[HIGH COURT OF AUSTRALIA.]

MERRI CREEK QUARRY PROPRIETARY LIMITED . . . . . Appellant;
Defendant,

AND

FOLETTA . . . . . Respondent.
Informant,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1951.

MELBOURNE, *March* 13;

SYDNEY, *April* 16.

Latham C.J., Dixon, McTiernan, Williams and Webb JJ.

Local Government (Vict.)—By-law—Prohibition of quarrying operations within municipality unless with consent of council—Exception of operations in connection with works commenced before a certain date—Quarry existing before that date extended thereafter to adjoining land—Local Government Act 1928 (*No.* 3720) (*Vict.*), *s.* 197 (1) (*xviii*).*

A municipal by-law prohibited quarrying operations within the municipality except with the consent of the council, but it was subject to a proviso that it should not apply to operations in connection with works commenced before 4th January 1911. After that date the defendant acquired from a quarry-master land in the municipality on which quarrying and work associated therewith had been carried on regularly from a time prior to that date and also adjoining land on which there had been no quarrying prior to 4th January 1911. The adjoining land had been the property of a stranger until, at a time after 4th January 1911, the defendant's predecessor in title purchased it and extended the face of the quarry into it. The defendant, without the

* The *Local Government Act* 1928 (Vict.) provided, by s. 197 (1), that "by-laws may be made for any municipality . . . for the purposes following . . . (xviii) Prohibiting regulating or controlling quarrying or blasting operations, provided that any by-law prohibiting such operations . . . shall not apply to any such operations in connection with works commenced before" 4th January 1911. (See now *Local Government Act* 1946 (No. 5203), s. 197 (1) (xxxv) (*a*), (5) (*a*).)

H. C. OF A. 1951.

MERRI CREEK QUARRY PTY. LTD. v. FOLETTA.

consent of the council, continued the quarrying operations on the adjoining land.

Held that the quarrying operations on the adjoining land were in connection with the works which had been commenced on the former block of land before 4th January 1911 and the defendant, therefore, had not contravened the by-law.

Decision of the Supreme Court of Victoria (*Barry* J.) reversed.

APPEAL from the Supreme Court of Victoria.

In a court of petty sessions of Victoria Merri Creek Quarry Pty. Ltd. was charged, on the information of Harold Walter Foletta, that between 1st September 1949 and 28th April 1950 it carried on quarrying operations on land in the city of Brunswick without the written consent of the council of the municipality of Brunswick contrary to a by-law of the municipality.

The by-law, which was made under s. 197 (1) (xviii) of the *Local Government Act* 1928 (Vict.), provided, so far as material: "Except with the written consent of the council no person shall within the city of Brunswick carry on any quarrying . . . operations provided that the provisions of this paragraph shall not apply to quarrying . . . operations in connection with . . . works commenced before" 4th January 1911.

It appeared that the defendant company was incorporated under the law of Victoria in 1927. It acquired title to a block of land within the municipality of Brunswick on which its predecessors in title had been regularly conducting quarrying operations and work associated therewith from a date prior to 4th January 1911. It also acquired title to an adjoining block (known as Robb's paddock) which until a date subsequent to 4th January 1911 was in the ownership of strangers and was not being quarried. The face of the quarry was extended into Robb's paddock, and the defendant was conducting quarrying operations there at the time charged in the information. It had not obtained the consent of the council to those operations, and they were relied on by the informant as constituting a separate undertaking, commenced since 4th January 1911.

The information was heard by a court constituted by a stipendiary magistrate, who dismissed the information. On an order to review this decision obtained by the informant in the Supreme Court of Victoria under Part V., Div. 3, of the *Justices Act* 1928 (Vict.) *Barry* J. made the order absolute.

From this decision the defendant appealed, by special leave, to the High Court.

A. D. G. Adam K.C. (with him *S. H. Z. Woinarski*), for the appellant. The operations in Robb's paddock were " in connection with " the works commenced on the other block of land. *Barry* J. overlooked the significance of the word " commenced " ; it is not to be read down by any notion of area in relation to proprietary rights. His Honour read the words " works commenced " as if they meant the works as they existed in 1911 by relation to the land then owned by those conducting the operations. That is wrong. " Works " means the whole enterprise of quarrying—of working a gradually expanding pit. Lack of title in the first instance to land over which the pit ultimately expands is immaterial. The lack of title would, no doubt, be an obstacle to expansion, but, that obstacle being surmounted, as it was in this case, the extension of the old quarry pit is merely a continuance of the old enterprise. *Dawson* v. *Hoffmann Brick & Potteries Ltd.* (1), whether or not it was rightly decided, has no bearing on this case.

D. I. Menzies K.C. (with him *G. B. Gunson*), for the respondent. The word " works " means, not the quarrying operations in themselves, but something of which those operations are in aid. The conception of the works is necessarily limited to the land over which quarrying rights existed at the relevant date. If this was not so, there would be no way of limiting quarrying operations, wherever conducted and whenever commenced, so long as they were conducted in conjunction with a quarrying enterprise which began, in however small a way, before 4th January 1911. It seems unlikely that the legislature intended to provide for such an extensive exception by the words appearing in the proviso to s. 197 (1) (xviii) of the *Local Government Act* 1928, and the words of the proviso to the by-law, which follow those of the proviso to s. 197 (1) (xviii), should be construed accordingly. The present submission accords with the views of *Mann* J. (as he then was) in *Dawson's Case* (2), which, it is submitted, are correct and have been rightly applied by *Barry* J. in the present case.

A. D. G. Adam K.C., in reply.

Cur. adv. vult.

(1) (1924) V.L.R. 208.

(2) (1924) V.L.R. 208.

H. C. OF A. 1951.

MERRI CREEK QUARRY PTY. LTD. v. FOLETTA.

April 16.

The following written judgments were delivered :—

LATHAM C.J. Appeal by special leave from an order of the Supreme Court of Victoria (*Barry* J.) directing a court of petty sessions to convict the appellant company of an offence against a by-law of the City of Brunswick. The by-law, so far as relevant, is in the following terms :—" Except with the written consent of the Council no person shall within the City of Brunswick carry on any quarrying or blasting operations provided that the provisions of this paragraph shall not apply to quarrying or blasting operations in connection with—(*a*) works commenced before the 4th day of January 1911 and (*b*) foundations for buildings." This by-law was made under the powers conferred upon the council by s. 197 (1) (xviii) of the *Local Government Act* 1928, which provided that by-laws might be made for the following purposes :— " (xviii) Prohibiting regulating or controlling quarrying or blasting operations, provided that any by-law prohibiting such operations shall not be made without the approval of the Governor in Council, and shall not apply to any such operations in connection with works commenced before the fourth day of January One thousand nine hundred and eleven."

It was proved before the court of petty sessions that the company carried on quarrying operations on certain land at Brunswick without the written consent of the council. The company contended that the quarrying operations were operations in connection with works commenced before 4th January 1911.

The quarry was in operation and it was being worked before 4th January 1911. At that date the quarry-owners owned all the land which was then being exploited for quarrying purposes.

On 8th October 1927 the quarry-owners acquired adjoining land. The quarry has been extended to that land and the offence of which the company was convicted was carrying on quarrying operations upon that land.

It was held by the learned judge that the object of the proviso in the by-law was to preserve the rights that were in course of exercise actually or prospectively on the date mentioned. He was of opinion that what was protected was only what could lawfully have been undertaken at the specified date, and, as the quarry-owners did not own the adjoining land on that date, they could not lawfully have carried on operations on that land, and therefore such operations were not protected by the proviso. His Honour said that the proviso protected not only what was being done actually on 4th January 1911, but also " the potentialities of the

undertaking as it then stood". But those potentialities were regarded as limited by the title of the then owners.

The meaning of the word "works" will vary with the context: see *Dawson* v. *Hoffmann Brick & Potteries Ltd.* (1). The proviso to the by-law protects quarrying operations in connection with works commenced before a specified date. The intention of this proviso is to make it unnecessary to obtain the consent of the council for the continuance of such operations. It therefore contemplates the development and extension of such operations in the only possible manner in the case of quarrying, that is downwards or laterally. The development of the quarry involves the enlargement of the quarry hole in one or both of these directions —that is what the by-law cannot interfere with if the "works were commenced" before 4th January 1911. Such works are to be allowed to continue. In the present case the extension of the quarry into adjoining land has not destroyed the identity of the quarry, which, notwithstanding the increasing excavation as the operations proceed, is still the same quarry. On any other view any excavation of stone made after 4th January 1911 would change the identity of the works because the quarry hole would, to the extent of the further excavation, be a new quarry hole. Such an interpretation would entirely deprive the proviso in the by-law of any effect. Thus the "works" which are now in operation, consisting of the quarry hole and the associated plant, are works which were commenced before 4th January 1911.

The identification of works in this manner leaves no room in my opinion for introducing a limitation based on ownership of land. The fact that the excavation has been extended to land not owned by the proprietor of the original quarry before 4th January 1911 does not displace the conclusion that in the relevant sense the present quarry is the same "works" as the original quarry. The terms of the proviso to the by-law—reproducing the terms of s. 197 (1) (xviii) of the *Local Government Act* 1928—are intelligible only upon the hypothesis that it is intended to preserve power to extend an existing quarry (though not to open a new quarry) without the consent of the council. The words of the by-law do not in my opinion provide any ground for limiting the operation of the proviso by confining it to operations conducted on land of which a person now engaged in quarrying was the owner before 1911. Before 1911 a quarry-master might have been a lessee with a limited term and a right to excavate stone. If his

(1) (1924) V.L.R. 208.

H. C. OF A. 1951.

MERRI CREEK QUARRY PTY. LTD. v. FOLETTA.

Latham C.J.

lease were extended, surely the " works " which he was conducting would be the same works. If he purchased the reversion and became the owner of the land the works would also be the same. If he sold the quarry to another person, the works would still be the same. If a quarry can fairly be described as a quarry which was commenced before 4th January 1911 the conditions of the proviso to the by-law are satisfied.

I am therefore of opinion that the appeal should be allowed, the order of the Supreme Court set aside and the order of the magistrate restored.

DIXON J. The question for decision upon this appeal is whether certain quarrying and blasting operations carried out by the appellant are quarrying and blasting operations in connection with works commenced before the fourth day of January 1911. The issue arises under by-law No. 126 of the city of Brunswick made on 10th May 1943 in pursuance of s. 197 (1) (xviii) of the *Local Government Act* 1928 of the State of Victoria. Section 197 is now replaced by s. 197 of the *Local Government Act* 1946. But par. (xviii) empowered the council of the municipality to make by-laws for the municipality for the purpose of prohibiting, regulating or controlling quarrying or blasting operations, provided that any by-law prohibiting such operations should not (among other things) apply to any such operations in connection with works commenced before the fourth of January 1911. The by-law provides that except with the written consent of the council no person shall within the city of Brunswick carry on any quarrying or blasting operations, and then by a proviso it goes on to exclude in terms quarrying and blasting operations in connection with works commenced before the fourth day of January 1911.

The situation of fact is simple. Before the year 1911 the appellant company's predecessors in title opened a quarry upon land of which apparently they were owners in fee simple. Upon this site quarrying operations including blasting operations were regularly carried on. As stone was won the excavation grew and the face or faces were advanced towards the boundaries of the land. Stone crushing was done upon the site and there were some buildings. On the west at the southern end of the quarry was a contiguous piece of land of the same mineral character. It was, however, owned by strangers. Some years after 1911 the appellant company's predecessors in title or one of them acquired title to this land. At or about the same time the westerly face of their

quarry was advanced across the boundary line. The enlargement of the quarry went on in consequence of their workings at the western face. Six or seven years later still, the appellant company was formed and the undertaking, including both parcels of land, was transferred to it. That is over twenty years ago and the western face of the southerly portion of the quarry is now some considerable distance inside the boundary of the second parcel of land, the parcel contiguous to that forming the original site. The question upon these facts is whether in working that part of the west face and blasting stone from it, the appellant company is carrying on quarrying or blasting operations in connection with works commenced before 4th January 1911. It has been decided that it is not doing so because the land upon which the face now is did not form part of the undertaking as it existed at the beginning of 1911. Neither the land itself nor any right to win stone upon it belonged to the enterprise. To qualify for protection from the application of the by-law the present quarrying and blasting operations must be " in connection with works commenced " before 1911 and it was said that to identify the works so commenced you must look at the undertaking enterprise, concern or establishment as it would be conceived to exist in 1911 with its potentialities. You must be able to say that the present are operations in connection with that undertaking, enterprise, concern or establishment. The identification, so it is said, means looking not only at objective physical facts but the rights and claims forming part of the undertaking.

This view of the matter appears to me to import a restriction upon the simple word " works " which is not warranted by the context or subject matter. It is not a word of fixed connotation and besides being elastic it is somewhat indefinite. The only sure guide to the decision of a question like the present is to be found in the actual language and context of the provision itself: per *Greene* M.R., *Attorney-General* v. *Rochdale Canal Company* (1). But it is not necessary to attempt an exhaustive statement of the meaning of the word in the context of the proviso to par. (xviii) of s. 197 (1) transferred as the proviso is into the by-law. It appears to me to be enough that the workings at the west face at the south end of the quarry had been commenced long before 1911 and that work on that face continually went on progressively advancing the face to its present position. The workings thus sustained appear to me necessarily to form part of an ever enlarging " works ".

(1) (1939) 55 T.L.R. 754, at p. 755.

H. C. OF A. 1951.

MERRI CREEK QUARRY PTY. LTD. v. FOLETTA.

Dixon J.

The very expression " works commenced " implies continuance or the possibility of continuance and as quarrying is the subject that means an enlargement of the dimensions of the quarry.

Nothing in the form of expression suggests that the boundaries of the site or sites whence stone might be lawfully won by the proprietors of the undertaking fix the identity of the works so that workings outside the site or sites must be " new works ". The acquisition of rights over contiguous sites is a " potentiality " of an undertaking, if potentiality enters into the test. But I prefer to say simply that the existing " works " expanded or advanced naturally without any loss of identity and that the blasting and quarrying operations are in connection with them.

In my opinion the appeal should be allowed with costs, the order absolute made in the Supreme Court should be discharged and in lieu thereof an order should be made discharging the order nisi with costs.

McTIERNAN J. I agree that the appeal should be allowed.

The appellant was guilty of the offences of carrying on quarrying and blasting operations within the area of the municipality of Brunswick in contravention of the council's By-law, No. 126, unless the operations came within the proviso to the by-law. The by-law says that, except with the written consent of the council, no person shall within the municipality carry on quarrying or blasting operations, but further says that the restriction does not apply to " quarrying or blasting operations in connection with (*a*) works commenced before the 4th day of January 1911 and (*b*) foundations for buildings."

It was necessary for the appellant to show, in order to bring itself within the proviso to the by-law, that its blasting and quarrying operations were in connection with works commenced before 4th January 1911. The only two matters which it was necessary for it to establish in order to get the benefit of the proviso were that " works " were commenced, whether by itself or some other person, before that date, and the blasting and quarrying operations, in respect of which it was prosecuted, were carried on in connection with those works.

The evidence proves that the appellant was carrying on the blasting and quarrying operations in order to dig or win stone from a quarry that had been opened before 4th January 1911. The word " works " in its ordinary sense extends to a quarry which, like the appellant's, is an establishment in which labour is employed and a number of interrelated industrial operations are carried on. The

by-law cannot be so narrowed by construction as to exclude this quarry from the benefit of the saving proviso. In the case of a quarry which is a " works " and which was " commenced before 4th day of January 1911 ", any quarrying and blasting operations which are done in connection with the quarry are free from the restrictions imposed by the by-law. In the present case the excavation forming the quarry proper has been extended by the appellant beyond the boundaries of the land upon which it was opened, to adjoining land, and the quarrying and blasting operations out of which the case arises were there carried on. It is argued that these operations are subject to the restriction imposed by the by-law because when the excavation crossed the boundaries it became a different works from the quarry commenced before 4th January 1911, for the reason that before that date those who worked the quarry had no right to extend it beyond those boundaries. The workings which the appellant has made across the boundaries into the adjoining land are the development of the quarry commenced before 4th January 1911 and the whole excavation is in a practical sense that quarry. The by-law contains no language showing that its intention is to free from the restrictions which it imposes, only quarrying and blasting operations within the boundaries marked out by the title of the land on which the works in connection with which the operations are carried on or commenced. The terms of the by-law are " the provisions of this paragraph shall not apply to quarrying and blasting operations in connection with works commenced before the 4th day of January 1911 ". The argument for the prosecutor seeks to imply a limitation in the proviso whereby a works, which is a quarry commenced before 4th January 1911, would be made subject to a restriction of which the proviso seems to intend that any such works should be free; for the development of a quarry involves its extension outwards by quarrying and blasting.

The fact that the operations for which the appellant was prosecuted were carried on beyond the boundary of the land on which the quarry was started does not deprive them of the character of operations carried on in connection with works commenced on that land. The appellant was entitled to the benefit of the exception in the by-law because there is a plain physical connection between those operations and a quarry, that is to say " works commenced before the 4th day of January 1911 ".

WILLIAMS J. I agree with the reasons of *Dixon* J. and with the order he proposes.

H. C. OF A. 1951.

MERRI CREEK QUARRY PTY. LTD. v. FOLETTA.

WEBB J. I agree with the reasons for judgment of *Dixon* J. and with the order his Honour proposes and have nothing to add.

Appeal allowed with costs. Order of Supreme Court set aside. In lieu thereof order that order nisi be discharged with costs. Order of magistrate restored.

Solicitors for the appellant, *Williams & Matthews.*
Solicitors for the respondent, *W. E. Pearcey & Ivey.*

E. F. H.