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PUBLIC CURATOR (QD.) v. UNION TRUSTEE CO. OF AUSTRALIA LTD.

in the declaration in answer to Questions (f) to (x) the word "valid." Case remitted to Supreme Court to make such further order as may be necessary accordingly. Costs of all parties as between solicitor and client to be paid out of the testator's estate.

Solicitor for the appellant, *R. J. S. Barnett*, official solicitor to appellant.

Solicitors for the respondents, *Chambers, McNab & McNab*; *H. J. H. Henchman*, Acting Crown Solicitor for Queensland; *W. A. Douglas*; *R. McCowan*.

J. L. W.

Cons *Western Australia* v *Wardley Aust Ltd* (1991) 102 ALR 213

Cons *Western Australia* v *Wardley Australia Ltd* (1991) 21 IPR 321

Disd *Gregg* v *Tasmanian Trustees Ltd* (1997) 73 FCR 91

Cons *Krakowski* v *Eurolynx Properties Ltd* (1995) 69 ALJR 629

Appl *Belan* v *Casey* (2003) 57 NSWLR 670

Adopted *Stewart, Re* [2004] 1 NZLR 354

Appl *David Grant & Co Pty Ltd* v *Westpac Banking Corp* (1995) 69 ALJR 778

Refd to *Baulderstone* v *Workcover & Male* (1995) 64 SASR 519

[HIGH COURT OF AUSTRALIA.]

THE CROWN . . . . . APPELLANT;
RESPONDENT,

AND

McNEIL AND ANOTHER . . . . . RESPONDENTS.
PETITIONERS,

H. C. OF A. 1922.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

MELBOURNE, *March* 9-10, 13-17, 20.

PERTH, *July* 27.

Crown—Liability of—Breach of contract by Crown—Petition—Time for filing petition—Fraud of servants of Crown preventing knowledge of breach of contract—When time begins to run—Crown Suits Act 1898 (*W.A.*) (62 *Vict. No.* 9), *secs.* 5 (2), 32, 33, 36, 37—*Mining Development Act* 1902 (*W.A.*) (2 *Edw. VII. No.* 20), *secs.* 19, 20, 21, 29.

KNOX C.J., ISAACS AND STARKE JJ.

Part III. (secs. 22-37) of the *Crown Suits Act* 1898 (W.A.) provides for the enforcing of claims against the Crown by a petition and proceedings thereon

similar to those in an ordinary action between subjects. Sec. 33 provides that "No claim or demand shall be made against the Crown under this Part of this Act unless it is founded upon and arises out of some one of the causes of action mentioned in this section. Provided that nothing herein contained shall be deemed to give a cause of action for breach of contract which would not have arisen in like circumstances before the passing of this Act. (1) Breach of any contract entered into by or under the lawful authority of the Governor on behalf of the Crown or of the Executive Government of the Colony, whether such authority is express or implied." Sec. 37 provides that "No person shall be entitled to prosecute or enforce any claim or demand under this Part of this Act unless the petition setting forth the relief sought is filed within twelve months after the claim or demand has arisen."

Held, that fraudulent conduct on the part of the servants of the Crown, which has prevented a person who has contracted with the Crown from knowing that the Crown has committed a breach of the contract, does not extend the time for filing a petition in respect of the breach of contract beyond twelve months after the breach complained of took place.

Gibbs v. *Guild*, (1882) 9 Q.B.D., 59, distinguished.

Decision of the Supreme Court of Western Australia (*Burnside* J.) in part reversed.

APPEAL from the Supreme Court of Western Australia.

A petition under the *Crown Suits Act* 1898 (W.A.) by Neil McNeil and Claude de Bernales, who carried on business under the firm name of the West Australian Gold and Copper Mines, was filed on 26th August 1919, and, as amended on 8th June 1921, was substantially as follows :—

1. Between January 1914 and June 1915 your petitioners delivered to the State Smelting Works on the Phillips River Goldfields 108 lots of copper ore under the provisions of the regulations for the purchase of auriferous copper ores made on 25th February 1914 by the Governor in Executive Council under the powers conferred by the *Mining Development Act* 1902 (W.A.).

2. By the said regulations it was provided (*inter alia*) as follows :— "11. A charge will be made to cover the costs of receiving, sampling, and smelting the ore to matte, of thirty shillings per ton of ore (net weight); and for the further expenses of transporting the matte to Hopetoun for shipment, shipping it to market, and realizing the values therein there shall be an additional charge per ton of ore (net weight) of three shillings and sixpence per unit of copper in

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the agreed assay value for copper less the schedule deduction aforesaid, and four per cent. of the agreed assay value in gold and silver less schedule deductions." "13. Payment will be made for the copper, gold, and silver in the ore, less the above-mentioned deductions and charges at the following rates :—Copper.—For all ore received prior to the commencement of a smelting campaign, at the average price of standard copper in London during the fourth week after such commencement as stated in the telegraphed market reports of the *West Australian* newspaper, or other daily or weekly journal from time to time selected by the State Mining Engineer ; and for all ore received during the first four weeks of a smelting campaign at the average price during the eighth week after such commencement ; and similarly for all ore received during successive periods of four weeks at the average price of the fourth week after the end of such period, provided that the smelting work is carried on continuously. But final settlement for ore received too late for inclusion in any smelting campaign may be deferred until the fourth week after the commencement of the next campaign, and made on the price of copper for such fourth week."

2A. On or about 29th August 1914 your petitioners verbally agreed with the State Smelting Works to a modification of reg. 13 as follows : "Final settlement for all ore received at the Smelting Works will be by payment to the seller of such balance as may accrue from the actual sale—on such terms as the Minister may determine—of the product of his ore after deduction of advances interest and all other expenses incurred in placing such product upon the market and selling it."

3. The said State Smelting Works have charged your petitioners the sum of 7s. 4d. per unit, which charge is in excess of the proceeds of the sale of the product of your petitioners' 108 lots of copper ore after deduction from such proceeds of advances, interest and all other expenses incurred in placing such product upon the market and selling it. The total amount of overcharge is £8,669 13s.

4. Between July 1915 and December 1915 your petitioners delivered to the said State Smelting Works 85 lots of copper ore under the provisions of the regulations for the purchase of auriferous

copper ores made on 30th June 1915 by the Governor in Executive Council under the powers conferred by the *Mining Development Act* 1902.

5. By the said regulations it was provided (*inter alia*) as follows :— " 11. A charge will be made to cover the costs of receiving, sampling, and smelting the ore to matte, of thirty shillings per ton of ore (net weight); and for the further expenses of realizing the values therein there shall be an additional charge per ton of ore (net weight) of three shillings and sixpence per unit of copper in the agreed assay value for copper less the schedule deduction aforesaid, and six per cent. of the agreed assay value in gold and silver less schedule deductions." " 15. Forthwith after agreement of assays advances in part payment towards purchase of the ores will be made, if desired by the sellers, after making the foregoing deductions and charges, up to ninety per cent. of the net value of the ore, calculated at such prices for the metals contained in it as may be fixed from time to time by the Minister by notice in the *Government Gazette*, and which until further notice will be :—Copper—£56 10s. per ton of standard copper. Gold—80s. per ounce of fine gold. Silver—2s. per ounce of fine silver." " 16. The marketable products of smelting of any ore or metal-bearing material presented to the Smelting Works for purchase will be sold by the Minister at his discretion as opportunity offers, and any balances remaining from the sale of such products after payment of all the expenses incurred by the Government on account of the purchase, receiving, and treatment of such ore or material, and the shipment and selling of the products therefrom, inclusive of interest at the rate of six per cent. per annum calculated from day to day from the time of payment of such expenses up to the date of the final payment of the balances to the sellers, will be paid, in final completion of the purchase of such ore or material, to the sellers thereof in proportion to the percentages which the values of the separate lots form of the total value of all the lots smelted from which the aforesaid products have been derived, calculating such values on the prices assumed as above for the purpose of making advances."

6. In regard to the whole of the said ore mentioned in par. 4 hereof the said State Smelting Works have charged your petitioners

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the sum of 9·169s. in place of the sum of 3s. 6d. per unit of copper or alternatively have charged your petitioners the sum of 9·169s. per unit of copper as realization expenses, which sum greatly exceeds the true expenses of realization.

7. Between January 1916 and June 1916 your petitioners delivered to the said State Smelting Works 64 lots of copper ore under the provisions of the regulations referred to in pars. 4 and 5 hereof.

8. In regard to the whole of the said ore mentioned in the last preceding paragraph the said State Smelting Works have charged your petitioners the sum of 8·735s. in place of the said sum of 3s. 6d. per unit of copper or alternatively have charged your petitioners the said sum of 8·735s. per unit of copper as realization expenses, which sum greatly exceeds the true expenses of realization.

9. Between July 1916 and December 1916 your petitioners delivered to the said State Smelting Works 85 lots of copper ore under the provisions of the regulations referred to in pars. 4 and 5 hereof.

10. In regard to the whole of the said ore mentioned in the last preceding paragraph the State Smelting Works have charged your petitioners the sum of 7·333s. in place of the said sum of 3s. 6d. per unit of copper or alternatively have charged your petitioners the said sum of 7·333s. per unit of copper as realization expenses, which sum greatly exceeds the true expenses of realization.

11. Between January 1917 and June 1917 your petitioners delivered to the State Smelting Works 104 lots of copper ore under the provisions of the regulations referred to in pars. 4 and 5 hereof.

12. In regard to the whole of the said ore mentioned in the last preceding paragraph the said State Smelting Works have charged your petitioners the sum of 10·233s. in place of the said sum of 3s. 6d. per unit of copper or alternatively have charged your petitioners the said sum of 10·233s. per unit of copper as realization expenses, which sum greatly exceeds the true expenses of realization.

13. Between July 1917 and December 1917 your petitioners delivered to the State Smelting Works 107 lots of copper ore under the provisions of the regulations referred to in pars. 4 and 5 hereof.

14. In regard to the whole of the said ore mentioned in the last preceding paragraph the said State Smelting Works have charged

your petitioners the sum of 12s. 6d. in place of the said sum of 3s. 6d. per unit of copper or alternatively have charged your petitioners the said sum of 12s. 6d. per unit of copper as realization expenses, which sum greatly exceeds the true expenses of realization.

15. Between January 1918 and March 1919 your petitioners delivered to the said State Smelting Works 183 lots of copper ore under the provisions of the regulations referred to in pars. 4 and 5 hereof.

16. The whole of the said ore referred to in the last preceding paragraph has been treated dealt with and disposed of by the said State Smelting Works but no account has been rendered to your petitioners in regard to the same.

17. All ore delivered as aforesaid between January 1914 and March 1919 was continuously delivered from time to time and not appropriated by your petitioners to any campaign or campaigns—such appropriation being determined by the said Smelting Works for their own convenience and without consulting your petitioners.

18. The said Smelting Works received and held all the products of your petitioners' said ore as agent upon trust (a) to sell the same; and (b) to render to your petitioners true accounts of such realization and of all expenses incurred in placing such products on the market and selling them, and (c) to pay to your petitioners on demand the proceeds of the realization of such products after deduction of advances interest and all other expenses incurred in placing such products on the market and selling them.

19. The said Works in breach of their duty failed and neglected to render such accounts and to pay to your petitioners the proceeds of the realization of the products of their ore less such deductions as aforesaid, and in or about the months of February and March 1919 refused after demand by your petitioners to render such accounts or pay such moneys to your petitioners.

20. Your petitioners believe that the said State Smelting Works have overcharged or underpaid your petitioners in the various sums hereinbefore mentioned and that on the taking of accounts such overcharges and under-payments will be proved, and your petitioners ask that an account be taken of all the transactions and dealings aforesaid between the said Works and your petitioners.

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21. Alternatively, the said State Smelting Works have sold the said products of your petitioners' ore, and in respect thereof have received and still hold for the use of your petitioners moneys amounting to the sum of £33,600 4s. 1d. and have after demand made in February and March last refused and still refuse to pay the same to your petitioners.

22. Your petitioners were ignorant and had no means of ascertaining the fact of the overcharges and moneys aforesaid or any of them until the month of January 1919, and such ignorance was caused by the said Works rendering to your petitioners untrue accounts, in which they falsely and with knowledge of such falsity represented and held out to your petitioners that all such overcharges and moneys were the actual cost of realization of the products of your petitioners' ore.

23. In all the matters referred to in this petition the said State Smelting Works were acting by or under the lawful authority of His Excellency the Governor on behalf of the Crown and/or the Executive Government of the State.

Your petitioners therefore most humbly pray that Your Majesty will be most graciously pleased to order that right be done in this matter, and that the Attorney-General of Western Australia may be required to answer the same and that your petitioners may henceforth prosecute their plaint in the said Court and take such other proceedings as may be necessary.

As to the claims or demands in pars. 1 to 12 of the petition the Crown raised the defence (*inter alia*) that they did not arise within twelve months before the petition was filed and that sec. 37 of the *Crown Suits Act* 1898 prevented the petitioners from prosecuting or enforcing the claims or demands.

The action was heard by *Burnside* J., who made an order the material portion of which was as follows:—"It is ordered and adjudged (a) that an account be taken by the Master of this Honourable Court of the several lots of ore delivered by the petitioners to the said State Smelting Works for treatment and realization as alleged in pars. 1, 4, 7, 9, 11, 13 and 15 of the amended petition;

(b) that as regards the ore referred to in par. 1 of the amended petition, such account be taken on the footing of the regulations made on the 25th day of February 1914 as amended and/or modified by the notice given by the said State Smelting Works on 29th August 1914—the petitioners having given the necessary notice; (c) that as regards the ore referred to in pars. 4, 7, 9, 11, 13 and 15 of the amended petition such account be taken on the footing of the regulations made on 30th June 1915; (d) that in taking the said accounts the petitioners are to be charged with (1) the sum of 30s. per ton (net weight) for receiving sampling and smelting the ore to matte and the fixed charges for sintering excess silica screening and rental and (2) the actual expenses of realizing the values in the said matte (including the transporting shipping and selling thereof); (e) that an account be taken of all sums of money paid by or on behalf of the said State Smelting Works to the petitioners; (f) and that the Master shall after taking the said accounts certify what sum is due from either of the parties to the other of them. And it is further ordered and adjudged that either party shall have liberty to apply in Chambers on the giving to the other of them of three days' notice in writing, and that the further consideration of this action be adjourned, and that the question of costs be reserved."

From that decision the Crown now appealed to the High Court.

The other material facts sufficiently appear in the judgments hereunder.

Downing K.C. and *Ham*, for the appellant. Sec. 37 of the *Crown Suits Act* 1898 is an answer to the claims referred to in pars. 1 to 12 of the petition. The provision of sec. 37 is a condition upon which the right given by sec. 33 to institute proceedings against the Crown is given, and compliance with it is the basis of the right. The present proceedings are in the nature of a common law action for accounts, and the equitable principle that concealed fraud prevents a statute of limitations from running does not apply to such an action (*Knox* v. *Gye* (1); *Armstrong* v. *Millburn* (2)).

(1) (1872) L.R. 5 H.L., 656, at p. 674. (2) (1885) 54 L.T., 247.

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[ISAACS J. referred to *Bulli Coal Mining Co.* v. *Osborne* (1); *Oelkers* v. *Ellis* (2).

[KNOX C.J. referred to *Gibbs* v. *Guild* (3); *Barber* v. *Houston* (4).]

Sec. 32, which renders applicable the laws, statutes and rules in force as to, among other things, limitations, does not make the principle as to fraud applicable to sec. 37. Sec. 37 has not the same effect as a statute of limitations (see *Henry* v. *Hammond* (5); *Osgood* v. *Sunderland* (6)). Fraud cannot be alleged against the Crown, nor can the Crown be deprived of the benefit of sec. 37 by setting up fraud on the part of its servants (*Tobin* v. *The Queen* (7); *Enever* v. *The King* (8); *Baume* v. *The Commonwealth* (9); *Hettihewage Siman Appu* v. *Queen's Advocate* (10)).

[KNOX C.J. referred to *Davenport* v. *The Queen* (11).

[ISAACS J. referred to *Farnell* v. *Bowman* (12).]

Sec. 33 must be read with sec. 5 (2), which provides that nothing in the Act shall interfere with or in any way restrict any privilege or authority of the Crown.

Owen Dixon K.C. (with him *Dixon Hearder* and *Frank Leake*), for the respondents. The respondents' cause of action is a right founded on contract to have an account of a continuous dealing, and it did not arise until they demanded an account in December 1918 (*Topham* v. *Braddick* (13); *Purcell* v. *Harding* (14)). The onus is upon the Crown to show that the cause of action did not arise within twelve months before the petition. Concealed fraud is an answer to sec. 37 of the *Crown Suits Act* 1898. That section is in form a limitation of the right to proceed under sec. 33. The provision in sec. 32 that the laws as to limitations are to apply has no meaning unless sec. 37 is a limitation within the meaning of sec. 32. Another view is that sec. 37 is a limitation upon sec. 36, which provides that no petition is to be filed unless one month's previous notice in writing has been given setting out the nature of the claim; that upon such notice

(1) (1899) A.C., 351.
(2) (1914) 2 K.B., 139.
(3) (1882) 9 Q.B.D., 59.
(4) (1885) 18 L.R. Ir., 475.
(5) (1913) 2 K.B., 515.
(6) (1914) 30 T.L.R., 530.
(7) (1864) 16 C.B. (N.S.), 310.
(8) (1906) 3 C.L.R., 969, at p. 977.
(9) (1906) 4 C.L.R., 97, at p. 110.
(10) (1884) 9 App. Cas., 571, at p. 586.
(11) (1877) 3 App. Cas., 115.
(12) (1887) 12 App. Cas., 643.
(13) (1809) 1 Taunt., 572.
(14) (1866) 15 W.R., 128.

being given a claim or demand arises, and that that claim or demand must be prosecuted within twelve months. In the case of concealed fraud time does not begin to run against the person affected by it until he becomes completely aware of the true facts (*Betjemann* v. *Betjemann* (1)).

Ham, in reply, referred to *Story's Equity Jurisprudence*, 3rd ed., p. 224, par. 529 ; *John* v. *Dodwell & Co.* (2).

Cur. adv. vult.

July 27.

The following written judgments were delivered :—

KNOX C.J. AND STARKE J. This is an appeal against a judgment of *Burnside* J., dated 12th August 1921, ordering an account to be taken of what was due to the respondents in respect of several lots of ore delivered by them to the State Smelting Works of Western Australia for treatment and realization, and containing directions as to the footing on which the account was to be taken.

In the year 1913 "the position of affairs in the Phillips River District" had received the serious consideration of the Minister for Mines in Western Australia, and he was convinced that it was "in the interests of the district and of the State that local smelting of copper ores should be undertaken in the district, for without local smelting it was impossible that the district should progress." There were certain smelting works at Ravensthorpe in the district, which, however, the owners were not in a position to operate. Accordingly, in December 1913, the Government of Western Australia agreed to lease these works from McNeil, one of the petitioners in these proceedings, and to receive ore from producers for the purpose of smelting. The authority of the Government to enter upon the smelting operations was referred to the *Mining Development Act* 1902, and all parties to these proceedings have acted upon the view, and admitted at the Bar, that these operations were warranted by the Act and the Regulations made thereunder. Under these circumstances we do not feel called upon to investigate the extent of the authority conferred by the Act, and propose to consider the rights of the parties on the basis assumed by them.

(1) (1895) 2 Ch., 474. (2) (1918) A.C., 563.

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In February 1914 the Governor in Council made certain regulations for the purchase of auriferous copper ores at the State Smelting Works, Phillips River Goldfield. These regulations provided for the delivery of ore to the Works, and for its weighing, sampling and assaying, and also for deductions to be made from agreed assay values in order to arrive at the amount of the metals for which payment would be made. But the important clauses of these regulations, as far as this case is concerned, are those numbered 11 to 15 inclusive. They are as follows :—" 11. A charge will be made to cover the costs of receiving, sampling, and smelting the ore to matte, of thirty shillings per ton of ore (net weight) ; and for the further expenses of transporting the matte to Hopetoun for shipment, shipping it to market, and realizing the values therein there shall be an additional charge per ton of ore (net weight) of three shillings and sixpence per unit of copper in the agreed assay value for copper less the schedule deduction aforesaid, and four per cent. of the agreed assay value in gold and silver less schedule deductions. The ore-buyer may at his discretion allow a reduction in the smelting charge on ores containing an excess of oxide of iron over silica, which he may consider to be of value as flux for the smelting operations of sixpence for each unit per cent. by which the amount of metallic iron (Fe) present in the ore exceeds the percentage of silica (SiO_2). The ore-buyer may likewise make an extra charge on any parcel of ore in which the silica (SiO_2) exceeds sixty per cent., of ninepence for each unit of silica (SiO_2) in excess of sixty. 12. A charge will be made of two shillings per ton of ore accepted at the Works for purchase for smelting treatment, and shall be payable to the owners of the Smelting Works by way of rental for the use thereof. 13. Payment will be made for the copper, gold, and silver in the ore, less the above-mentioned deductions and charges at the following rates :—Copper.—For all ore received prior to the commencement of a smelting campaign, at the average price of standard copper in London during the fourth week after such commencement as stated in the telegraphed market reports of the *West Australian* newspaper, or other daily or weekly journal from time to time selected by the State Mining Engineer ; and for all ore received during the first four weeks of a smelting campaign at the average price during

the eighth week after such commencement; and similarly for all ore received during successive periods of four weeks at the average price of the fourth week after the end of each period, provided that the smelting work is carried on continuously. But final settlement for ore received too late for inclusion in any smelting campaign may be deferred until the fourth week after the commencement of the next campaign, and made on the price of copper for such fourth week. Gold.—At 80s. per ounce fine. Silver.—At 2s. per ounce fine. 14. Forthwith after agreement of assays, advances will be made up to such proportion of the net value of the ore as shall be determined from time to time by the State Mining Engineer, but not exceeding seventy-five per cent., taking the price of copper at the price of standard copper in London during the week in which the sampling was performed, such price being ascertained as in the foregoing regulation 13, and fixed by the State Mining Engineer. Interest will be charged on the advances at the rate of six per cent. per annum from the date of payment of the advance to the date of final settlement of the balance. 15. All accounts against the State for payments due on account of ore sold to the Works shall be rendered on the usual forms of accounts against His Majesty's Government, and shall be certified as correct by the ore-buyer before being paid." In March 1914 a further regulation was made, authorizing, at the discretion of the Government's ore-buyer, an extra charge of 5s. per ton for sintering.

Deliveries of ore to the Smelting Works began in January 1914, and smelting operations about July 1914. Soon afterwards the War broke out and was followed by the closing of the London Metal Exchange. Consequently the method of payment provided for in clause 13 of the Regulations became more or less impracticable. And the evidence also suggests that the State Mining Engineer and the manager of the Works began to doubt whether the charges fixed by the Regulations were sufficient to meet the cost of operations. However, on 6th August 1914 the petitioner McNeil sent the following letter to the Minister:—"At the request of the mine-owners and tributors of the Ravensthorpe District and on my own behalf, I beg to request that the final settlement for copper smelted at Ravensthorpe Smelters be held over until a more equitable value

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can be arrived at. The present crisis has, of course, considerably affected the copper market, and for a time at least market values must fall, and, were settlements based on these values, the whole of the Ravensthorpe District would suffer therefrom. It is therefore on behalf of all concerned, and at the request of all, that I beg to place the matter before you for your consideration." And on 29th August 1914 the following notice was posted :—" Settlement for all ore received prior to 29th August 1914 will be made in accordance with regulation 13 of 25th February 1914 unless written notice is given to the ore-buyer forthwith by the owners of the ore that they wish such settlement to be deferred and made in accordance with the price actually realized for the matte, and that they agree to the matte being disposed of by the Hon. the Minister for Mines on such terms in such market and at such times as in his sole discretion he may think most advisable. Furthermore, final settlement for all ore received at the Smelting Works after 29th August 1914 will be by payment to the seller of such balance as may accrue from the actual sale on such terms as the Minister may determine of the product of his ore after deduction of advances, interest and all other expenses incurred in placing such product upon the market and selling it."

The operations proceeded, but it was found that the charges fixed by the Regulations were insufficient to meet the working costs. The principal causes of the loss were the fineness of the ores, which resulted in slow smelting, increased costs for power, labour and water, and the high silica contents of the ores, which compelled the use of large ratios of flux and coke. It was ascertained that the charges must be increased by 10s. per ton, and the Minister, in March 1915, so ordained. It was apparently impolitic to increase the smelting charge, but it was thought that a revision of the Regulations and the charges as to silicious ores and as to ores which in the opinion of the Government's ore-buyer required sintering and screening would achieve the desired result. Consequently the 1914 Regulations were cancelled, and new Regulations were made in July 1915. The material alterations are contained in clauses 11 to 17, which are as follows :—" 11. A charge will be made to cover the costs of receiving, sampling, and smelting the ore to matte, of thirty shillings per ton of ore (net weight) ; and for the further expenses of realizing the

values therein there shall be an additional charge per ton of ore (net weight) of three shillings and sixpence per unit of copper in the agreed assay value for copper less the schedule deduction aforesaid, and six per cent. of the agreed assay value in gold and silver less schedule deductions. The ore-buyer may make an extra charge on any parcel of ore in which the silica (SiO_2) exceeds forty per cent., of sixpence for each unit of silica (SiO_2) in excess of forty. 12. Any ore or metal-bearing material offered for purchase which in the opinion of the ore-buyer requires sintering before blast-furnace treatment may be charged five shillings per ton for sintering, in addition to the regular smelting charges, and any ores which in his opinion require screening may be screened through a three-quarter inch screen, and charged seven shillings and sixpence per ton of fines passing through the screen, to cover costs of screening and sintering. 13. Ores which contain iron and sulphur in sufficient quantity to have a value as flux and fuel in the treatment of other ores, may be smelted at a reduced charge, calculated on such value, at the discretion of the management. 14. A charge will be made of two shillings per ton of ore accepted at the Works for purchase for smelting treatment, and shall be payable to the owners of the Smelting Works by way of rental for the use thereof. 15. Forthwith after agreement of assays advances in part payment towards purchase of the ores will be made, if desired by the sellers, after making the foregoing deductions and charges, up to ninety per cent. of the net value of the ore, calculated at such prices for the metals contained in it as may be fixed from time to time by the Minister by notice in the *Government Gazette*, and which until further notice will be :— Copper—£56 10s. per ton of standard copper. Gold—80s. per ounce of fine gold. Silver—2s. per ounce of fine silver. 16. The marketable products of smelting of any ore or metal-bearing material presented to the Smelting Works for purchase will be sold by the Minister at his discretion as opportunity offers, and any balances remaining from the sale of such products after payment of all the expenses incurred by the Government on account of the purchase, receiving, and treatment of such ore or material, and the shipment and selling of the products therefrom, inclusive of interest at the rate of six per cent. per annum calculated from day to day from

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the time of payment of such expenses up to the date of the final payment of the balances to the sellers, will be paid, in final completion of the purchase of such ore or material, to the sellers thereof in proportion to the percentages which the values of the separate lots form of the total value of all the lots smelted from which the aforesaid products have been derived, calculating such values on the prices assumed as above for the purpose of making advances. 17. All accounts against the State for payments due on account of ore sold to the Works shall be rendered on the usual forms of accounts against His Majesty's Government, and shall be certified as correct by the ore-buyer before being paid."

The smelting operations were divided into what were called "campaigns." A "campaign" began when the actual smelting process commenced, and closed when the furnaces were cleaned up and the copper matte extracted therefrom. There were altogether ten campaigns, but the claims in this action relate to nine only. The Regulations of February to March 1914 coupled with the notice of August 1914 govern, it is admitted, the rights of the parties in relation to the first campaign, whilst the Regulations of July 1915 govern their rights in relation to the other eight campaigns. The final statements and accounts of the first, second, third and fourth campaigns had all been rendered by 9th July 1917, but those of the fifth campaign were not rendered until June 1918, and those of the remaining campaigns were either subsequent to the date of the petition (26th August 1919) or have not been rendered.

On 26th August 1919 the petitioners filed a petition in the Supreme Court of Western Australia pursuant to the *Crown Suits Act* 1898, alleging, in substance, that overcharge had been made in the said accounts contrary to the Regulations, and that a large sum of money was in the hands of the Government of Western Australia to the use of the petitioners. The procedure prescribed by the *Crown Suits Act* was followed, and the petition came on for hearing before *Burnside* J. in May and June 1921. The hearing extended over fifteen days, and a vast amount of evidence was tendered by the parties. But the facts were not really susceptible of much doubt. And one example will illustrate the nature of the dispute. The officers of the Government prepared a particular claim for the ore-supplier

and made the deductions shown therein upon the basis of the Regulations applying to the case. Thus a smelting charge of 30s. was made in accordance with the Regulations, and deducted, but in addition a realization charge for copper at 9·169s. per unit was also deducted. According to the petitioner this realization charge includes a considerable amount due purely to the smelting of the ore; and the fact cannot be denied. At an early stage of the smelting operations it was ascertained that the charges fixed by the Regulations would not cover the cost of those operations. Apparently, however, the Government considered it impolitic to make an open declaration of the fact; and so, with an economy of truth, a considerable portion of those costs in the vouchers prepared for the ore-suppliers was placed under the description of realization charges, and not under that of smelting charge.

The method adopted by the officers of the Government may be open to animadversion, but it is conceivable that the charges might be justified under the Regulations if they had been more accurately described. Indeed, the main argument for the Government was that the Regulations entitled it to charge all costs and expenses incurred by it in smelting ore and ultimately realizing the metallic contents of that ore. Consequently, the first question is the proper construction of the Regulations, &c.

Standing alone, the Regulations of 1914 seem clear enough. The parties stipulated for a fixed charge of 30s. for receiving, sampling and smelting the ore to matte, and an additional charge of 3s. 6d. per ton of ore (net weight) per unit of copper in the agreed assay value, less the schedule deductions, for transporting the matte to Hopetoun and ultimately realizing the values therein. These charges were not a mere estimate for the purpose of determining advances pursuant to clause 14 of the Regulations, for in clause 13 we find that payment for the metallic contents of the ore is to be made, less the prescribed charges, upon an agreed basis, namely, average market prices. The notice of August 1914 substituted a new basis of payment for the metallic contents of the ore: the actual proceeds of sale instead of the agreed basis. And it is argued that the notice also substituted the actual costs of smelting and realization for the fixed charges made by the Regulations. The words are: "final

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settlement . . . will be by payment to the seller of such balance as may accrue from the actual sale . . . of the *product of his ore* after deduction of advances" made pursuant to reg. 14, "interest and *all other expenses incurred in placing such product upon the market and selling it.*" The introduction of the words "product of the ore" rather than the word "matte" must be noted. About the time of the notice, the manager of the Works and the State Mining Engineer were considering the conversion of the matte into blister copper, and they ultimately did so convert the matte, or at least that part of it which was richest in gold. At a later stage it was found that electrolytic copper was phenomenally high as compared with standard copper. Electrolytic copper was therefore also obtained from the ore sent to the Smelting Works by utilizing the services of the Electrolytic Works at Port Kembla in New South Wales. The costs of the production of copper were naturally increased by these additional operations. The "product of the ore" is wide enough to cover matte, blister, or electrolytic copper. But the expenses which the notice allows to be deducted are "all expenses incurred in placing such product upon the market and selling it." These words deal with marketing or realization charges. It may be that they substitute actual expenses of marketing or realization for the charge of 3s. 6d. fixed by the regulation, and we incline to this opinion; but the matter is of little importance, for the petitioners, contending that the 3s. 6d. is a fixed charge, are and always have been willing to submit to be charged with the actual costs of the marketing or realization of the ores dealt with in the various campaigns. But, in our opinion, the words relied upon, in the collocation in which they are placed, do not warrant any increase upon the fixed smelting charge of 30s. per ton.

The Regulations of 1915 are more difficult. The important clauses are those numbered 11 and 16. In clause 11 fixed charges are made for receiving, sampling, and smelting the ore to matte, and for further expenses of realizing the values therein. This clause does not contemplate the conversion of the matte into blister copper, or the production of electrolytic copper, and no provision is made for these operations. But by clause 16 the balances remaining from the sale of the products of the ore, after payment of all expenses

incurred by the Government on account of the purchase, receiving and treatment of the ore and the shipment and selling of the products therefrom, with interest thereon, are to be paid in final completion of the purchase of ore. The phrase the "final completion of the purchase" is used with reference to advances in part payment of the ore pursuant to clause 15. The learned counsel for the Government suggests that clauses 11 and 12 only operated for the purpose of making advances in part payment of the ore under clause 15, or, in other words, that the fixed charges are abandoned in the final settlement for the actual costs of smelting, &c., during a campaign and of realizing the metallic values contained in the ores smelted during that campaign. But we are unable to adopt this view. There is nothing in clauses 11 and 12 to suggest the limitation, and some rather strange consequences would result from its adoption. Thus, ores containing a large proportion of silica or ores which had required sintering or screening would not, apparently, be chargeable with the special rates fixed by clauses 11 and 12, but with simply the average cost of smelting of all ores used in a campaign and of realizing the metallic values contained in those ores. The words "all the expenses incurred" in clause 16 must be read in conjunction with the sums fixed for certain costs and expenses in clauses 11 and 12. These charges are expenses within clause 16: they are the agreed expenses for certain operations and services, and can neither be increased nor reduced (without the consent of the parties) in ascertaining the amount due to the ore-suppliers. If these operations and services cost less than the agreed sum, the Government benefits; if more, the suppliers benefit. But there may be expenses beyond those fixed by clauses 11 and 12, and these would be covered by the provisions of clause 16.

We have before pointed out that the charges in clause 11 only cover the costs of receiving, sampling and smelting of the ore to matte and of realizing the values therein; and it may be that the costs of conversion to blister or electrolytic copper would be in addition to the charges provided for in that clause. The point is unimportant, however; for the petitioners, though contending before us that the Government is restricted in point of law for realization expenses to the fixed charge per ton of ore of 3s. 6d. per unit of

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copper, are willing to abandon this right and to allow the actual costs of realization to be charged, including therein, as we understand, the conversion of the copper in the matte to blister or electrolytic copper. But, as indicated, the Government is bound, in our opinion, by the fixed charge of 30s. per ton of ore, to cover the costs of receiving, sampling and smelting the ore to matte, and the inclusion of a further sum in realization or other charges to cover these costs is contrary to the Regulations and to the agreement of the parties.

Another argument of the petitioners was that auriferous ores had been smelted with auriferous copper ores to the detriment of the petitioners and contrary to the provisions of the Regulations. But as the point was not made at the trial, and as attention was never called to the fact by any interested person during the smelting operations, the Court must refuse to entertain it at this late stage of the case.

A further complaint was that the suppliers of auriferous ores had been favoured as against copper ores in the charges for smelting. Apparently there have been charged against the auriferous ores the charges fixed by the Regulations for smelting, whilst against the copper ores actual costs for smelting had been charged. As we think that only the fixed rate for smelting can be charged against the copper ores, the point loses force and the error will be corrected in account.

The Crown has, however, pleaded the provisions of sec. 37 of the *Crown Suits Act* 1898, which is as follows: "No person shall be entitled to prosecute or enforce any claim or demand under this Part of this Act" (*i.e.*, a claim against the Crown) "unless the petition setting forth the relief sought is filed within twelve months after the claim or demand has arisen." The only claims or demands that can be made against the Crown are those specified in sec. 33 of the Act, and the only one of these specified claims relevant to this case is a claim or demand founded upon and arising out of a cause of action for breach of contract entered into by or on behalf of the Government. It is therefore essential to ascertain when the claim or demand, which we take to mean the cause of action, arose. As to cases falling under the 1914 Regulations, clause 15, and, as to those falling under the 1915 Regulations, clause 17,

determine the accrual of the claim or demand. The right to payment depends upon accounts being rendered to the Government by the ore-suppliers and certified as correct by the ore-buyer appointed by the Minister. The accounts for the second, third and fourth campaigns were all rendered and certified by 9th July 1917; that of the fifth campaign was not rendered or certified until June 1918, whilst those of the remaining campaigns were rendered subsequent to the date of the petition (26th August 1919) or were not rendered at that date. As the petition was not filed until 26th August 1919, prosecution and enforcement of the claims or demands in respect of the first, second, third, fourth and fifth campaigns are prohibited by the Act.

The petitioners endeavoured to avoid this conclusion by two lines of reasoning. One was that the supply of ore, the smelting operations, and the realization of the metallic contents were a continuous and uninterrupted operation and transaction unbroken by any division of those operations or transactions into campaigns. The conduct of the parties is entirely opposed to the argument, and, moreover, the Regulations of 1914 contemplated the division of the operations into campaigns (see reg. 13). On the evidence we have no difficulty in holding that the operations were not continuous and uninterrupted, but broken advisedly into campaigns; and each campaign was treated and dealt with as an independent and separate operation and transaction. The other line of argument taken was that the officers of the Government had made fraudulent statements to the petitioners in relation to the realization charges, and had concealed that fraud from the petitioners until within twelve months of the filing of the petition. *Burnside* J. found this allegation of fact in favour of the petitioners. And it seems clear that the officers of the Government did prepare vouchers for the ore-suppliers to sign, containing statements as to realization charges which they knew were contrary to the facts. But it must be said, in their favour, that it is extremely unlikely the method adopted in preparing the vouchers was not reported to and known by the Minister in charge of the Department for the time being. The truth seems to be that the Minister and his officers were satisfied that, under the notice of August 1914 and the Regulations of July 1915, the Government was entitled to

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charge actual costs as opposed to the charges fixed by the Regulations. The accounts may have contained errors in other directions—for instance, charging the auriferous ores on the fixed rate and the copper ores on the basis of actual costs; but if the Minister and his officers had been right in their main contention, the petitioners would not have been damaged by the false statement, whatever view one takes of the moral aspect of the matter. In our opinion, however, the controversy as to the fraud of the Government officers is misconceived. The new mode of enforcing claims against the Crown given by Part III. of the *Crown Suits Act* is, by force of sec. 37, subject to a condition that the petition for relief be filed within twelve months after the claim has arisen. The function of sec. 37 is not to bar a cause of action, as in the case of the ordinary statutes of limitations, but to prevent a party resorting to the special statutory procedure unless he comes within the time specified. No Court has any right or power to act in opposition to the express words of the statute. The only relevance of the argument as to concealed fraud must, therefore, be in relation to the point of time at which the claim or demand arose or accrued.

It was suggested, on the authority of *Gibbs* v. *Guild* (1), that, in the case of concealed fraud, producing damage to the petitioners, the cause of action only arose or accrued upon the date of the discovery of the fraud or upon the date when the fraud, with reasonable diligence, might have been discovered. If the fraud is the cause of action, then the argument is useless to the petitioner, for such a cause of action is not within the ambit of sec. 33 of the *Crown Suits Act*. And if, as the petitioners must assert, the breach of contract relied upon in this case only arose from the discovery of the fraud, then *Gibbs* v. *Guild* is no authority for the argument. *Brett* L.J. puts the matter thus (2):—"But assuming that the *Statute of Limitations* would be binding, the Courts of equity, on doctrines of their own, sometimes applied, if other circumstances arose, a particular kind of equity. They did not construe the statute so as to give an equity, they adopted an equity which was quite independent of the statute, but which no doubt had an effect on the transaction notwithstanding the statute, that is to say, they said if the existence

(1) (1882) 9 Q.B.D., 59. (2) (1882) 9 Q.B.D., at pp. 68-69.

of the cause of action given by the defendant was fraudulently concealed by the defendant from the plaintiff until a period beyond six years, then they would not allow the defendant to prevent the plaintiff from supporting his right to his remedy on the ground that the statute was a bar. It seems to me that there is some little confusion in the expressions used in some cases as to the origin of the cause of action being a fraud. That is not the fraud which raised the equity ; *but if there was a cause of action, and if its existence was fraudulently concealed* from the plaintiff by the defendant who had given that cause of action, it was then that the *plaintiff's equity arose notwithstanding that his cause of action had arisen more than six years before.*" Again, in *Trotter* v. *Maclean* (1) *Fry* J. says that the limitation imposed by the statute of James " ought to apply to proceedings in this Court in respect of a trespass, *unless there be some equitable ground for repelling the application of the statute.*" Such an equitable ground has in many cases been found in fraud. See also *Barber* v. *Houston* (2) and *Bulli Coal Mining Co.* v. *Osborne* (3).

It is impossible, therefore, in this case to say that the cause of action for moneys due in respect of the first, second, third, fourth and fifth campaigns only accrued when the falsity of the statements relating to the realization charges was discovered. The Courts cannot repel the clear words of sec. 37, for to do so would be to give effect to an equity which is not provided for in sec. 33.

The result is that the judgment of *Burnside* J. must be reversed as to the first, second, third, fourth and fifth campaigns, and affirmed as to the sixth, seventh, eighth and ninth campaigns.

The learned counsel for the Crown, however, stated that the Crown had no intention of retaining money in excess of what it was entitled to under the Regulations, and would adjust the accounts on the basis of the true interpretation of the Regulations, subject only to this, that it was not restricted to a fixed charge of 3s. 6d. in respect of realization charges properly so described. And to this extension of the realization charge the petitioners did not object. But all this is a matter for voluntary adjustment between the parties, and

(1) (1879) 13 Ch. D., 574, at p. 584. (2) (1885) 18 L.R. Ir., 475.
(3) (1899) A.C., 351.

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is outside their legal rights and duties, which alone it is the province of the Court to consider.

On the question of costs the position is that the petitioners launched a case of fraud, which, though established in fact, is irrelevant to the questions decided. In point of law, their claim in respect of the first five campaigns cannot be sustained, but they succeed as to the remaining four campaigns. On the appeal to this Court each party has succeeded in part and failed in part. In these circumstances, we think justice will be done and complications in taxation avoided by ordering the respondent to pay one-third of the petitioners' costs in the Supreme Court up to and inclusive of the judgment of *Burnside* J., and leaving the parties to abide their own costs in this Court.

ISAACS J. There are three main questions for decision, and, as I view the case, these are the only questions necessary to be determined. They are (1) the effect of sec. 37 of the *Crown Suits Act* 1898 of Western Australia; (2) the construction of the Regulations of 30th June 1915, and (3) whether there has been a breach of the contract made on the basis of those Regulations. The question of fraud, which has occupied by far the greatest portion of the time and has involved the greatest expense of this litigation, is, in my opinion, entirely negligible from a strictly legal standpoint. At the same time, it cannot now be entirely ignored, for reasons I shall state later.

(1) *Sec.* 37.—The *Crown Suits Act* 1898 is in three parts, the first part is general, the second relates to proceedings by the Crown and the third deals with the enforcement of claims against the Crown. Sec. 22 is the enabling section. It enables any person who has any "claim or demand" against the Crown, which has arisen or accrued within Western Australia since the coming into operation of the Act, to set forth the particulars of his claim or demand as nearly as may be in a statement of claim in an action in the Supreme Court between subject and subject. But the all-important words in sec. 22 for the present purpose are in the opening phrase, "Subject to the provisions of this Part of this Act." One of those provisions is sec. 33, which in two ways restricts the nature

of the claims and demands which come within the ambit of sec. 22: one is that the claim or demand must be "founded upon and arise out of" (a) a breach of contract, or (b) a wrong or damage independent of contract done or suffered in connection with certain public works defined; the other is that "nothing herein contained shall be deemed to give a cause of action for breach of contract which would not have arisen in like circumstances before the passing of this Act." But even though the nature of the claim or demand answers the conditions of the Act, secs. 36 and 37 impose, by negative words, two further conditions. Sec. 36 is immaterial here. Sec. 37 is in these terms: "No person shall be entitled to prosecute or enforce any claim or demand under this Part of this Act unless the petition setting forth the relief sought is filed within twelve months after the claim or demand has arisen." The Crown contends that this section is imperative and unless its terms are complied with the action is incompetent. The respondents contend, and *Burnside* J. agreed with them, that fraudulent concealment of the cause of action extends the period indefinitely, until the fraud is discovered.

The Crown's view seems to me clearly right. The Act is of the class described by Sir *Barnes Peacock* for the Privy Council in *Farnell* v. *Bowman* (1). It is an Act described as establishing a process "opening a larger range of remedies to the subject" as distinguished from "that of amending procedure without any enlargement of remedy." The King with the advice of his Parliament of Western Australia grants to his subjects the greater facilities and the range of remedies and advantages of procedure which are detailed in the Act. But he limits his grant both as to the nature of the claim and the time in which it can be presented. These are the express conditions of Parliament. What right or power has any Court to disregard the condition as to time and by any rule or doctrine of its own add an alternative period in the case of fraud? And more especially in the case of fraud of some subordinate officers—not His Majesty's advisers. I frankly say I cannot understand the contention. It is sought to be supported on the ground that equity allows such an extension in similar circumstances. That argument

(1) (1887) 12 App. Cas., at p. 650.

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rests on two fallacies. One is as to the cases in which equity, in the presence of fraud, disregards the *Statute of Limitations*. This branch of the matter is so fully dealt with by cases of high authority —two of them of supreme authority for us—that I do little more than mention them. They show conclusively that, even if sec. 37 could be regarded as an ordinary section of limitations, the equity doctrine referred to would be inapplicable in this case. The most notable cases establishing this are *Bulli Coal Mining Co.* v. *Osborne* (1); *John* v. *Dodwell & Co.* (2); *Imperial Gas Light and Coke Co.* v. *London Gas Light Co.* (3); *Hunter* v. *Gibbons* (4); *Osgood* v. *Sunderland* (5), and the cases there cited.

The position may be shortly stated. Where a Court of equity finds that a legal right, for which it is asked to give a better remedy than is given at law, is barred by an Act of Parliament, it has no more power to remove or lower that bar than has a Court of law. *But where equity has created a new right founded on its own doctrines exclusively, and no Act bars that specific right, then equity is free.* It usually applies, from a sense of fitness, its own equitable doctrine of laches and adopts the measure of time which Parliament has indicated in analogous cases, but, when a greater equity caused by fraud arises, it modifies the practice it has itself created and gives play to the greater equity. The present case is entirely outside the ambit of that doctrine. But the fallacy goes even deeper. Sec. 37 differs fundamentally from our ordinary *Statute of Limitations*. The latter finds a person in possession of a right and a remedy. In some cases it abolishes the right, in others it simply bars the remedy. But in both cases it takes from the person something he already has independently of that statute. In *Hurrinath Chatterji* v. *Mohunt Mothoor Mohun Goswami* (6) Sir *Richard Couch* in the Privy Council said: "The intention of the law of limitation is, not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right." Sec. 37 is a condition of the gift in sec. 22, and unless that condition is satisfied the gift can never take effect. Non-compliance with its

(1) (1899) A.C., 351.
(2) (1918) A.C., 563, particularly at p. 573.
(3) (1854) 10 Ex., 39.
(4) (1856) 1 H. & N., 459.
(5) (1914) 111 L.T., 529.
(6) (1893) L.R. 20 Ind. App., 183, at p. 192.

terms is not a matter in bar of the claim as in the case of the *Statute of Limitations*: it is an objection which goes to the foundation of the procedure, and shows that the petitioner is not "*rectus in curiâ*."

Sec. 32 has been strongly relied on as supporting the respondents' argument on the ground that it applies (*inter alia*) the laws relating to limitations and that no *Statute of Limitations* is known fixing a less period than the period mentioned in sec. 37. But sec. 32, in my opinion, tells in the opposite direction. To begin with, its first words are "So far as they are applicable." If any of the many laws, rules, &c., mentioned in sec. 32 happen to be applicable, they are to be applied. But it does not by any means say that all or any are applicable. Sec. 37 is always applicable. A statute of limitations of less than twelve months may at any time be enacted, just as any other law of the classes mentioned may be enacted. And one plain instance of present application of the *Statute of Limitations* is possible. The Crown may by sec. 32 "set off" some claim, and by the same section the subject might, if the facts support it, set up the *Statute of Limitations* appropriate as between subject and subject. But in any case the Act cannot be supposed to be either self-contradictory or absurd. It would be both if effect were given to the argument of the respondents. Among the various statutes of limitations there are various periods of limitation, but if sec. 37 is intended to be a limitation of that nature and to fix a rule for all cases within the Act, it necessarily conflicts with all of them. How can it and they be supposed to apply at the same time? For this reason sec. 32 confirms the view I take of sec. 37.

I hold a clear opinion that sec. 37, where it applies, cannot be extended by fraud. But the question is does it apply in this case; in other words, did the claim or demand arise more than twelve months before the filing of the petition? Respondents contend it did not, and that it is continuous. The facts demonstrate otherwise. In the original regulations provision was made (reg. 13) for "campaigns." The practice has always been followed. This segregation of "campaigns" was absolutely necessary to the existence of the mines, for an indefinite prolongation of the date of final payment would have been utterly disastrous. At all events by common consent, if nothing else, a day was adopted when "final payment"

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for each campaign respectively was made and received, and vouchers signed, and, as far as both parties then thought, that particular campaign was completely settled for. It was like a distinct and separate contract of sale, delivery on the one side and payment on the other being definitely and assumedly final. The dates of the vouchers and the evidence as to the first five campaigns establish that the "claim or demand" as to them arose more than twelve months before the filing of the petition. The action is consequently, as far as it relates to them, incompetent by reason of sec. 37. Fraud therefore is strictly speaking immaterial. But there are reasons for referring to it. The public administration of an Australian State is concerned. It should be made clear at once that nothing is imputed to any Minister of the Crown. Subordinate officers alone are involved in the charge of fraud. *Burnside* J., who tried the case and heard the witnesses, shrank from imputing to anyone moral fraud as known at common law. He found that false statements had been made intentionally to mislead, but he rested his finding of fraud on equitable considerations of duty to give true information. His language is very much that of the head-note to *Nocton* v. *Ashburton* (1). I have carefully considered his Honor's finding; and, although it is difficult to reconcile with an absence of moral fraud the intentional misleading he finds, I think I apprehend what he means. That Shepherd, the manager of the State Smelting Works, deliberately caused to be set down in the final vouchers, as for actual expenses of realization, as distinguished from expenses of smelting, a sum which he knew was in excess of the actual expenses of realization is beyond doubt. That he did so to mislead the respondents into thinking they were true is equally undoubted. That Montgomery, the State Engineer, though not originating this, yet permitted this course to be adopted is also undoubted. And that the producers of ore accepted the figures as correct and took the balance on that basis is plain. Such conduct is indefensible, and more particularly from the high standpoint of public administration. But one thing it is fair to add. In my opinion, neither Shepherd nor Montgomery had any intention to deprive the respondents of a single penny to which they were, in the opinion of these officers, strictly entitled. Shepherd pressed

(1) (1914) A.C., 932.

upon Montgomery the adoption of the misleading figures, and Montgomery yielded, and passed on the suggestion without objection from him. But no higher officer can fairly be charged with complicity. The Under-Secretary and the Secretary might perhaps by deeper scrutiny have detected the objectionable character of the proposals. But when so much is routine and dependent on the special and technical knowledge of branch officers, and so little of the details of such a contract as the present is personally known to the secretarial officers of a great Department, it would be preposterous on such materials as are before us to impute any bad faith to the Secretary or Under-Secretary, and, as I have said, the Minister is unchallenged. The Minister had the papers before him just as the Secretary had, and the Secretary had less responsibility. Neither of them can be brought into this accusation. What, then, was the object of Shepherd in putting forward, and in Montgomery in permitting him to put forward, these false figures? That appears to me to be this:—The State Smelting Works, if confined to the regulation charges for smelting, would show a loss, and, though it was believed by Shepherd and Montgomery that the notice of August 1914, properly read, covered all actual expenses of smelting, they thought it was very imperfectly and inconclusively worded to carry out that result. They therefore, and particularly Shepherd, arranged in the final vouchers the total actual costs of smelting and realization, so that while not exceeding them in the whole, part of the actual smelting costs was represented as part of the actual realization costs, leaving the claim in the voucher for smelting costs to stand at the schedule rates. Though no more money was deducted than Shepherd and Montgomery believed the vendors were liable to bear for total expenses, the course adopted was wholly improper. It deceived and was intended to deceive the vendors. It led them to think that the Government still regarded the regulation smelting charges as binding and complete and that the actual costs of realization, as distinguished from smelting, were higher than they really were. It was intended to induce the vendors to believe they had no reason to challenge the Government's construction of the August notice, and the inducement succeeded. If the figures had been truthfully arranged, the vendors could, and probably would, have there and then challenged the

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deduction and, as it appears, with success. It was fraudulent notwithstanding the motive (see per Lord *Blackburn* in *Smith* v. *Chadwick* (1)). Whether in law this is fraud which can be imputed legally to the Crown, I do not find it necessary to decide. I will add only two observations. I do not think that the subsequent events, such as the deputations and balance-sheets, can be taken from any standpoint as sufficiently discharging the obligation of displacing the false belief intentionally created by the untrue costs of realization. Those events were complicated, confused and technical, and, though they went some distance, on the whole do not amount to such clear admission of the position as fair dealing required. The essential of a sufficient disclosure is that either it should in fact successfully convey to the mind of the party to whom the misrepresentation was made that it was a misrepresentation and what the truth was in substance, or the disclosure should be such as is calculated to convey that information to a person in his position (see per *Lindley* L.J. in *Arnison* v. *Smith* (2)). That is the first observation. The second observation is this : Governments may be expected, if not as a matter of law, at any rate of conduct, in litigious matters to set a very high standard. In the course of the argument I asked learned counsel for the Crown what course the Crown would adopt with respect to the first five campaigns if the Court took the view that the final payments for those campaigns were less than the contractual obligations between the parties justified, and yet that sec. 37 was fatal to the claim. The answer was to the effect that the Government would in that case voluntarily apply to the first five campaigns the same rule as the Court applied to the later campaigns, subject to not treating the 3s. 6d. per unit as fixed costs of realization.

(2) *Regulations of* 1915.—I pass now to the terms of the Regulations of 1915. They were the outcome of repeated attempts to place the relations of the Government with the mine-owners on a proper basis. The Regulations of February 1914 were rendered impracticable by the War. And so on 29th August 1914, within a month from the beginning of the War, a notice was put up which, as I read it, intended in respect of all future ore to modify only the terms of final settlement and to leave the schedule charges for smelting ore to obtain matte as

(1) (1884) 9 App. Cas., 187, at p. 201. (2) (1889) 41 Ch. D., 348, at p. 373.

provided by the Regulations. I read the notice in this respect as entitling the Government to actual expenses of conversion of matte to blister and to electrolytic copper, and of all post-smelting operations, that is, of realizing the product once the matte was obtained. This becomes, I think, evident when it is observed that in the Regulations of February 1914 the price is to be a conventional price, namely, the London price as appearing in a Western Australian paper, and no mention of any expenses of realization except the 3s. 6d. per unit. By reg. 13 these were to be the only "deductions and charges" from the conventional price. Obviously the second part of the August notice trenched to some extent on reg. 11 as to realization charges, but I do not think that the words "placing such product on the market and selling it" in the notice went any further or displaced that provision for smelting charges.

The Regulations of 1915 raise a difficulty by repeating in reg. 11 the realization charge of 3s. 6d. per unit of copper, &c. The effect, strictly speaking, is that, as we must take the wording as it stands, the Government would be restricted to the smelting charge of 30s. per ton to matte and the charge for realizing the product in the form of matte, leaving further charges, as of conversion into blister and electrolytic copper, to fall under the general terms of reg. 16. The contention of the Crown that regs. 11 and 15 are for interim purposes only, namely, for advances, cannot be sustained. It is opposed to the wording of the Regulations and to their general purpose. Besides the provisions of reg. 11 already mentioned, reg. 15 provides for advances "in part payment" towards purchase of the ores—up to 90 per cent. of the value of the ore—and certain prices are stated for copper, gold and silver respectively, in order to ascertain their value for that purpose. These prices, as we can well understand and as is expressly stated in the next regulation, are only assumed prices. Reg. 16 is the ultimate form of the statement of final settlement—the "marketable products" of smelting ore to be sold by the Minister. It is not that "matte" is to be sold, but "marketable products," which may be matte or blister or electrolytic copper. Any balances remaining from the sale of such products "after payment of all the expenses incurred by the Government on account of the purchase, receiving, and treatment of such ore or material, and the

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shipment and selling of the products therefrom" will be paid "*on final completion of the purchase*" to the sellers, &c. It is the contention of the Crown that when the stage of final settlement is reached, all the previous dealings in respect of the ore are disregarded. Regulation charges, it is said, are nothing; advances are loans, and meant to be debited as such with interest, and all the expenses in fact incurred by the Government from first to last are to be taken into account and charged against the proceeds of sale. That is not the interpretation as I read the Regulations. The words quoted are in their natural sense opposed to it. The "part payment" by way of advances is final and not a loan. It is an advanced payment *pro tanto*, and as it is made before the Government receives the proceeds of the foreign sale, interest is charged, but that is to equalize accounts on the "final completion of the purchase" as if payment took place then. There would otherwise be no meaning in "final." There is nothing which says that the charges in the 11th regulation are to be upset. The expression "payment of all the expenses incurred by the Government" from purchase to date, is not at all inconsistent with a collateral provision in reg. 11 that some of those expenses shall be fixed at a certain time or rate; the point in the phrase quoted is "after payment" of the expenses, whatever they may be. It is the authority to deduct expenses that is important, so as to get at the *net* sum for distribution. The whole difficulty arises from the fact that the Government in its laudable desire to assist the mine-owners, to smelt their ore, and to devise a means of getting them money results as soon as possible and long before the mine-owners could otherwise get them, has combined the statutory authority to treat the ore and make a charge for its statutory services, with a further step of providing the money. It has become the purchaser as well as the smelter, the smelting charges being fixed by regulation and having the force of law; and it is not to be supposed, without very express words, that they have been abandoned or supplanted by rates not authorized by law. The repetition of reg. 11 is itself against such a supposition. In my opinion the joint effect of regs. 11 and 16 is as I have said. But the respondents by their counsel have informed the Court that in view of their mode of dealing with the Crown, and the attitude they have

always taken up, they will not insist on the realization charges being restricted at all, and they consent to full realization expenses being charged, after the smelting charge of 30s. is provided for.

On this branch there is still the method of distribution of the net balance to be considered. The campaign contemplated is a pooling of the ore of various owners, with a joint smelting and a joint realization, leaving the allocation of values to be proceeded with when the net results are obtained. The process of allocation is substantially this :—From the gross proceeds deduct the charges and expenses, and the net total sum is to be distributed among the vendors. The charge for smelting is fixed and determined by the net tonnage of each vendor's ore. The other expenses are common (with the qualifications referred to in regs. 11, 12 and 13, and involved in the judgment of the Chief Justice and my brother *Starke*), and are apportionable rateably according to the respective money values of each vendor's products, calculated for this purpose at the assumed values which were employed for advance part payments. The remainder is what is owing to each vendor.

(4) *The Breach.*—The contract has been broken in two ways : (a) excess smelting charges have been made ; (b) discriminatory realization charges have been allocated. It was said that the latter breach has caused no injury but rather an advantage to the copper vendors, because it was accompanied by a lower price for gold than the contract warranted. That, however, the Court must leave to be determined by an account.

I agree with what the Chief Justice and my brother *Starke* have said as to not entertaining at this stage the objection that ores properly auriferous ores as distinguished from auriferous copper ores had been included.

I agree with the formal order proposed.

Appeal allowed. Order appealed from varied as follows :—Strike out pars. (a), (b), (c) and (d), and substitute the following :—" (a) An account to be taken by the Master of the several lots of ore delivered to the State Smelting Works and treated in the sixth,

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seventh, eighth and ninth campaigns, and of the moneys realized in each of such campaigns and of the deductions, charges and expenses to be debited against the moneys so realized in each such campaign. (b) Such account to be taken on the footing of the Regulations made on 30th June 1915. *(c) In taking the said accounts the petitioners to be charged with* (i.) *the sum of* 30*s. per ton (net weight) for receiving, sampling and smelting the ore to matte, and the charge for rental and the charges for excess silica, sintering and screening allowed by the Regulations if the petitioners' ores contained excess silica or were sintered or screened*; (ii.) *by consent of the petitioners, the actual expenses of realizing the metallic values in the said ore, including conversion to blister or electrolytic copper and the selling thereof.*" *Strike out the order that the question of costs be reserved, and substitute*: "*Order that the respondent do pay to the petitioners one-third of their costs of this petition up to and including the date of the judgment of Burnside J. dated 12th August* 1921." *Otherwise the said order affirmed. The parties to abide their own costs of this appeal.*

Solicitor for the appellant, *F. L. Stow*, Crown Solicitor for Western Australia, by *Lawson & Jardine*.

Solicitors for the respondents, *Stone, James & Co.*, Perth, by *Blake & Riggall*.

B.L.