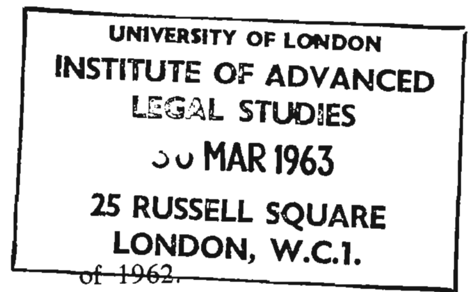
UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
30 MAR 1963
25 RUSSELL SQUARE
LONDON, W.C.1.

In The Privy Council No. of 1962.

68294

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES IN ITS EQUITABLE JURISDICTION

Between

AUSTRALIAN BLUE METAL LIMITED - - - (Plaintiff) Appellant

and

ROBERT FRANK HUGHES CLARENCE VIVIAN HUGHES FREDERICK CHARLES HUGHES VICTOR RAYMOND HUGHES LOGAN HUNTER CALDWELL MARGARET FERGUSON CALDWELL LINDSAY GEORGE REGAN and NORMAN VIVIAN REGAN - - (Defendants) Respondents

AND BY AMENDMENT

Between

AUSTRALIAN BLUE METAL LIMITED - - - (Plaintiff) Appellant

and

ROBERT FRANK HUGHES CLARENCE VIVIAN HUGHES FREDERICK CHARLES HUGHES VICTOR RAYMOND HUGHES MARGARET FERGUSON CALDWELL LINDSAY GEORGE REGAN NORMAN VIVIAN REGAN and STEELE HUNTER CALDWELL - - - - - - - - (Defendants) Respondents

AND BY AMENDMENT

Between

AUSTRALIAN BLUE METAL LIMITED - - - (Plaintiff) Appellant

and

ROBERT FRANK HUGHES CLARENCE VIVIAN HUGHES VIOLET JEAN FREEMAN IVY ALMA RICHARDS VICTOR RAYMOND HUGHES MARGARET FERGUSON CALDWELL LINDSAY GEORGE REGAN NORMAN VIVIAN REGAN and STEELE HUNTER CALDWELL - (Defendants) Respondents

CASE FOR THE APPELLANT

RECORD:
p. 377.

1. This is an appeal by leave of the Supreme Court of New South Wales in its Equitable Jurisdiction from a Decree of that Court made on 11th December 1961, dismissing with costs a suit instituted by the Appellant as Plaintiff for an injunction and other relief in aid of rights claimed by the Appellant under an agreement in writing for the mining of magnesite dated 14th June 1957.

p. 415.

The hearing of the suit before the Honourable Mr. Justice Jacobs occupied sixteen days in February and March 1961; judgment was reserved on 16th March 1961.

2. The circumstances out of which this Appeal arises and relevant to the contentions to be urged by the Appellant are traversed in paragraphs 3 to 68 hereof. 10

The contentions to be urged by the Appellant and the reasons of appeal are set forth in paragraphs 69 to 90.

3. In the year 1923 two brothers, George Wigham Caldwell and Logan Hunter Caldwell, both of whom were graziers, became the owners in fee as tenants in common of about 1340 acres of land (hereinafter called the "grazing lands") at Thuddungra, near Young, a small township in the south-west of New South Wales, distant about 243 miles by road from Sydney. 20

p. 382.
Exhibit A.U.

4. Their title to the land stemmed from a Crown Grant made in 1907 under the provisions of the Crown Lands Act, 1884 (as amended) to a predecessor in title; this grant reserved it to the Sovereign, His Heirs and Successors, "all minerals" which the said land contained.

Magnesite is not included in this reservation of minerals and it was not included in the definition of "Minerals" either in Section 4 of the said Crown Lands Act 1884 (as amended) or in Section 5 of the Crown Lands Consolidation Act 1913 (as amended); nor has it ever been declared to be a mineral within the meaning of either Act 30 by proclamation of the Governor published in the Gazette. See **Commonwealth v. Hazeldell** (25 C.L.R. 552); ((1921) 2 A.C. 373).

5. Some time prior to June 1936, Joseph Peter Hughes a farmer of Young, desiring to mine for magnesite and chromite on a small section of the grazing lands, made application under Part IV, Division 4A, of the Mining Act 1906-1935 (hereinafter called the "Mining Act") for, and was granted, Authority to Enter for that purpose upon a specified area of a little over 55 acres. On receipt of his Authority

to Enter the said Joseph Peter Hughes made application under the provisions of Sec. 70B of the Mining Act for a lease of the said area for twenty years.

6. An authority to enter upon privately owned lands and to search there for minerals not reserved to the Crown can be granted under Section 70A of the Mining Act by a Mining Warden to any holder of a Miner's Right. Under Section 70B, the holder of such an authority may make application for a lease of the land to which the authority relates. The Governor may grant such a lease for a term not exceeding twenty years, which, however, may be renewed 30 as provided in Section 62. The Lessee must pay a ground rent to the owner (see Section 64) and is also required by Section 70C to pay to the Minister of Mines on behalf of the owner of the minerals a royalty calculated by reference to the gross value of minerals won.

7. Division 4A was introduced into the Mining Act by Act No. 14 of 1918, which came into force on 18th December 1918.

It seems to have been introduced as swiftly as possible to authorise subjects to mine upon private lands for minerals which had not been reserved to the Crown, no such authority ever having been, in the opinion of the High Court in **The Commonwealth v. Hazeldell Ltd.** 40 (25 C.L.R. 552 at p. 562), intended to be conferred by the Mining Act 1906 or by the earlier Acts it repealed.

8. On 15th June 1936, some fifteen months before the issue to him of a mining lease of the said area, Joseph Peter Hughes and three of his sons, Frederick Charles, Victor Raymond and Robert Frank, entered into a partnership agreement to mine on that area for magnesite and chrome with the said brothers George Wigham Caldwell and Logan Hunter Caldwell.

RECORD: p. 392.

The agreement was evidenced by an informal document in the 10 handwriting of Logan Hunter Caldwell.

9. It is common ground that these partners thereafter carried on a mining business under the firm name "Hughes and Caldwell" for nearly ten years until the death of the said Joseph Peter Hughes on 17th January 1946.

p. 350.

10. His Honour found that for some years the mine was actually being worked by two of the partners, Robert Frank Hughes and Victor Raymond Hughes, who were being paid fixed rates per ton for winning and carting magnesite; that the magnesite was sold mainly in the name of Joseph Peter Hughes; that the proceeds of sale were 20 paid into the partnership bank account; and that Logan Hunter Caldwell drew and signed cheques in payment of the outgoings and in distribution of the profits.

RECORD:
p. 384.
Exhibit A.

11. On 2nd September 1937, a mining lease of the said area (therein and hereinafter described as P.M.L. 1) issued to the said Joseph Peter Hughes. It was a lease for 20 years under Part IV, Division 4A, of the Mining Act for the purpose of mining for working and winning chromite and magnesite.

It provided, inter alia, for payment to the owner for the time being of the land:—

(i) directly, a yearly rental of £56.0.0 payable under Section 64; and

(ii) through the Secretary for Mines, a sum equal to $1\frac{1}{8}$% of the gross value of minerals won. 10

It also contained a covenant that the lessee should during all working days continuously work the mines in the best and most effectual manner and in accordance with the practice of efficient mining and that he should employ during the first 12 months of the said term not less than three able and competent workers and miners and during the remainder of the term not less than six such workmen and miners.

12. The common law which would categorise a mining lease as a profit à prendre, was first abrogated in New South Wales by Section 18 of the Mining Act, 1874. This section was replaced by Section 129(1) of the Mining Act, 1906, which provides, inter alia, that every right, title or interest acquired under the Act shall be deemed and taken in law to be personal property and shall not be of the nature of real estate and may be disposed of during the lifetime of the holder as personal property. 20

p. 227.

13. In the year 1942 six brothers by the name of O'Neil were and had for some time been carrying on business in partnership as quarry masters and motor truck distributors under the trade name of the Australian Blue Metal Company. In that year they began to mine for magnesite in the Young district and were the lessees under two mining leases numbered P.M.L. 15 and P.M.L. 16 which (as shown on the plan Exhibit B.Y.) adjoin P.M.L. 1. 30

p. 551.
p. 227.

(In November 1951, the Appellant Company was incorporated as a public company under the provisions of the New South Wales Companies Act 1936 and acquired the interests of the partnership which had traded under the name of Australian Blue Metal Company.)

Exhibit P.
p. 393.

14. On 6th October 1942, the Australian Blue Metal Company entered into an agreement with Hughes and Caldwell under which the partners granted to that company during a period of five years a licence to mine for magnesite on P.M.L. 1. 40

p. 349.

15. His Honour found that the company mined under this agreement and paid royalties into a joint account of the partnership.

RECORD: p. 402. Exhibit B.Q.

16. Until some time in 1944, when their operations ceased, the Company won more than 28,000 tons of magnesite for which it paid royalties in the order of £16,000.

p. 398. Exhibit O.

17. On 14th August 1943, the partners of Hughes and Caldwell executed a deed of partnership. Its terms are summarised in the following passages from His Honour's judgment:—

p. 348.

"This agreement stated that the partnership should be for the term of the said mining lease and the name of the firm should be 'Hughes & Caldwell'. The capital of the firm was stated to include at that time the said mining lease and ore therein. The agreement envisaged the working of the mine by the partners; it provided in clause 6 that each partner should at all times during the partnership be at liberty to inspect the workings of the mine and accounts kept in connection therewith." 10

"Clause 10 provided that proper books of account should be kept on behalf of the partnership by Logan Hunter Caldwell and that they, together with letters, papers and documents belonging to the partnership should be kept at the office of Logan Hunter Caldwell".

"Clause 15 of the agreement provided that all excavations made upon the land embraced in the said lease in carrying on mining operations should be filled in by the partnership as far as possible by refilling with earth and other material, and insofar as such material should prove insufficient completely to fill in such excavations, the same should have their sides "ramped off" to a batter of one in five or thereabouts." 20

18. The death of Joseph Peter Hughes on 17th January 1946 dissolved this partnership by the operation of Section 33(1) of the New South Wales Partnership Act, 1892, which is a reproduction of the same section in the English Partnership Act of 1890. 30

19. There was a contest at the hearing as to whether the surviving partners entered into a new partnership with their brother, the Respondent Clarence Vivian Hughes.

20. His Honour found this issue in favour of the Appellant:—

p. 349.

"Joseph Peter Hughes died on 17th January 1946 and probate of his will was, on 12th June 1946, granted to the executors named in the will, Robert Frank Hughes and Clarence Vivian Hughes."

"It does not appear that the surviving partners elected to purchase the share of Joseph Peter Hughes in accordance with Clause 12 of the partnership deed and it seems that the partnership business was carried on by the surviving partners and either 40

by the estate of Joseph Peter Hughes or with the addition of Clarence Vivian Hughes as a partner in his own right. It is admitted that distributions of profits made after the death of Joseph Peter Hughes were made to Clarence Vivian Hughes who received the same into his own account and used the same for his own purposes. Whatever the situation may have been between Clarence Vivian Hughes, who was one of the executors of the estate of Joseph Peter Hughes, and the estate of Joseph Peter Hughes, I am satisfied that Clarence Vivian Hughes was treated as a partner from a time shortly after the death of Joseph Peter 10 Hughes."

"There does not appear to have been any substantial change in the manner of conducting the business of the partnership after the death of Joseph Peter Hughes. Mining continued with the actual work of mining being carried out by certain only of the partners, and it would seem that these partners were entitled to the proceeds of the sale of the mineral after deduction of the royalties in favour of the partners generally".

"At various times over the years up to the death of George Wigham Caldwell on the 21st July 1956 the partners would 20 seem not only to have carried on some business of mining themselves, but also to have granted licences to various persons and companies, including some of the partners themselves, to mine in return for payment of royalties. All income, whether from mining or from royalties was paid into the partnership account in the name of Logan Hunter Caldwell and Robert Frank Hughes, and distributions were made to the partners from the same account. I am satisfied that the business of the partnership was continued over this period whether by actual mining or by granting of licences to mine in return for payments of royalties. 30 The licences were granted to various persons and companies, mainly firms or companies in some way connected with one or another of the partners. The partnership paid the shire rates and the royalties due by the mining lessees."

"It appears to have taken steps to obtain on behalf of the partnership other areas, particularly P.M.L. 19."

RECORD:
p. 403.
Exhibit D.L.

21. The Application for Authority to Enter the area subsequently defined as P.M.L. 19 to mine for magnesite was made in October 1955 by Logan Hunter Caldwell. (He had earlier that year transferred his undivided one half share in the grazing lands to his brother George 40 Wigham Caldwell.)

p. 551.
p. 406.

22. P.M.L. 19 is shown on the plan (Exhibit B.Y.) as adjoining part of the western boundary of P.M.L. 1. Exhibit A.T. shows that legal costs incurred in connection with the application for P.M.L. 19

were paid out of the Hughes and Caldwell account. That Logan Hunter Caldwell applied for P.M.L. 19 on behalf of the partnership and subsequently treated it as a partnership asset is also shown by an entry in Exhibit B.N. in which he included in a list of his own assets under the heading "Mining Interests"—"1/6 profits from syndicate in P.M.L. 1 and P.M.L. 19 Hughes and Caldwell".

RECORD: p. 405.

p. 382. Exhibit A.U.

23. On 23rd March 1956, George Wigham Caldwell transferred the whole of his right title and interest in the said grazing lands to his four daughters as tenants in common.

24. Some four months later, on 21st July 1956, the said George Wigham Caldwell died and the then existing partnership of Hughes and Caldwell accordingly dissolved. 10

25. There was also a contest at the hearing as to whether:—

(i) the surviving partners entered into a new partnership with the executors of George Wigham Caldwell (the Respondents, Margaret Ferguson Caldwell, Lindsay George Regan and Norman Vivian Regan); and

(ii) such partnership was subsisting at the date of the institution of the suit.

26. His Honour also resolved this issue in favour of the Appellant:— 20

p. 350.

"George Wigham Caldwell, by his will, appointed Margaret Ferguson Caldwell, Lindsay George Regan and Norman Vivian Regan executrix and executors. Probate of the will was granted to them. By Clause 9 of his will they were empowered to enter into any partnership or trading agreement with any person or persons whatsoever. The surviving partners did not exercise any right to purchase the share of George Wigham Caldwell pursuant to Clause 12 of the partnership agreement. There is little or no evidence of any actual carrying on the partnership affairs after 30 the death of George Wigham Caldwell apart from the making of the agreements with the plaintiff company to which I shall shortly refer. It was only a short period of a few months between the death of George Wigham Caldwell on 21st July 1956 and the making of the first of these agreements in November of that year. However, it does appear that during that period Victor Raymond Hughes was mining on the lease for magnesite."

"Although it has eventually been conceded by the defendants that there was a partnership actually in existence up to the death of George Wigham Caldwell, it is denied by the defendants other 40 than Steele Hunter Caldwell that any partnership arose after the death of George Wigham Caldwell and it is claimed that

any activity of the surviving partners was only in the course of winding up the partnership".

"It seems to me that there is some evidence that the surviving partners agreed to continue the business of the partnership, and they have not seen fit to deny any such intention in the witness box. On the other hand, there is little direct evidence that the executors of the estate of George Wigham Caldwell agreed to become partners in the business. There is evidence that one of the executors, Norman Vivian Regan, visited the area of the lease frequently after early 1957. There is also evidence of 10 distributions to the estate of George Wigham Caldwell in respect of income received after his death. These distributions related to income not only from royalties paid by the plaintiff after November 1956, but also to income from royalties paid by Victor Raymond Hughes. During 1957 a number of payments were received by the estate of George Wigham Caldwell and in various documents to which the executors of that estate are partners there is a reference to 'partnership' ".

"Thus, in the agreement in relation to costs of this litigation made between the various defendants in November 1957 there is 20 reference to the partnership. However, it appears to me that I am entitled to take regard of the general course of conduct from 1956 to the present time, the failure to take any step to wind up the business on the ground that it was dissolved in July 1956, and the continued treatment of the executors of George Wigham Caldwell as entitled to some say in the affairs of the partnership, and I have reached the conclusion particularly in the absence of any evidence by any of the surviving partners or of the executors of the deceased partner, George Wigham Caldwell, that it was intended to carry the business on as it had previously been 30 carried on without any intention of early winding up thereafter."

RECORD: p. 129.

27. Early in 1956, the Appellant began mining operations on its leases P.M.L. 15 and P.M.L. 16 so as to comply with undertakings given in the Warden's Court at Young during proceedings for cancellation of those leases for non-performance of labour conditions.

pp. 443-4. Exhibit C.C.

28. In February 1956, the Appellant had negotiated a contract with the Broken Hill Proprietary Company Limited for the supply to it of magnesite at a base price of £3.15.0 per ton and upon other terms appearing in correspondence.

p. 129.

29. In the same month, the Appellant sent Thomas Ernest 40 Buckley to Thuddungra as manager and sent there by road from its depot near Sydney the necessary equipment for mining by the "open-cut" method.

RECORD:
p. 131.

30. The equipment consisted of "a bulldozer, a diesel shovel loading device, a compressor and jack hammer, drills and four trucks." Provision was made on the site for two store sheds and a little shed for storing explosives.

p. 229.

31. This plant was owned by a subsidiary of the Appellant company incorporated in Western Australia, National Contractors Pty. Limited, which made no charge for the hire or use of it until the financial year commencing 1st July 1957; the Appellant, however, during that period bore the expenses of repairs and maintenance.

32. The first association between the Appellant and the Hughes and Caldwell partnership occurred in April 1956. The evidence as to what took place is summarised in the following passage from His Honour's judgment:— 10

p. 352.

> "When the plaintiff through its local operations manager, Thomas Ernest Buckley, had first approached Victor Raymond Hughes at the site of the lease in April 1956 seeking permission to enter on the area of P.M.L. 1 for purposes of disposing of soil, Victor Raymond Hughes said 'I think it will be all right. You had better see Logan Caldwell about it'. Victor Raymond Hughes added, 'I will have to see the others'. A few days later Victor Raymond Hughes said to Mr. Buckley, 'I have seen Logan Caldwell. It will be quite all right to tip dirt there'. Shortly afterwards Logan Hunter Caldwell visited the site and confirmed to Buckley that it would be quite all right to tip dirt on the P.M.L. 1. It seems to me that these conversations show at least that Victor Raymond Hughes regarded Logan Hunter Caldwell as the person who, although the others would have to be consulted, would in fact give the permission sought." 20

33. His Honour had previously dealt in the following separate passages in his judgment with the position of Logan Hunter Caldwell in the partnership. 30

p. 350.

> "There is evidence that Logan Hunter Caldwell carried on practically the whole of the administration of the partnership business. His writing appears on the cheque butts and he wrote the great majority of the letters to the Department of Mines. He applied for an authority to enter in respect of P.M.L. 19 and, indeed, it may be generally said that he was administering the affairs of the partnership at least to the extent envisaged in the 1943 partnership agreement."

* * *

p. 351.

> "Logan Hunter Caldwell continued before and after the death of George Wigham Caldwell to perform most of the 40

secretarial and like duties in relation to the business. He kept records, checked quantities of magnesite won, received moneys, paid out moneys saw to the preparation of the partnership returns and corresponded with the Mines Department in relation to royalties and other matters."

RECORD: p. 548.

34. The Appellant's actual operations in 1956 on P.M.L. 15 and P.M.L. 16 are depicted in the photograph Exhibit B.Z. The photograph looks in a general southerly direction from P.M.L. 15 and P.M.L. 16 towards P.M.L. 1 and shows in the background a truck tipping dirt on portion of P.M.L. 1 no doubt in accordance 10 with the agreement arrived at in April 1956.

p. 231.

35. In October 1956, Robert Mitchell Driscoll, the secretary of the Appellant company, gave some instructions to Mr. Buckley about making an approach to Hughes and Caldwell in respect of P.M.L. 1.

p. 352.

36. In the result, as His Honour found, "In November 1956 an agreement was made between the surviving partners of the Hughes and Caldwell partnership and the plaintiff whereby the plaintiff was to have the right to mine on a part of P.M.L. 1 in return for a royalty of 10s. per ton of magnesite mined. It is necessary to consider the circumstances in which this agreement, the making of which is not 20 disputed, was made. Mr. Buckley first approached Victor Raymond Hughes who was carrying on mining operations in certain pits on P.M.L. 1. He asked Victor Raymond Hughes if the plaintiff company could work where he was giving up for 10s. per ton royalty. Victor Raymond Hughes replied: 'I think it will be all right but you will have to see Logan Caldwell'. Victor Raymond Hughes added, 'I will have to see the others, I think it will be all right, but I will have to see the others.' This conversation shows that in regard to the making of such an agreement between 'Hughes & Caldwell' and the plaintiff company the other members of that firm would have to be consulted 30 but that the person to see in regard to the making of the arrangements was Logan Hunter Caldwell.

p. 352.

"A few days later Buckley and Victor Raymond Hughes had another conversation in which Victor said, 'It will be all right to work in the old pits'. Victor indicated the area in which the work could be carried on".

p. 353.

His Honour also found that Victor Raymond Hughes, after stating that it would be all right to work in the old pits stated, "see Logan Caldwell regarding it".

p. 132.

37. According to the uncontradicted evidence of Buckley the 40 area was described to him by Victor Hughes as being the eastern side

p. 134.

of the turn or break in the fence, and by Logan Hunter Caldwell as being the eastern side of a line drawn south from the turn in the fence.

RECORD: p. 551.

This line of demarcation is shown on the plan by a broken line having its northern end at the boundary of M.L. 1 and M.L. 4 and ending on the southern boundary of P.M.L. 1.

38. Buckley was cross-examined at some length to suggest that the area agreed upon by Mr. Victor Hughes was limited to that portion of P.M.L. 1, east of the line but bounded to the south by a gully.

39. As to this contest His Honour said:—

p. 352.

"As the case has proceeded it has ceased to be of great importance to determine what was the actual area agreed upon. There was a dispute indicated in the examination and cross-examination of the plaintiff's witnesses on the question whether initially the right to mine was limited to the area of certain old pits and was certainly not to extend over the gully. It is unnecessary for me further to consider this indicated conflict and in any case on the failure of any of the defendants to give evidence the conflict could only be resolved in favour of the plaintiff company." 10

40. The events between the oral agreement arrived at in the conversations of November 1956 and the execution of a written agreement dated 31st January 1957 are summarised by His Honour as follows:— 20

p. 353.

"After these conversations the plaintiff went on to the area of the mining lease and commenced to mine at the site of the old pits. Logan Caldwell saw Buckley and arranged with him to be given a copy of the weights and numbers of railway trucks and requested that cheques be made out to Hughes and Caldwell for the royalties, and sent to him. Logan Hunter Caldwell said, 'I will get an agreement drawn up by Gordon Giugni'.

"Mr. Giugni received instructions to prepare this agreement of 31st January 1957 on 9th January 1957."

p. 409.

41. The agreement was in the following terms:— 30

"AN AGREEMENT made this 31st day of January in the year One thousand nine hundred and fifty seven BETWEEN AUSTRALIAN BLUE METAL LTD. (herein called the Company) of the one part and ROBERT FRANK HUGHES, CLARENCE VIVIAN HUGHES, FREDERICK CHARLES HUGHES, VICTOR RAYMOND HUGHES, LOGAN HUNTER CALDWELL and THE EXECUTORS OF GEORGE WHIGHAM CALDWELL (hereinafter called Hughes and Caldwell) of the other part WHEREAS Hughes and Caldwell are entitled to receive royalties from P.M.L. 1 (Young) and the Company wishes to mine for magnesite on P.M.L. 1 and have agreed to pay to Hughes and Caldwell a flat rate royalty of ten 40

shillings (10/-) per ton in respect of magnesite won and delivered from the said Private Mining Lease.

NOW THIS AGREEMENT WITNESSETH:—

1. The Company shall have the right to mine for magnesite on P.M.L. 1 east of a line running south from a turn in the fence on the northern boundary of such P.M.L. 1.

2. The Company will pay to Hughes and Caldwell royalty of ten shillings (10/-) per ton in respect of all magnesite won and delivered from such area.

3. The weights for the purposes of ascertaining the amount of royalties payable hereunder shall be ascertained and calculated by weigh-bridge weights at the siding where the metal is taken. 10

4. The Company will pay such royalties and render statements monthly to the aforesaid Logan Hunter Caldwell.

5. In the event of their (sic) arising any difficulties as to weights or quantities Hughes and Caldwell or their nominee may have access to the Company's books or records for the purposes of ascertaining the quantity of metal delivered hereunder AND the Company will make such books and records available to Hughes and Caldwell or their nominee if so required. 20

6. The Company will use its best endeavours to ensure that all gates to the said P.M.L. 1 are kept closed and no dogs are taken thereon.

7. The Company will fill in all excavations made by it or its employees except the last excavation which is to be left with three in one batter.

AS WITNESS the hands and seals of the parties hereto the day and year firstly before written.

SIGNED for and on behalf of
AUSTRALIAN BLUE METAL LTD. Thos. M. O'Neil. 30

SIGNED for and on behalf of
HUGHES AND CALDWELL Logan H. Caldwell

G. Giugni
Solicitor
Young".

RECORD:
p. 353-4.

42. His Honour found that although it was clear that "Victor Raymond Hughes, Robert Frank Hughes and Logan Hunter Caldwell, and probably Clarence Vivian Hughes, knew of the mining being carried on by the plaintiff company from 31st January 1957, and in the case of some of them from November 1956, there is no direct evidence that any of them other than Logan Hunter Caldwell knew that a written agreement had been prepared or executed." 40

p. 409.
p. 410.
Exhibit A.Y.

43. After its execution by Logan Hunter Caldwell on 31st January 1957, the agreement was then forwarded by Mr. Giugni for

signature to the Secretary of the Appellant Company under cover of a letter of the same day.

RECORD: p. 411.

A copy of the agreement duly executed was returned by the Secretary of the Appellant company under cover of a letter of 5th February 1957, which raised a query as to the adequacy of the definition of the boundary. This query appears to have been sufficiently resolved by Mr. Giugni's reply of 15th February 1957.

p. 412. Exhibit A.Z.

p. 354.

44. The Appellant, so His Honour found, "continued mining operations at P.M.L. 1, and it is clear that a number of the parties observed these operations from time to time. The Plaintiff company 10 had difficulties with production and costs. It applied on 31st January 1957 to its main customer, the Broken Hill Pty. Company Limited, for an increase in the price of magnesite of ten shillings per ton. The Broken Hill Pty. Company Limited replied by letter of 15th February suggesting that one of the principal difficulties in economical operation had been a necessity to pay a ten shillings per ton royalty to the lease owner and added 'We do feel that in granting any increase we would be condoning and perpetuating a royalty basis which we consider to be unduly high'.

p. 447.

p. 448.

"The accounts which have been placed before us show that the 20 operations of the Plaintiff company on P.M.L. 1 between January and May 1957 were conducted at a loss."

p. 543.

45. Exhibit C.O. and the oral evidence of Driscoll show that for the five months ending 31st May 1957 the cost of the Appellant Company's operations (without any payment to its subsidiary for the hire of plant) was in excess of £13,000, which sum included payments in excess of £1,900 to Hughes and Caldwell as royalties under the agreement of 31st of January 1957.

46. The net profit to Hughes and Caldwell for these five months would have been about £1,800 as they would have been liable for 30 about £100 for royalties and rent due to the owner in fee and for rates.

p. 375.

47. Of the Appellant company's position in May 1957 His Honour found: "It is clear to me that up to May the Plaintiff company was most unhappy about the returns from the mining, and it was seeking in a number of ways to improve its position. It was seeking a higher price from B.H.P.: it was seeking a reduction in cartage rates; and it was seeking a reduction in royalty rates from the defendants. All these efforts were proceeding simultaneously. By approximately 20th May the Company had arranged a reduction in 40 its cartage rates. By 29th May it had arranged an increase in price to B.H.P. of 10/- per ton."

p. 354.

48. In the same month, so His Honour found, "the plaintiff com-

pany through Mr. Buckley determined to test for magnesite beyond the gully in an area which was suggested to it by Logan Hunter Caldwell, and at about the same time Buckley raised with Logan Hunter Caldwell the possibility of reducing the rates of royalty to six shillings per ton, Logan Hunter Caldwell said "I will discuss it with the others." In a further conversation on 28th May Logan Hunter Caldwell said to Buckley, "We will talk about the royalties but not until Thursday as Frank will be finished shearing by then". In that situation tests south of the gully were commenced early in June. It appears that independent of those tests and of any mining south of the gully the position 10 in May was somewhat better than it had been in preceding months. Moreover, as I have said, the increase in price from the Broken Hill Pty. Company Limited was operative from 1st June 1957 and word of it was received on 29th May.

RECORD: p. 235.

On 5th June 1957 Mr. Driscoll, Secretary of the Plaintiff company, rang Logan Hunter Caldwell from Sydney. He stated to Mr. Caldwell that the yield was poor, production was bad, that the company was operating at a loss, and he informed him that the company would have to pull out on 30th June unless it could decrease its costs, increase revenue and increase production. He informed Mr. Caldwell 20 that the company had arranged for a reduction in cartage rates and said, "As you know we have all got an increase of ten shillings a ton from B.H.P." He further stated to Mr. Caldwell, "I would like you to consider a decrease in the royalty rate from ten shillings to six shillings per ton."

p. 355.

"Within a few days after that conversation Giugni prepared a fresh agreement which was signed by Mr. Buckley on behalf of the plaintiff company on 10th June and which was signed at about the same time by Logan Hunter Caldwell, 'for and on behalf of Hughes and Caldwell'. This document was in the same terms as the document 30 of 31st January 1957 except that the royalty in the recital and in Clause 2 of the document was expressed to be six shillings per ton instead of ten shillings per ton."

p. 415.

49. That document also differed from Exhibit A.V. in that it specified the date (1st June 1957) from which the royalty was payable.

p. 417. Exhibit A.X.

50. The execution of this agreement was reported by Mr. Giugni to the Secretary of the Appellant company by letter of 14th June 1957.

p. 143.

51. On 6th August 1957, Mr. Victor Hughes asked Mr. Buckley if he had any instructions from the Appellant company to limit pro- 40 duction, and suggested that the Appellant was flooding the market and that it should not be "too hungry". He did not suggest, however, that the Appellant was exceeding the boundaries of its licence.

RECORD:
p. 485.
Exhibit C.B.

On the evening of the same day Mr. Buckley, in a letter to the Secretary of the Appellant company, reported: "Vic Hughes is very worried now we are in a patch of stone. Does not want us to rail more than 8,000 tons a year. He tells me you agreed not to send more than that for fear of flooding market and they would all be out of work. I await your reply on that. I told him my instructions were to get away 1,000 to 1,100 a month."

p. 486.
Exhibit C.A.

52. The events of the following day were likewise reported that evening by Mr. Buckley in the following terms:—

"Storm clouds are now gathering out here. It looks as if we are running into trouble with Hughes, since we have been on this good show. Vic has been looking down in the mouth, and this morning he informed me I have to go and see Frank Hughes as we had no right to mine where we are, that he never ever gave us permission to cross the creek, that the line from the break in the fence was meant only to the gully, and not right across the lease, that something has to be done about it as they are only getting 10d. a ton out of it." 10

"But the whole gist of it is they are jealous and I believe they are trying to force us out." 20

"Now Bob, I'll see Frank and then I'll ring you (before you get this). But it looks bad to me and I think someone will have to come up and sort it out."

"He definitely said from the break in the fence across the lease."

p. 355.

53. The events leading up to and the occurrences of the 7th, 8th and 9th of August 1957 are summarised in the following passages from His Honour's judgment:—

"Certainly by shortly after the middle of June it became apparent to Mr. Buckley that mining operations south of the gully would be quite successful, and in fact they were successful. Production increased so that by August a very considerable production of magnesite was obtained. On 7th August Victor Raymond Hughes had a conversation with Mr. Buckley in which he stated that the Plaintiff company had no right to be operating where they were, namely south of the gully, Mr. Buckley replied that there was no mention of stopping at the gully in the agreement. That day Mr. Omant, solicitor for the Hughes brothers, obtained from Mr. Giugni a copy of the agreement of 14th June 1957 and on that same evening Buckley visited Robert Frank Hughes at the latter's home in Young. Buckley asked what the trouble was and whether it was desired to go back to the 10/- per ton royalty. The conversation continued and in the course of it Robert Frank Hughes said, "We wrote to Australian Blue 30 40

Metal and asked them to pay the Government Royalty and they haven't even bothered to answer us.

"This reference by Robert Frank Hughes was to a letter which had been written by Logan Hunter Caldwell to the Plaintiff company on 30th June 1957 in the following terms:—

" 'Your letter of the 27th June, 1957 enclosing cheque and statement for magnesite mined from P.M.L. 1 during May 1957 is to hand. Your total of tonnage balances with figures handed to us by Mr. Buckley. Your statement did not show truck No. U.22393 of 24 tons 9 cwt. railed during 3.4.5, May 1957 but the 24 tons 9 cwt. is included in your total amount of 1052 tons 14 cwt. 10

" 'On the matter of the reduction of royalty paid by you from 10/- to 6/- per ton coming under discussion by Messrs. Hughes & Caldwell Syndicate, it was felt that with the higher prices being received for magnesite, that these higher prices reduce their income due to the fact that the amount to be paid to the Department of Mines at 1½% (sic) increases as the value of magnesite mined increases.

" 'Messrs. Hughes & Caldwell have asked me to write you on this matter and to ask you would you pay the Government Royalty of 1½% (sic) as from the 1st June 1957. 20

" 'In arriving at the value of magnesite at the mine, Messrs. Hughes & Caldwell would not have the figures available for making out the return'.

"By 9th August 1957 at the latest, all the original defendants in this action had undoubtedly become aware that Logan Hunter Caldwell had purported to arrange with the plaintiff company for a reduction in the rate of royalty, and, further, had become aware that he had purported to act on their behalf in making that arrangement." 30

RECORD: p. 117.

54. On 14th August 1957, a meeting of the partners was held in Young at the office of Tester Porter & Co., Accountants. Mr. Matthew Porter said in evidence that the meeting came to be called to confirm a request made to him some months before by the defendant Norman Regan that his firm look after the affairs of the mine. All members of the firm were present except Frederick Charles Hughes, Lindsay George Regan and Margaret Ferguson Caldwell. A detailed account of what took place at the meeting is contained in the evidence of Frank Ellersley Roberts and the said Matthew Porter. 40

p. 356.

55. His Honour found that at this meeting the agreement of 14th June 1957 was read out by Mr. Porter, who took the chair, and that it was also decided to approach the company for termination of the licence.

RECORD: p. 356.

56. His Honour went on to find: "On 19th August 1957 the following letter was written by Tester Porter & Company on behalf of the original defendants in this action:—

" 'We desire to convey to you a resolution passed by the partners of Hughes and Caldwell at a meeting of their syndicate at a meeting held on 14th August 1957.

" 'That the Australian Blue Metal Company be requested to immediately vacate P.M.L. 1 and therefore cease to work its lease for magnesite.

" 'We will therefore be pleased if you will kindly cease 10 operations immediately on P.M.L. 1.'

"Meanwhile on 15th August 1957 the plaintiff company had written a letter to Hughes and Caldwell forwarding a royalty cheque for the month of July, together with a statement of the weights and truck numbers of the various loads despatched during the latter month. On 19th August this cheque was deposited to the credit of the Hughes and Caldwell bank account. On 17th August 1957, Mr. Driscoll and Mr. J. O'Neill on behalf of the Plaintiff company visited Young and saw Victor Raymond Hughes, Robert Frank Hughes, Clarence Vivian Hughes and Norman Vivian Regan. The claim was 20 then made by Victor Raymond Hughes that Logan Hunter Caldwell had no right to sign the agreement.

"Messrs. Hughes, Hughes & Garvin replied on 21st August 1957 to Messrs. Tester Porter & Company's letter of 19th August stating they had advised the plaintiff company that it was not within the power of the Hughes and Caldwell partnership to terminate the agreement under which the company was operating the mining lease and stating that the plaintiff company proposed to continue with the mining operations."

57. On 1st September 1957 the term of the mining lease P.M.L. 30 1 (Exhibit A.) would have expired; but, the Lessees having theretofore applied for its renewal, the lease continued in full force and effect by virtue of the retroactive operation of the provisions of the Mining (Renewal of Leases) Amendment Act (No. 59 of 1961) which came into force on 11th December 1961 (the day on which His Honour published his reasons for judgment).

p. 384.

On 17th July 1957, the mining lessees, Robert Frank and Clarence Vivian Hughes, had in accordance with the Mining Act and the Regulations thereunder duly made application to the Under Secretary of the Department of Mines for a renewal of the said lease 40 for a term of twenty years commencing on 2nd September 1957.

That application had neither been granted nor refused before the expiry of the lease but was on 31st July 1958 granted for a term of twenty years commencing on 2nd September 1957.

The relevant provision introduced into the Mining Act by Act

No. 59 of 1961 is Section 107A(i) which provides:—

"Where in accordance with any regulations in that behalf an application is made for the renewal or further renewal of a lease granted under any of the provisions of this Act or of any Act repealed by this Act and the application has not been granted or refused before the expiry thereof, the lease shall, subject to this section, continue in full force and effect until the application is granted or refused, and the Governor may grant or refuse such application notwithstanding that the term for which the lease, or any renewal thereof, was granted has expired." 10

By virtue of Sec. 4(1)(a) of the same Act, Section 107A was applied and deemed always to have applied to and in respect of any application made before the commencement of that Act for the renewal or further renewal of any lease granted under any of the provisions of the Mining Act and to and in respect of the lease the subject of the application.

RECORD:
p. 423.
Exhibit D.D.

58. On 2nd September 1957, Messrs. Eric Campbell Omant & Grant wrote to the Appellant in the following terms:—

"We are informed that two members of our client syndicate at different times spoke to you regarding a solution of the present 20 difficulty arising out of the licence agreement dated the 14th June 1957, and that you indicated to them that your company would like to consider a new agreement re-defining the land to be affected so as to exclude certain cultivable lands from the area quoted in the abovementioned licence.

"In view of this the syndicate recently met to consider the position and instructed us to inform you that they would be prepared to discuss a new licence to you, for part only of the area mentioned in the abovementioned licence and providing that the royalty revert to 10/- as from the time and figures when 30 it was reduced to 6/- per ton.

"The syndicate would agree to any reasonable term and suggests one year with an option to extend for a further year.

"We would be obliged if you would have the position considered and advise us whether you would like a licence on this basis. We would anticipate there would be other usual clauses in such a licence not limited to the previous licence.

"In order to define the area some members of our syndicate will now approach your manager on the spot with the object of fixing the Southern boundary of this proposed licence by pegs 40 commencing at a point on the North-South line from the step in the Northern fence and running thence on a generally South Easterly direction to the Eastern boundary of the lease.

"In conclusion, it is to be clearly understood that until brought to fruition any proposal is without prejudice to the

syndicate's existing rights arising out of the termination of the licence and your continued occupation."

RECORD:
p. 424.
Exhibit D.D.

59. The Appellant company replied on 10th September 1957 as follows:—

"Receipt of your communication dated 2nd September last is acknowledged, relative to the above matter.

"It is desired to advise that this Company is prepared to negotiate relative to the solution of the present difficulty relative to the mining of magnesite from P.M.L. 1. It is suggested that some members of your syndicate approach this Company's local 10 Manager on the spot, with the object of discussing appropriate boundaries. Should an agreement be forthcoming from such discussions, the local Manager will not have power to finalise any agreement or boundaries but will refer his recommendation to this Office for finalisation.

"It is to be clearly understood that until such time as an agreement is reached, any proposal is absolutely without prejudice to this Company's existing rights in accordance with the Agreement dated 14th June, 1957 and subsequent correspondence.

"It is desired to point out that had previous mining sites 20 been on a profitable basis, no application would have been made to your syndicate for a reduction of royalty to 6/- but it was only on account of losses on account of such mining, that such application had to be made to your syndicate and the subsequent approval was forthcoming.

"Therefore, subject to this present deposit remaining satisfactory from a profit making point of view, without prejudice, as mentioned previously, this Company would be prepared to return to the original 10/- per ton royalty but would point out that should the deposit again become unprofitable, we would 30 expect the syndicate to again consider reduced royalty.

"Your proposal to a reasonable term for mining within redefined boundaries to be discussed, would appear to be too brief.

"It is suggested that a term of three years, with option of a further two years, would be a satisfactory reasonable term from this Company's point of view."

p. 357.

60. Of these letters His Honour said, "Generally speaking this correspondence concerned a proposal for a new licence agreement, a proposal which came to nothing, so that on 11th September Messrs.

p. 426.
Exhibit 17.

Eric Campbell, Omant & Grant wrote to the Plaintiff company that 40 the continued mining of the lease was an open defiance and an unwarranted removal of minerals in respect of which a claim for damages would be made."

This letter of 11th September concluded in these terms: "Further-

more unless the property is vacated by you immediately we will seek appropriate orders for an injunction and to be put into sole possession of the Lease."

RECORD:
p. 427.

61. On 13th September 1957, the solicitors for the Appellant replied in the following terms:—

"We act as solicitors to the company and are instructed to reply to your letter of the 11th instant.

"We have perused the agreement of the 14th June last which is indefinite in time and have advised our client that your clients cannot terminate it forthwith as they have purported to do. Our 10 clients must be given a reasonable period within which to enjoy the benefits of the rights conferred on them and they will resist any proceedings that may be taken by your clients in the matter."

p. 357.
Exhibit 17.

62. On the same day, 13th September 1957, the Appellant, so His Honour found, "forwarded to Hughes and Caldwell a letter containing a cheque for £447.5.0 in payment of royalties for the month of August. This cheque was paid to the credit of the Hughes and Caldwell account on 19th September. There had been no distribution of royalties from the Hughes and Caldwell account after the royalty payments of August to which I have referred and with the 20 payment in of that July royalty and the payment in September of the August royalty the account was in credit to the extent of £743.10.3. On 21st September six cheques, each for £100.0.0 were drawn on the account in favour of each of the original defendants. Five of these were deposited against the account on the same day but the sixth, in favour of Clarence Vivian Hughes, was not deposited against the account until 15th November 1957. The state of the account was such that these payments amounting to £600.0.0 were made to a very large extent out of the July and August royalties paid by the Plaintiff company, and as to the balance out of the June royalties which had 30 been paid by the Plaintiff company by a cheque for £251.11.0 which was deposited in the account on 7th August.

"In the following months the Plaintiff company continued to mine magnesite on P.M.L. 1 and continued to forward cheques but no further cheques were banked to the credit of Hughes and Caldwell".

(The Appellant's letters forwarding the royalties for the months of September, October, November and December 1957 and Logan Hunter Caldwell's acknowledgements of the same, are part of Exhibit B.X.)

p. 428.
Exhibit 2.

63. On 16th October 1957, a firm of solicitors, Lionel Dare 40 Reed & Martin (inadvertently referred to by His Honour as Messrs. Eric Campbell Omant & Grant) acting on behalf of Robert Frank Hughes and Clarence Vivian Hughes in their capacity as the registered

lessees of P.M.L. 1 wrote to the Appellant in the following terms:—

> "We are instructed that your company has entered upon the lands of the estate of the deceased without authority and has removed large quantities of magnesite therefrom. You are hereby given notice that our clients did not consent to your entry upon the lands which are the subject of the lease and to your removal of magnesite or any material therefrom. Your action in entering upon the lands is a trespass and we are instructed to give you 16 days from the date hereof to vacate such lands."

RECORD: p. 429. Exhibit D.J.

64. On 5th November 1957, there being, apparently, a difference of attitude between the Hughes brothers on the one hand and the Caldwell interests on the other hand about taking proceedings against the Appellant company an agreement was entered into which provided for such proceedings being taken in the names of all members of the partnership but with the exclusive conduct of any litigation to be in the hands of the four Hughes brothers as litigating parties. Provision was made for any damages or compensation recovered to be divided in such a way that only the litigating parties should share in any amount recovered which represented royalties over and above the 6/- per ton then being paid by the Appellant company to the partnership.

p. 431. Exhibit 20.

65. On 19th November 1957, a suit was commenced in the Equity Jurisdiction of the Supreme Court of New South Wales against the Appellant company by Robert Frank Hughes and Clarence Vivian Hughes as Executors of the will of Joseph Peter Hughes seeking an injunction to restrain an alleged trespass by the Appellant. The Statement of Claim, Citation, and Appearance in that suit are in evidence as Exhibit 20.

p. 1.

66. On 13th May 1958, the Appellant commenced the present suit against all the members of the Hughes and Caldwell partnership claiming a declaration that the agreement of 14th June 1957 is a valid and subsisting agreement and that the defendants are not entitled to rescind the same or to prevent the plaintiff from having access to the lands for the purpose of mining for and winning magnesite and removing any magnesite so won. An injunction was also sought restraining the defendants during the continuance of the agreement from preventing or hindering access by the Appellant company to the lands for the purpose of mining for magnesite and from ejecting the Appellant company, its servants and agents, from the land so long as the Appellant company performed and was willing to perform the agreement on its part. The Appellant further sought an order for the execution by the then Defendants of a form of document registerable under the provisions of the Mining Act.

RECORD: p. 29.

67. The following issues were raised by the Respondents other than Steele Hunter Caldwell in their Statement of Defence as finally re-amended:—

(i) No partnership was in existence either at 31st January 1957 or at 14th June 1957.

His Honour determined these issues in favour of the Appellants: paragraphs 20 and 26 (supra).

(ii) Logan Hunter Caldwell had no authority to bind Hughes & Caldwell either as partners or co-owners of the mining lease when he purported to execute the abovementioned agreements; nor was his action subsequently ratified. 10

His Honour made a limited finding on these issues, in favour of the Appellants, as indicated in paragraphs 83 to 86 (infra).

(iii) That Logan Hunter Caldwell was not authorised in writing to execute those documents.

This defence was not pressed, presumably because of the provisions of Section 129 of the Mining Act.

(iv) That he was not authorised by deed to execute those documents; nor was there any ratification by deed. 20

These defences were not adverted to in His Honour's judgment, presumably because they were founded on the erroneous assumption that each of the agreement was itself a deed.

(v) That each of the agreements lacks valuable consideration moving from the Appellant and is, therefore, void.

His Honour's differential approach to the question of consideration is the subject of submissions in paragraphs 87 and 88 (infra).

(vi) That each of the agreements was lacking in mutuality. 30

While agreeing in this submission, His Honour held that any want of mutuality was not a bar to relief by way of injunction. The Appellant's submission on this point is to be found at paragraph 89 (infra).

(vii) That the agreement of 14th June 1957 was neither concurred in nor sanctioned by nor registered with the Minister for Mines and was therefore invalid.

This defence was not dealt with by His Honour.

(viii) That the agreement of 14th June 1957 was induced by unfair concealment on the part of the Appellant. 40

His Honour found this issue in favour of the Appellant.

(ix) That the Appellant's right to remain on the subject land and mine there was duly determined.

His Honour, having found that the agreement of 14th

June 1957 was terminable at will, found that it had been properly terminated. The Appellant submits that its rights under the agreement have never been determined; see paragraph 81 (infra).

(x) That the Appellant's right of occupation terminated in any event on 2nd September 1957.

His Honour decided this point in favour of the Respondents. The Appellant's submissions upon it are set out in paragraph 77 (infra).

68. The suit twice became abated due to the deaths of Logan 10 Hunter Caldwell on the 2nd January 1959 and of Frederick Charles Hughes on the 25th December 1960 but orders were made reviving the suit and the legal representatives of each of the deceased were joined as defendants and pursuant to leave granted appropriate amendments were made to the Statements of Claim and of Defence.

RECORD: p. 415.

69. It was against the background of the facts traversed in paragraps 3 to 65 hereof that the agreement of 14th June 1957 (Exhibit A.W.) fell to be constued.

The Appellant company claimed to be entitled to the relief sought because the said agreement had never been terminated as, on 20 its true construction:—

(i) it is a licence coupled with an interest in personalty and is irrevocable so long as magnesite remains to be won or until the title or interest of the grantors should determine whichever event should first happen; or

(ii) alternatively, it is terminable only upon the expiration of a period of reasonable notice which has never been given.

His Honour rejected these submissions and refused the relief sought on the grounds that:—

p. 359.

(a) The agreement of the 14th June 1957 is an agreement operat- 30 ing as a licence to the Appellant to mine coupled with a grant of minerals actually mined, and was properly terminated because upon its true construction the right to mine thereby given was terminable at will by the licensors provided that the Appellant thereupon had a period of grace within which to remove any mined minerals and to vacate the land;

p. 359.

(b) Even if the agreement upon its true construction is the grant, or an agreement for the grant, of a right to mine in the nature of a profit à prendre for a period greater than "at will", that grant terminated upon the expiration of the mining lease on 40 the 2nd September 1957 and did not enure into the period of renewal thereafter;

p. 359.

(c) The agreement, being terminable at will, is unenforceable in Equity.

It is from His Honour's refusal of relief that this Appeal is brought.

70. As the Appellant's first contention is founded in part upon the true meaning and effect of Section 129(1) of the Mining Act and as that Act is derived from Statutes originating within the Colony of New South Wales for which no precedent then existed in any other country, brief reference is made to the history of the Section.

As indicated in paragraph 12 hereof, the common law was first abrogated by Section 18 of the Mining Act, 1874 which provided:—

"18. Every share or interest in any claim or portion of land occupied for business or residence under this Act and any right title or interest acquired or created under the provisions of this Act or any Regulation to be made thereunder shall be deemed and taken in law to be a chattel interest". 10

It was held by the Full Court of the Supreme Court of New South Wales in **Williams v. Robinson** ((1890) 12 N.S.W.L.R. Eq. 34) that this section was intended to alter the law and that all interests created under that Act became by virtue of that section personal estate or chattels personal "as distinguished from any interest savouring of real estate, an interest not within the meaning of the 4th section of the Statute of Frauds". That decision was followed in 1896 by Owen C.J. in Eq. in **Kennedy v. Currie** (17 N.S.W.L.R. Eq. 28 at pp. 31-32). 20

The same view of the section was taken by the Full Court in **Lucas v. Meagher** ((1896) 13 W.N. 67), by A. H. Simpson J. in **re Keith** ((1897) 18 N.S.W.L.R. (B. & P. 19); and by Manning C.J. in Eq. in **Homeward Bound Gold Mining Co. v. McPherson** ((1898) 14 W.N. 99).

The Mining Act of 1906 repealed the Mining Act, 1874 and substituted for section 18 a provision in the following terms:—

"129(1). Every tenement, or share or interest in a claim, and any authority, right title or interest acquired or created under this Act, or any Act hereby repealed, or the regulations, shall be deemed and taken in law to be personal property, and shall not be of the nature of real estate, and may be disposed of during the lifetime of the holder, and shall on his death descend or devolve on intestacy or by will as personal property, subject to this Act and the regulations." 30

71. It is submitted that the primary object of both sections, but in particular that of Section 129, was to exclude the operation of the Statute of Frauds and the requirements of the common law relating to the creation of interests in land. 40

72. The twofold effect of this section, it is submitted, is that all mining interests can be created by parol freed as to their form

from the incidence of the general law and that all such interests are transmuted as to their character from realty into personalty.

In the result, it is contended, not only is the interest under the mining lease (acquired by the partnership as its initial asset) personalty, but so also is the interest acquired by the Appellant under the written agreements of January and June 1957.

73. Upon its true construction, therefore, the agreement of 14th June 1957 is a licence to the Appellant to enter upon a defined portion of land, coupled with the grant of a legal interest. Such interest is the right to win and remove magnesite from that portion 10 of land and is by the operation of section 129 an interest in personalty.

Even if the agreement, not being a deed, did not operate by itself to vest this interest in the Appellant, the intended grant was perfected by delivery, inasmuch as the Appellant by its physical operations assumed possession of the subject matter.

The licence, being coupled with or granted in aid of a legal interest—albeit a purely chattel interest—is irrevocable: **James Jones & Sons v. Earl of Tankerville** ((1909) 2 Ch. 440 at p. 442).

The statement of principle formulated by Parker J. in that case was adopted in **Cowell v. The Rosehill Racecourse Co. Ltd.** (56 20 C.L.R. 605 at pp. 627 and 630).

His Honour appears to have found it unnecessary to advert to these decisions by reason of the conclusion at which he arrived as to the question of the duration of the grant of the right to mine.

74. It is submitted that the term of the grant, though unspecified and indefinite, was intended to enure until such time as the last of the magnesite should be won, or until the grantors' title or interest should determine, whichever event should first happen: see **Atkinson v. King** (Ir. R. 11 C.L. 536); (2 L.R. (Ir.) 320).

His Honour did not question that this case was rightly decided 30 but derived no assistance from it due, it is respectfully submitted, to a misconception of the ratio of the decision.

It is submitted that His Honour was in error in distinguishing that case. Although a decision on the meaning of a profit à prendre, it supports the view contended for by the Appellant that the licence of the 14th June 1957 (Exhibit A.W.) was intended to continue until all the magnesite available within the area had been won or until the grantor's title might determine—whichever event should first happen.

RECORD: p. 415.

pp. 409-415.

The final clause of Exhibits A.V. and A.W. shows that it was 40 within the contemplation of the parties that the grant should subsist while magnesite remained to be won. It requires the Appellant to fill in all excavations made by it or by its employees except the last which shall be left with three in one batter. The use of the word

"last" in this context implies that the Appellant shall be entitled to nominate the stage of operations at which further excavating by it is to cease.

RECORD: p. 367.

75. His Honour expressed the opinion that the agreement of June 1957 could not be so construed for the reason that such a grant would be void for uncertainty. It is respectfully submitted that this reasoning depends upon an erroneous assumption, namely, that the agreement should be interpreted on the basis that it is the grant of a leasehold interest in land. It is only if the grantor's interest is of this character that any considerations of uncertainty would be rele- 10 vant; for the grant of an interest in the nature of personal property is not invalidated by reason of uncertainty as to the length of time during which the interest may subsist.

76. His Honour also, it is respectfully submitted, fell into error in attaching importance as an aid to construction to the absence of the type of covenant which might be expected in the grant of exclusive interests in realty.

In illustrating the unilateral advantages which the absence of such covenants might confer upon a grantee His Honour seems to have assumed (although he nowhere expressly so found) that the licence 20 granted was exclusive.

Such a construction was expressly disavowed by the Appellant, never contended for by the Respondents and could not, it is respectfully submitted, be supported by authority.

An exclusive licence will not be inferred from language which is not clear and explicit: **Sutherland v. Heathcote** ((1892) 1 Ch. 475).

p. 415.

No such language is to be found in the agreement (Exhibit A.W.) and the partners were, therefore, not excluded from mining for magnesite upon the defined portion, but had as well the right, to the exclusion of the Appellant, to mine thereon for chromite and the 30 exclusive right to mine on the remainder of P.M.L. 1 for both magnesite and chromite.

It was His Honour's assumption that the Appellant could exclude the partnership from itself working the minerals or granting concurrent licences which led to the erroneous conclusion that, if the construction contended for by the Appellant were accepted, the Appellant could, for so long as it might elect not to work the minerals, render the land sterile in the hands of the partnership.

77. It is also respectfully submitted that His Honour fell into error in holding that even if the agreement upon its true construction 40 is the grant, or an agreement for the grant, of a right to mine in the nature of a profit à prendre for a period greater than "at will", that grant terminated upon the expiration of the mining lease on 2nd September 1957 and did not enure into the period of renewal thereafter.

Firstly, it seems that His Honour would have arrived at this view without the benefit of having considered the provisions of the Mining (Renewal of Leases) Amendment Act No. 59 of 1961.

RECORD: p. 420.

As submitted in paragraph 57 hereof, by reason of its retroactive operation and by reason of the application for renewal made on 17th July 1957 (Exhibit D.M.), the mining lease P.M.L. 1 (Exhibit A.) continued in full force and effect as from 2nd September 1957.

There was thus no break in the title of the partnership, and the partnership at all relevant times had a subsisting interest in the lease capable of supporting a grant to the Appellant either for a period terminable upon reasonable notice or co-terminous in duration with the interest of the grantors.

His Honour should have held on the authority of **Key v. Neath Rural District Council** (93 L.T. 507) that the interest of the partnership in the subject land, prolonged as it was by the renewal of the mining lease, was capable of supporting a continuance of the Appellant's rights under the agreement dated 14th June 1957. The decision of the Divisional Court in that case was affirmed by the Court of Appeal (95 L.T. 771).

Secondly, it is respectfully submitted that His Honour misapprehended the principle to be derived from **Booth v. Alcock** (L.R. 8 Ch. App. 663). The principle is that where a grant is as a matter of construction limited in its scope by reference to the nature of the grantor's interest at the date of the grant, the rights of the grantee will not be enlarged if the grantor happens to obtain an estate in the subject matter of a wider nature than that which he had when the grant was made. This principle does not affect the Appellant's position, because, it is submitted, the rights given by the agreement dated 14th June 1957 were not, according to its true interpretation, limited in any such way.

It is thirdly submitted that when the agreements of 31st January 1957 and 14th June 1957 were respectively made no question was raised between the parties as to the nature or duration of the partnership's interest in P.M.L. 1. Thus the parties did not deal with each other on the footing that the partnership had only a limited interest, destined to expire on 2nd September 1957. The recital in each of the documents to the effect that the grantors were "entitled to receive royalties" indicates that it was implicit in the agreements under which the Appellant was granted possession for mining purposes that its right to remain and to continue mining could or would subsist for so long as the partnership had a title capable of supporting the grant.

p. 417.

Nor was any such question raised or relied upon in the attempts at eviction made after the renewal date, either when the summary demand to vacate was made by the Solicitors for the partnership on 11th September 1957 (Exhibit 17) (see paragraph 60 hereof) or when the solicitors for the mining lessees claimed on 16th October 1957

RECORD: p. 428.

(Exhibit 2) that the Appellant was trespassing and gave it 16 days notice to vacate (see paragraph 63 hereof).

78. The Appellant's alternative contentions as to the true construction of the agreement dated 14th June 1957 are:—

(a) That it is terminable only upon the expiration of a period of reasonable notice to be given by or on behalf of the Hughes & Caldwell partnership to the Appellant; and

(b) That the reasonableness or otherwise of any such notice falls to be determined in the light of circumstances existing at the date when the notice is given. 10

See **Wintergarden Theatres v. Millenium Productions Limited** (1948 A.C. 173); **Landale v. Menzies** (9 C.L.R. 89); **Lowe v. Adams** ((1901) 2 Ch. 598); **Martin-Baker Aircraft Limited v. Canadian Flight Equipment** ((1955) 2 Q.B. 556).

79. It is submitted that some or all of the following circumstances require a term to be implied that the agreement was terminable only upon reasonable notice:

(i) The intended mining operations were so speculative in character that a gainful period of working must, in the event of 20 ore being found, have been contemplated.

(ii) The expense incurred and the loss sustained by the Appellant over the five months to the end of May 1957;

(ii) the profit of some £1,800 enjoyed by the partnership over the corresponding period;

p. 355.

(iv) the partnership's knowledge (as found by His Honour) that the Appellant had sustained a loss;

(v) the partnership's knowledge that the Appellant was ready and willing, and intended, to exercise its rights under the agreement as appears from one of the recitals to it; 30

(vi) the provision in clause 4 for the rendering of statements and payment of royalties on a monthly basis. (This indicates an intention that the Appellant should have, at the least, the right to carry out mining operations until such time as the agreement might be terminated by reference to the expiry of a royalty period);

(vii) The arrangement existing in January 1957 under which statements were being rendered only every three months. (Despite Clauses 3 and 4 of Exhibit A.V., Logan Hunter Caldwell was prepared to permit the continuance of this arrangement: 40 Exhibit A.Y.);

p. 410.

(viii) The agreement was a commercial transaction under which, to the knowledge of the partnership, the Appellant proposed to win minerals and sell them to a buyer (Broken Hill Pty. Co. Ltd.) under a long-term arrangement;

(ix) The Appellant was obliged to fill in all the excavations made by it: see clause 7; and

(x) The obligation of the partnership to allow the Appellant to mine for a reasonable time necessarily corresponding to the Appellant's implied obligation so to do. (The Appellant's implied promise arises out of its offer to continue mining in consideration of a reduction of royalty).

To hold against this background that the Appellant's right to mine was terminable at will deprives the agreement of commercial efficacy and ignores the principle, adverted to in the **Wintergarden case** (supra), that "he who sows should be allowed to reap". 10

On the other hand, a requirement of reasonable notice to determine the agreement involves no injustice to the partnership; for if the Apellant were to conduct no operations, or if it were to conduct them in such a manner as to involve a risk that the lease might be liable to forfeiture, the reasonableness of any period of notice would be assessed by reference to such circumstances and would be appropriately short.

RECORD: p. 365.

80. His Honour expressed the view that the "scale of operations" undertaken by the Appellant was not such that the parties 20 must be taken to have intended to allow a period of notice during which mining could continue.

As to this the Appellant would submit that:—

(i) it is the nature of the operations rather than their scale which should be looked at: see 79(i) supra;

(ii) the scale of operations was of no mean order: equipment of an estimated value of £15,000 was in use; a work force of nine was employed and large tonnages were won between January 1957 and June 1957; and

(iii) furthermore, the "scale of operations" is not a relevant con- 30 sideration where, as here, the Appellant did not have an exclusive right to mine. The position in this respect might well be different if the Appellant's right to mine for magnesite were an exclusive or sole right; for, were that the case, the Appellant by doing no or little mining, could have rendered the subject land sterile or unproductive; cf. **Reid v. Moreland Timber Co. Pty. Ltd.** (73 C.L.R. 1).

p. 365.

81. His Honour stated that his finding concerning "the scale of operations" was "to some extent" bound up with the finding that "the agreement created rights analogous to a profit à prendre at will". 40 There follows this passage:—

"The latter interest in realty is truly an interest at will similar in respect of termination to a tenancy at will. If it is intended that the profit à prendre be terminable only on reason-

able notice or on certain notice then it would be necessary so to state in the instrument."

It is submitted that there are certain errors inherent in this conclusion:—

(i) His Honour has omitted to bear in mind that a tenancy at will can be subject to an implied stipulation that it may be determined only on the expiry of reasonable notice: **Landale v. Menzies** (9 C.L.R. 89).

(ii) His Honour has overlooked the principle that where land is held at a rent under a general occupation which is not expressly a tenancy at will, a notice to quit reasonable in point of time is requisite to determine the tenant's rights: **Wintergarden** case (supra) p. 200, where Lord Uthwatt points out that it was this principle which brought into being the rule that a reasonable notice, where rent is paid by the year, is six months. 10

(iii) There is, it is respectfully submitted, nothing in principle or authority to support the view that if it be intended that a profit à prendre be terminable only on reasonable notice or on certain notice the instrument of grant must so stipulate.

82. It is submitted that no reasonable notice has ever been given by the partnership to the Appellant. 20

His Honour's finding that the agreement of 14th June 1957 was properly terminated depended upon his conclusion that the right to mine thereby given was terminable at will.

RECORD: p. 421.

It is assumed that His Honour regarded the letter from Tester Porter & Co. of 19th August 1957 (Exhibit C) as sufficient for that purpose; but as this letter ignores both the existence and the terms of the agreement and requests vacant possession forthwith it is, in the Appellant's submission, the negation of reasonable notice.

p. 93.

In any event, the evidence being that Frederck Charles Hughes was absent from the meeting of 19th August, the notice not being that of all the partners, is invalid. 30

pp. 40-1.

The Defendants did not plead that reasonable notice had ever been given but claimed that any right of the Appellant to have access to the subject land or any part thereof for the purpose of mining for or winning magnesite from the said land or for any purpose was terminated prior to the institution of the suit by reason of some one or more of the following:—

p. 421. (i) the said letter of 19th August 1957 (Exhibit C); and/or

p. 426. (ii) the letter of 11th September 1957 from the Solicitors for the Partnership (Exhibit 17); and/or 40

p. 428. (iii) the letter of 16th October 1957 from the Solicitors for the mining lessees (Exhibit 2); and/or

p. 431. (iv) the institution by the mining lessees of Suit No. 1414 of 1957 (Exhibit 24).

The Appellant submits that Exhibit 17, like Exhibit C, is the negation of reasonable notice.

It is also submitted that the letter of 16th October 1957 (Exhibit 2) does not purport to be a notice from or on behalf of the partnership; nor is there any evidence that it was; nor was it pleaded as such: cf. **Lemon v. Lardeur** ((1946) 2 All E.R. 329). Furthermore it is contended that this letter treats the Appellant as a trespasser and that it does not seek to terminate the agreement of 14th June 1957 but ignores its existence. In any event, a period of sixteen days would not, for reasons already advanced, be reasonable. 10

The institution of the suit (Exhibit 24) cannot, in the Appellant's submission, be regarded as reasonable notice for reasons similar to those advanced in respect to Exhibit 2.

83. His Honour decided that Logan Hunter Caldwell was authorised by the partners of Hughes & Caldwell to enter into the agreement of 14th June 1957 on their behalf, but qualified this finding by holding that authority was established only if the agreement was on its true construction terminable at the will of the partners.

It is submitted that His Honour fell into error in so limiting his decision. 20

The Appellant's argument on the question of authority is put on a threefold basis:

(i) Logan Hunter Caldwell had actual authority to make the agreement.

(ii) He had implied authority so to do, on the footing that it was an act for carrying on in the usual way business of the kind carried on by the partners, and that the Appellant had no knowledge of any lack of authority: see Section 5 of the Partnership Act 1892 (N.S.W.) which is in terms identical with Section 5 of the English Act. The Appellant also relies 30 upon Section 6 of the N.S.W. Act, which too has its counterpart in the English Statute.

(iii) The making of the agreement, if originally unauthorised, was subsequently ratified by the action of the partners in receiving royalty payments made by the Appellant under the agreement (see paragraphs 56 and 62 supra).

RECORD: p. 368.

84. After stating his conclusion that Logan Hunter Caldwell had actual authority, His Honour went on to say:

"My conclusion in this regard depends to a large extent upon my first finding, namely that the agreement was terminable. 40 In those circumstances I do not have to reach a final conclusion upon the question whether Logan Hunter Caldwell ever had authority, express or implied, to make an agreement which was not terminable so long as mineral remained to be taken and the

right of the Hughes and Caldwell syndicate endured. Such an agreement would be the disposition of the main undertaking of the partnership and I think that the evidence falls short of showing any such authority in Logan Hunter Caldwell".

It is respectfully submitted that the agreement, if understood in the sense referred to by His Honour, would not be "the disposition of the main undertaking of the partnership", because:

(i) As submitted in paragraph 76, the agreement did not purport to confer on the Appellant a "sole" or "exclusive" right to mine on the subject land; 10

RECORD: p. 551.

(ii) The area comprised in the agreement was about half only of P.M.L. 1 (Exhibit B.Y.); and

p. 413.

(iii) The partners had as well an interest in the area known as P.M.L. 19 (see paragraph 21) supra and also Exhibit B.B.).

The Appellant respectfully invites attention to the fact that His Honour did not advert to the question whether authority was established if the agreement was upon its true construction terminable by the partners only upon the expiration of a period of reasonable notice. There is, it is submitted, no reason why Logan Hunter Caldwell's authority should be limited so as to exclude from its ambit an agreement so terminable. 20

The effect of section 14B of the Evidence Act (N.S.W.) (compare Evidence Act 1938 (U.K.) Section 1 (1)) upon the initial recital in the agreement of the 14th June is to constitute such recital, as His Honour found, a statement by Logan Hunter Caldwell of the fact of agreement on the part of all the partners: a statement which remained uncontradicted in evidence.

It is submitted that the authority evidenced by that statement necessarily extends to the grant of whatever interest the agreement on its true construction operates to confer. 30

p. 371.

85. On the question of implied authority, the Appellant respectfully adopts His Honour's reasoning and would add only this: the granting of licences to mine was shown to be part of the business of Hughes & Caldwell; there was no evidence that a licence terminable at will was the only type of licence granted by the firm: indeed Exhibit P supplies evidence to the contrary. Therefore no foundation exists for the view that Logan Hunter Caldwell's implied authority was confined to the making of an agreement of such limited duration.

p. 372.

86. As to ratification, the Appellant would respectfully submit that His Honour's conclusions were correct, except for the qualification already indicated. 40

p. 97.

There is no doubt that all the partners present either in person or by representation at the meeting held on 19th August 1957 then

became aware of the terms of the agreement dated 14th June 1957, if they were not previously seised of them. The Appellant submits that the receipt thereafter of royalties by these partners constituted a ratification so far as they were concerned.

RECORD: p. 372.

His Honour correctly pointed out that Frederick Charles Hughes was neither present nor represented at the meeting; but he does not appear to have borne in mind a submission made on behalf of the Appellant and based on the first letter in Exhibit D.D. written on behalf of Frederick Charles Hughes (among others). It is implicit in the terms of this letter that there was a meeting of all the partners subsequent to 19th August 1957 at which the terms of the agreement dated 14th June 1957 were under notice. In the absence of a denial by any of the surviving partners that Frederick Charles Hughes was not so present at such a meeting, there is, in the Appellant's submission, an irresistible inference that this partner was aware of the provisions of that agreement when the royalty payments referable to mining carried out in July and August were received by him.

p. 423.

87. On behalf of the Respondents it was submitted at the hearing that the agreement of January 1957 was unenforceable at the suit of the Appellant on the ground that there was no valuable consideration to support the promise of the Respondents to allow the Appellant to mine. It was also put that the June agreement lacked any consideration to support the partners' promise to accept a reduction in the royalty rate in respect of minerals won from and after 1st June 1957.

The ground upon which it was argued that the January agreement lacked the supposedly necessary ingredient of a valuable consideration moving from the Appellant was that the Appellant was not obliged by the agreement to do any mining at all. It was also said that the agreement lacked the element of mutuality necessary to render it enforceable in equity. Apart from the question whether the June agreement was unenforceable by reason of a supposed lack of consideration for the reduction in royalty, the Respondents (other than Steele Hunter Caldwell) further argued that it was also vitiated for the same reason as was urged in relation to the January agreement.

p. 366.

His Honour appears to have taken the view that if, as the Appellant contended, each of the agreements operated as the grant of a proprietary interest in personal property, no consideration was necessary to support such grant beyond the obligation imposed by each agreement that the Appellant should pay royalties for minerals actually mined. His Honour also appears to have been of the opinion that if the January agreement constituted a grant of the duration suggested by the Appellant, it was open to the parties to agree upon a surrender of the grantee's interest and the making of a fresh grant in terms of the June agreement.

The Appellant respectfully submits that His Honour's reasoning

on this aspect of the case is correct, and that its validity is in no way affected by the possibility that neither of the relevant agreements may have operated per se as a grant, because delivery of possession of the area comprised in each agreement may have been necessary to perfect the creation of the relevant proprietary right.

The Appellant submits that if, as it contends, each of the agreements in question coupled in each case with delivery of possession, is a grant in the abovementioned sense, then no consideration, other than the payment of royalty prescribed by each agreement, was necessary to render them enforceable in equity, at least by means of declaratory relief or an injunction to restrain any attempt at premature determination. This proposition, it is submitted, is in accord with His Honour's views. 10

RECORD: p. 366.

88. His Honour also dealt with the question of consideration on the footing that the agreements were in each case no more than purported contracts to make a grant. Taking this differential approach, His Honour thought that in neither case was there any consideration moving from the Appellant sufficient to create rights enforceable in equity.

While it may be conceded that in the case of the January agreement difficulties might lie in the way of obtaining specific performance by reason of the absence of any express provision requiring the Appellant to carry out any mining operations, it is submitted that there is no such difficulty so far as the June agreement is concerned. The events revealed in evidence as to the way in which that agreement came to be made gave rise to an implied promise on the part of the Appellant that if the royalty were reduced from 10/- to 6/- per ton the Appellant would remain upon the subject land and continue for a reasonable time to conduct mining operations. It is suggested that such a promise provided sufficient consideration to render the June agreement specifically enforceable or susceptible to protection by injunction or declaratory relief. 20 30

89. In dealing with the question of consideration, His Honour did not advert to an argument advanced on behalf of the Appellant in relation to both the January and the June agreements. It was submitted that even if each agreement was initially void for lack of mutuality in the sense that the Appellant incurred no obligation to carry out any mining operations, this defect was remedied when the Appellant by commencing operations supplied an executed consideration in the nature of an act in return for and referable to the Respondents' promise to allow the Appellant to mine: **Westhead v. Sproson** (6 H. & N. 728); **Boyd v. Moyle** (2 C.B. 644); **Provincial Bank of Ireland v. Donnell** (1934 N.I. 33); **British Empire Films v. Oxford Theatre** (1943 V.L.R. 163); **Combe v. Combe** (1951 2 K.B. 215 per 40

Denning L.J. at p. 221); **Australian Woollen Mills v. The Commonwealth** (92 C.L.R. 424). It is submitted that once such consideration was supplied, the Respondents' offer contained in the relevant agreements became irrevocable and that the duration of the Appellant's right to mine could not be determined by a withdrawal of the offer so long as the Appellant continued to mine.

SUBMISSION

90. The Appellant therefore respectfully submits that the Decree of the Supreme Court of New South Wales in its Equitable Jurisdiction dismissing the Appellant's suit ought to be reversed, that this appeal should be allowed and that the relief sought in the re-amended Statement of Claim ought to be granted for the following (amongst other) 10

REASONS

(1) The agreement of 14th June 1957 is on its true construction a licence coupled with an interest in personalty and is irrevocable so long as magnesite remains to be won or until the title or interest of the grantors should determine whichever event should first happen.

(2) His Honour was in error in holding that the agreement if so construed would be void for uncertainty. 20

(3) His Honour was in error in holding that the said agreement was terminable at will provided that the Appellant had a period of grace within which to remove any mined minerals and to vacate the land.

(4) His Honour was in error in holding that even if the said agreement was for a period greater than "at will" it terminated upon the expiration of the mining lease on 2nd September 1957 and did not enure into the period of renewal thereafter.

(5) His Honour was in error in assuming that the licence conferred by the said agreement was exclusive. 30

(6) His Honour should have held that Logan Hunter Caldwell was authorised by the partners of Hughes and Caldwell to enter into the said agreement, whatever its duration on its true construction might be

(7) His Honour should have held that the said agreement whatever its duration on its true construction might be was ratified by all the partners.

(8) The said agreement is on its true construction terminable only upon the expiration of a period of reasonable notice which has never been given. 40

ANTONY LARKINS
T. E. F. HUGHES
Counsel for Appellant.

In The Privy Council No. of 1962.

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES IN ITS EQUITABLE JURISDICTION

Between

AUSTRALIAN BLUE METAL LIMITED - - - (Plaintiff) Appellant

and

ROBERT FRANK HUGHES CLARENCE VIVIAN HUGHES FREDERICK CHARLES HUGHES VICTOR RAYMOND HUGHES LOGAN HUNTER CALDWELL MARGARET FERGUSON CALDWELL LINDSAY GEORGE REGAN and NORMAN VIVIAN REGAN - - (Defendants) Respondents

AND BY AMENDMENT

Between

AUSTRALIAN BLUE METAL LIMITED - - - (Plaintiff) Appellant

and

ROBERT FRANK HUGHES CLARENCE VIVIAN HUGHES FREDERICK CHARLES HUGHES VICTOR RAYMOND HUGHES MARGARET FERGUSON CALDWELL LINDSAY GEORGE REGAN NORMAN VIVIAN REGAN and STEELE HUNTER CALDWELL - - - - - - - (Defendants) Respondents

AND BY AMENDMENT

Between

AUSTRALIAN BLUE METAL LIMITED - - - (Plaintiff) Appellant

and

ROBERT FRANK HUGHES CLARENCE VIVIAN HUGHES VIOLET JEAN FREEMAN IVY ALMA RICHARDS VICTOR RAYMOND HUGHES MARGARET FERGUSON CALDWELL LINDSAY GEORGE REGAN NORMAN VIVIAN REGAN and STEELE HUNTER CALDWELL - (Defendants) Respondents