crown all minerals in the ordinary signification of that word, or in the alternative with such as in law have the effect of creating such a reservation. It cannot be intended to deal with Crown grants which contain a reservation of all minerals within the meaning of sec. 3 as amended by sec. 45. To give it such a construction would be to render it wholly inoperative, for it would exclude from its operation all Crown grants containing the ordinary reservation of "all minerals" where those words are not governed by the statutory definition contained in the *Mining Act* 1906, and no Crown grant containing a reservation of minerals as defined by sec. 3 and sec. 45 has issued or could have issued under any Act now or heretofore in force in New South Wales. On the other hand, I do not know of any reason why the word "minerals" when used in the last part of sec. 46 (2) should not have the meaning provided in the interpretation clauses, and there is a very weighty reason why it should have such a meaning, because otherwise the definition of "minerals," which is especially adopted and amended for Part IV. of the Act, will have practically no application in that Part. Sec. 46 (2) defines the private lands which shall be open to mining under that Part. If the word "minerals" in the second part of the sub-section is not subject to the statutory definition, the whole object of Part IV. of the Act fails, for coal and shale, though excepted by sec. 45, would be open to mining, and no substance which was not a mineral independent of the interpretation clauses would be open to mining. The Crown grant in question in this case validly reserves all minerals in the ordinary signification of that word, and limestone is a mineral within the meaning of the second part of the sub-section. The result is that the sub-section authorizes mining for limestone

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on the land granted, and to that extent interferes with the proprietary right of the plaintiff company. It is said that on any interpretation of the reservation in the Crown grant it does not include limestone, and that the effect of thus construing the subsection is to confiscate the property in the limestone which passed under the grant, and that we ought not to attribute such an intention to the Legislature. If a man takes land under a grant reserving to the Crown all minerals, the question of what is or is not a mineral under the reservation may be often a very difficult one to determine, and I cannot see that any hardship is inflicted on the grantee by Parliament when it leaves to the Governor in Council the task of defining the substances which may fairly and properly be dealt with by the Crown in pursuance of such reservation, and to the Secretary of Mines the function of determining what substances shall in fact be mined, and this is what the Legislature has done. In my opinion the appeal should be allowed, and the judgment of *Ferguson* J. restored.

Appeal dismissed with costs.

Solicitor for the appellants, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors for the respondents, *Parish & Stephen.*

B. L.