CASE FOR THE RESPONDENTS

(Other than Steele Hunter Caldwell)

RECORD:
p. 377.

1. This is an appeal from a judgment of the Supreme Court of New South Wales in its Equitable Jurisdiction in which the suit of the Appellant (plaintiff) against the Respondents (defendants) was dismissed with costs.

p. 20.

2. In the suit the plaintiff, as appears by the prayers in the Amended Statement of Claim sought:—

p. 415.

(i) A declaration that a certain agreement dated 14th June 1957 (hereinafter called "the June agreement") was a valid and subsisting agreement and that the defendants were not entitled to prevent the plaintiff from having access to the lands mentioned in it for the purposes of mining for and winning and removing magnesite from the said land;

(ii) An injunction restraining the defendants from preventing access by the plaintiff to the said land for the purpose of mining for magnesite;

(iii) Specific performance of the said agreement; and

(iv) Other ancillary relief.

3. The matters alleged by the plaintiff in support of the said prayers included the following:—

p. 11, l. 10.
p. 12, l. 36.
p. 384.

(i) That at all material times there had existed a partnership consisting of the original defendants to the suit which carried on a mining business, and that one of its assets was a Mining Lease granted by the Crown pursuant to the provisions of the Mining Act 1906 (as amended) of the State of New South Wales (hereinafter called "the Mining Act") the Lease being known as Private Land Lease 460 (hereinafter called "the Mining Lease") and the land to which it applied being situate near Young in the said State and described as P.M.L. 1 (Young).

p. 13, l. 36.
p. 17, l. 19.

(ii) That Logan Hunter Caldwell, one of the said partners, acted as managing partner of the said partnership and, as agent for the defendants, entered on their behalf into the said agreement with the plaintiff.

p. 18, ll. 29-41.

(iii) That after the execution of this agreement the plaintiff, by virtue of the agreement, to the knowledge and with the consent of the defendants, proceeded with mining operations it had previously been conducting on the said land.

RECORD:
p. 19, l. 11. (iv) That after the execution of the said agreement the defendants adopted and ratified it and accepted benefits thereunder.

p. 9, l. 33. (v) That the defendants thereafter on 19th August 1957 committed a breach of the said agreement by requiring the plaintiff to cease mining operations on the said land and by threatening to eject the plaintiff therefrom.

4. The Respondents other than Steele Hunter Caldwell (hereinp. 29. after called "the said Respondents") by their Amended Statement of Defence joined issue on many of these allegations and in particular:—

(i) Denied that in executing the said agreement the said Logan p. 37, l. 32. Hunter Caldwell acted on behalf of the defendants.

(ii) Denied that the plaintiff entered upon the said land and p. 38, l. 8. conducted mining operations thereon by virtue of the alleged agreement to the knowledge of the defendants.

(iii) Denied that they had adopted or ratified the alleged agreep. 38, l. 40. ment or had accepted benefits thereunder.

(iv) Denied that they were in breach of any agreement with the p. 39, l. 7. plaintiff.

(v) Alleged that if they were bound by the June agreement the p. 41, ll. 13, 40. same was terminable at will and that they had in fact validly terminated it.

p. 42, l. 8. (vi) Alleged that the said agreement was unenforceable for lack of consideration and want of mutuality.

(vii) Alleged that any right which the paintiff had to obtain access p. 42, l. 17. to the said land terminated in any event upon the expiration of the Mining Lease on 2nd September 1957 (i.e., prior to suit brought).

(viii) Alleged that in inducing the June agreement the plaintiff had p. 40, l. 24. been guilty of unfair concealment such as to disentitle it to the relief claimed.

5. The suit was heard between 14th February 1961 and 20th March 1961 and on 11th December 1961 the Honourable Mr. Justice p. 348. Jacobs delivered judgment. His Honour expressed his conclusions as follows:—

p. 359, l. 3. "(1) The agreement of 14th June 1957 is an agreement operating as a licence to the plaintiff company 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 plaintiff company thereupon had a period of grace in which to remove any mined mineral and to vacate the land.

(2) 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

2nd September 1957 and did not enure into the period of renewal thereafter.

(3) The agreement being terminable at will cannot be enforced in this Court.

(4) The agreement dated 14th June 1957 was binding on all the defendants because

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

(b) The agreement was made by Logan Hunter Caldwell as an act for carrying on in the usual way business of the kind carried on by the firm of Hughes and Caldwell at the time of the making of the agreement, and, if I am incorrect in my conclusion that Logan Hunter Caldwell had actual authority in the particular matter, the plaintiff company did not know that he had no authority.

(c) Even if there was no actual authority and if the making of the agreement was not an act for carrying on in the usual way business of the kind carried on by the firm of Hughes and Caldwell, the agreement was ratified by the acceptance and retention of the royalty payments received by the original defendants in August and September 1957 in respect of royalties paid under the agreement of 14th June 1957.

(5) Although it is unnecessary to my decision, I express the conclusion that there was no unfair concealment which made the agreement voidable or any unfair concealment or oppressiveness which would debar the plaintiff from equitable relief.

(6) Although it is not necessary to my decision, I express my conclusion that although there is no mutuality, in that there was nothing to be enforced against the plaintiff company, nevertheless this want of mutuality would be no defence in this suit which is primarily for an injunction in respect of the executed agreement and the right thereby created. In so far as the suit is for specific performance of a further instrument, I do not consider that specific performance of any further instrument was intended or could be granted, because of want of consideration and lack of mutuality."

In the course of expressing his reasons for those conclusions His Honour made it clear, furthermore, that if, contrary to the view expressed by him in (1) above, the agreement, on its true construction, was not terminable at will, the making of it was beyond the authority, express or implied, of Logan Hunter Caldwell, and it could not be deemed to have been ratified by the defendants, who knew nothing of a non-terminable agreement at the material times.

RECORD:
p. 368, l. 8.
p. 371, l. 20.
p. 374, l. 19.

It will be seen that His Honour's decision to dismiss the suit was supported by a number of grounds each of which in itself, and quite independently of the others, justified this dismissal. In particular,

those independent grounds include the ones stated in (1) and (2) above, and also His Honour's finding, above referred to, that Logan Hunter Caldwell had no authority to make a non-terminable agreement. To these three independent grounds appearing from the judgment itself there will be added a submission on behalf of the said Respondents that (contrary to His Honour's view of the matter) the Appellant, by its unfair concealment of certain matters inducing the June agreement, was disentitled to relief, this being a fourth alternative and independent ground which if successful would justify a dismissal of the appeal. A further submission will be put that the absence of consideration for the June agreement renders it nugatory and unenforceable.

6. The said Respondents accept His Honour's conclusions as expressed in (4) above, and submit that the conclusions expressed in (1), (2), (3) and the second sentence of (6), together with the findings previously mentioned as to lack of authority and non-ratification in respect of any non-terminable agreement, were correct. The reasons for these submissions appear below.

The said Respondents propose to present their submissions under the following headings:—

I. The Agreement was Terminable. (Paragraphs 7-16.)

II. Want of Consideration for, Lack of Mutuality in and the Oppressiveness of Enforcing the Agreement Disentitle the Appellant to Relief by way of Specific Performance or Otherwise. (Paragraphs 17-24.)

III. Any Grant to the Appellant of a Right to Mine Terminated in any event on the Expiration of the Mining Lease. (Paragraph 25.)

IV. Logan Hunter Caldwell had no Authority, Express or Implied, to Enter into a Non-Terminable Agreement with the Appellant and such an Agreement was never Ratified. (Paragraphs 26-29.)

V. The Agreement was Induced by the Appellant by an Unfair Concealment of Relevant Facts. (Paragraphs 30-32.)

VI. By Reason of the Provisions of the Mining Act the June Agreement was Ineffectual to Convey any Rights to the Appellant. (Paragraphs 33-36.)

I. THE AGREEMENT WAS TERMINABLE.

RECORD: p. 415.

7. In construing the June agreement in order to decide whether such rights as it conferred on the Appellant were terminable it is submitted that attention would be given to the following features of it:—

(i) No term was expressed.

(ii) No obligation to mine was imposed on the Appellant.

(iii) The Appellant was not given either an exclusive right to mine for minerals or an exclusive right to mine for magnesite on the land described.

RECORD: p. 415, l. 12.

(iv) The agreement recited that the Appellant "wishes to mine for magnesite on P.M.L. 1 (Young)" and purported to grant, not the right to mine **the** magnesite, but "the right to mine **for** magnesite" and nothing more.

p. 415, l. 20.

(v) No obligation was imposed on the Appellant except payment of royalty; in particular there was no minimum quantity of mineral to be mined, no minimum amount of royalty to be paid, no dead rent reserved and no provision that the Appellant should comply with the terms of the Mining Lease.

(vi) There was no express right to cancel reserved to the licensors so that without a right of terminating the agreement the licensors thereunder might be exposed to risk of forfeiture of the Mining Lease from the Crown without any remedy against the licensee.

(vii) There was no obligation imposed on the licensors to renew or to keep the Mining Lease on foot.

The agreement therefore bore no resemblance to a permanent arrangement covering all the magnesite on the Mining Lease, either in substance or in form. Properly construed, it was a bare and revocable permission.

8. Regard may also be had to the circumstances surrounding the grant of a licence of unspecified duration in deciding what was presumably intended as to its length. For example, considerations which caused the House of Lords to regard as revocable the licence under consideration in **Wintergarden Theatres Ltd. v. Millennium Productions Ltd.** (1948) A.C. 176, esp. at pp. 196, 199, 204 included the following:—

(a) The acceptance by the licensors of responsibility for repairs and payment of all rates, taxes, assessments and theatre and excise licences.

(b) The fact that the licensors retained portions of the theatre for their own use.

(c) The presence in the contract of obligations incumbent on the licensees, the non-performance of which might subject the licensors to serious loss, coupled with the absence of any power of determination in the licensors in the event of breaches by the licensees of their obligations.

(d) The various stipulations appearing in the contract which gave each party a close and lively interest in the conduct and integrity of the other.

9. In support of the conclusion that the June agreement in the present case conferred no more than a revocable licence regard should

be had to the following circumstances known to both parties surrounding the making of the agreement:—

RECORD:
p. 384, ll 3, 40.

(i) The interest of the lessees in the minerals under the Mining Lease was of uncertain duration. The lease had as at June 1957 approximately three months to run. The prospects of renewal for another 20 years depended upon, first, whether the lessees were willing to apply for and take a renewal and, secondly, whether the Governor on the advice of his Ministers was prepared to grant it, there being no obligation on either the lessees to apply for a grant of renewal or the Governor to make the grant.

p. 163, ll. 14, 36.

(ii) Victor Hughes knew of and had informed Buckley of the existence of magnesite in a portion of the Lease "south of the gully" which had not previously been mined but nothing indicates that either of them knew its precise value or extent, making it the more unlikely that a non-terminable agreement for extraction of magnesite at a flat rate of royalty would have been intended.

p. 160, l. 19.
p. 161, ll. 3, 6, 11.

(iii) There was in existence a gentleman's agreement between the Respondents and the Appellant which had the effect of preserving the mineral in the area south of the gully until the last, and on the evidence it appeared that this area would soon be the only portion of the Lease not worked out.

p. 394, l. 15.

(iv) The price of magnesite had shown an upward trend: the minimum sale price stipulated in the 1942 agreement had been as low as £2.0.0 per ton; Ex. "P", Cl. 9. Yet the remuneration of the syndicate under the June agreement was to remain constant. The obligation on the lessees to pay to the owner 1-1/8 per cent of the gross value of the minerals mined as required by the terms of the Mining Lease (see Cl. 2 of the Lease Ex. "A"), whilst the royalty received by them remained constant, could result in their receiving less and less per ton, the more valuable the mineral became. (This was pointed out by Logan Hunter Caldwell in his letter to the Appellant of 30th June 1957: Ex. "B.X.")

p. 385, l. 16.

p. 498, ll. 18-20.

p. 17, l. 5.

(v) The price of 6/- per ton was determined because a price of 10/- had for the time being rendered mining by the Appellant uneconomic (or so it had claimed) and was fixed against a background of facts which might well prove temporary.

(vi) The lessees were obliged by the Lease to pay a fixed yearly rent to the owners and in addition had continuing obligations involving them in expense of uncertain amount, e.g.,

p. 385, l. 40. Cl. 7, observance of labour conditions.
p. 386, l. 7. Cl. 8, drainage of water from workings.
p. 386, l. 29. Cl. 9, disposal of soil.
p. 386, l. 34. Cl. 10, observance of sanitary regulations.
p. 386, l. 37. Cl. 11, maintenance of boundary posts.

RECORD:

p. 386, l. 42. Cl. 12, erection of fencing around workings.

p. 387, l. 12. Cl. 14, rendering of sworn statistical returns to Secretary for Mines.

p. 387, l. 25. Cl. 15, preservation of the mine and the land from injury or damage and preservation of roads, works etc. in good repair and condition.

p. 441. Likewise the lessees had a continuing obligation to pay and were in fact paying (see Ex. "B.V.") Shire Rates in respect of the mine (Local Government Act 1919, s. 157(1)) calculated, at the option of the Shire Council, upon the saleable value of the mineral won (ibid. s. 153(1), 153(3)).

(vii) There was no obligation cast upon the Appellant under the said agreement to observe or perform all or any of the terms

p. 394, l. 30. and conditions of the Lease (contrast Ex. "P", Cl. 12). Yet upon failure by the lessees to fulfil or contravention by them of the conditions and covenants of the Lease, the same might be summarily cancelled by the Governor and the lessees

p. 388, l. 1. summarily expelled: see Lease Cl. 17(a). In particular non-

p. 385, l. 44. compliance with labour conditions (Cl. 2) would expose the lessees to complaint under s. 124A of the Mining Act by any person at all and to consequent cancellation of the Lease.

(viii) Forfeiture of the Mining Lease resulting from the acts or omission of the Appellant thereon would have affected not only the mining operations carried on by the licensees but also mining operations being carried on contemporaneously by the licensors on other portions of the Lease not covered by the June agreement.

(ix) The Appellant was not obliged under the agreement to mine in a proper or workmanlike manner or in such a way as would extract the greatest amount of magnesite from the Lease. (It is possible to mine wastefully and leave portion

p. 211, ll. 7, 20. of the metal beneath the spoil.)

(x) There was a continuing possibility of conflict between the licensor syndicate and the Appellant if both attempted to mine the same deposit of magnesite at the same time. The

p. 209, l. 30. Lease was for chromite as well as magnesite and there were

p. 394, l. 5. deposits of chromite on the land (Cf. Cl. 14, Ex. "P"). The Appellant's operations for magnesite might at any time have interfered with or prevented the lessees from mining for chromite if they had wished so to do.

(xi) There was no obligation imposed on the Appellant to sell at or above a minimum price and therefore nothing to prevent the Appellant from, in effect, destroying the syndicate's own

p. 394, l. 14. operations on the Lease by undercutting. (Contrast Ex. "P", Cl. 9.)

Three additional matters also support the construction of the agreement for which the said Respondents contend:—

(xii) There are significant provisions in the 1942 agreement between the syndicate (as then constituted) and the Australian Blue Metal Company (the partnership whose business was subsequently acquired by the Appellant company) which find no counterpart in the June agreement. Under the 1942 agreement:—

RECORD:
p. 393, l. 31.
(a) The licensee was liable to pay a proportion of royalties due to the Mines Department: Cl. 3.

p. 394, l. 8.
(b) The licensee agreed to mine not less than 5,200 tons and not more than 26,000 tons of magnesite each year: Cl. 8.

p. 394, l. 30.
(c) The licensee agreed to observe and perform all the terms and conditions of the lease: Cl. 12.

p. 393, l. 24.
(e) The licence was granted for a period of 5 years, with an option of renewal for a further period of 5 years: Cll. 1, 18.

p. 395, l. 7.
(xiii) The Appellant regarded itself as entitled to withdraw from P.M.L. 1 at any time without notice. There were other Mining Leases in the area yielding magnesite and the Appellant was lessee of P.M.L. 15, 16 situated nearby. It was prospecting on other Leases (including P.M.L. 19) while it was mining on P.M.L. 1; it was looking for magnesite wherever it could find it. If it had found any better magnesite than that on P.M.L. 1 it would have left that land.

p. 155, l. 43.
p. 212, l. 37.
p. 228, l. 1.
p. 156, ll. 41, 46.
p. 200, l. 17.
p. 216, ll. 17-29.

(xiv) The Appellant itself did not originally take the stand that the licence could not be terminated at all: see letter of 13th September 1957 (Ex. "17").

p. 427.

10. Before developing these submissions relating to terminability further, it is pointed out that a distinction is herein made between terminability and revocability. The word "irrevocable" and related words are, it is submitted, used in the authorities in two different senses: sometimes, as meaning that a purported termination would constitute a breach of the agreement or derogation from the grant under consideration (it being on its true construction non-terminable); at other times, as meaning that a purported termination is not only a breach of the agreement, but ineffective to render the licensee a trespasser, the licence being coupled with a grant, or as the case may be. When used in this latter sense, e.g., in the doctrine that "a licence coupled with a grant is irrevocable," the double meaning may obscure the sense: it does not mean that a licence coupled with a grant is **necessarily** non-terminable, but only that, if non-terminable, either at all or during a defined term, the purported termination during the term cannot render the licensee a trespasser. In this Case the word "irrevocable" and related words will be used only in the latter sense, and when dealing with the question whether on its true construction, and properly regarded, the rights conferred by the June agreement

were terminable at will, the word "terminable" and related words will be used. This distinction in terminology was observed by His Honour in his judgment.

RECORD: p. 361, l. 22.

11. It is submitted that the June agreement was not one having perpetual operation and that any rights conferred thereunder were terminable by the licensors. The agreement did not involve a sale of the minerals or a lease of the minerals for a term. It was either a bare licence or at most a licence to mine coupled with a grant of minerals won. On either view it was terminable.

It is true that in **Llanelly Railway & Dock Co. v. L. & N.W. Railway** (1874) L.R. 7 H.L. 550, at p. 567 Lord **Selborne** said:

> "An agreement **de futuro** extending over a tract of time which, on the face of the instrument is indefinite and unlimited must (in general) throw upon anyone alleging that it is not perpetual the burden of proving that allegation, either from the nature of the subject, or from some rule of law applicable thereto."

But this is not a universal rule of construction. There were special features in the **Llanelly Railway Case** which influenced the result. As Lord **Porter** said in **Wintergarden Theatre Ltd. v. Millennium Productions Ltd.** (1948) A.C. 173, at p. 195:—

> "Undoubtedly in that case running powers over their line given by one railway company to another were held to be irrevocable, but they formed part of a general agreement under which a large sum was lent, and formed part of the consideration for a loan. In any case running powers are in a class by themselves involving special arrangements, preparations and expenditure, which may well influence the construction of an agreement under which they are granted."

And Lord **MacDermott** observed (at p. 203):—

> "When the facts of that case are examined it is plain that the contract for running powers which was there held to be permanent in character has little in common with the contract between the parties to this appeal, save that in neither instance was express provision made for revocation by the licensors. In **Llanelly's Case** the agreement not only contained terms which indicated the construction adopted, but, as a perpetual arrangement, it conferred rights of a kind contemplated by the railway legislation then in force—a circumstance which Lord **Cairns** L.C. obviously regarded as important. (See L.R. 7 H.L. 550, at p. 559.)"

The same thoughts concerning the background which prompted the construction placed on the agreement in the **Llanelly Railway Case** may be found in the judgment of **McNair J.** in **Martin Baker Aircraft Co. Ltd. v. Canadian Flight Equipment Ltd.** (1955) 2 Q.B. 556, at p. 574.

The presumption of perpetuity probably has no application to the case of the ordinary mercantile or commercial contract: see **Crediton Gas Co. v. Crediton Urban District Council** (1928) Ch. 174, at p. 178; (1928) Ch. 447. In the commercial or mercantile field the law does not without clear words or intention regard an agreement as intended to constitute a permanent relationship: **Martin Baker Aircraft Co. Ltd. v. Canadian Flight Equipment Ltd.** (supra); see also **Birtley and District Co-operative Society Ltd. v. Windy Nook and District Industrial Co-operative Society Ltd.** (1960) 2 Q.B. 1, at pp. 9-10.

In relation to licenses to have access to land or premises the rule is that "prima facie licenses are revocable": **Wintergarden Theatre Case** per Lord **Porter** (at p. 195).

> "It is one thing to say that a limited and temporal licence remains in force until the particular object for which it is given is fulfilled or the definite period of time has elapsed; it is quite a different matter to allege that a licence once given in general terms can never be terminated. To my mind the whole historical development of the law is against such a contention" (ibid. at p. 194).

This is especially so when the licensee is without obligations to the licensor. A bare permission, imposing no obligation on the licensee to do anything, is prima facie revocable as a matter of law: see **Moffat v. Sheppard** (1909) 9 C.L.R. 265, at p. 286, per **Isaacs** J.; **Wintergarden Theatre Case** (1948) A.C. 173, at p. 188 per Viscount **Simon.** The (dissenting) judgment of **Christian** L.J. in **Atkinson v. King** (1878) 2 I.R. 320 illustrates the application of these principles to a licence to mine. The distinction between that case and the present is pointed out by His Honour in the judgment appealed from.

RECORD: p. 363, l. 40.

12. The question whether notice is necessary to terminate an agreement and, if so, the period of such notice, is a question of construction. Lord **Greene** M.R. said in the **Wintergarden Theatre Case** (1946) 1 All E.R. 678, at p. 680 that the contract must first be construed to ascertain whether the licence is revocable (i.e., terminable) at all and, if so, upon what conditions. It is submitted that the licence which the June agreement conferred on the Appellant in the present case was terminable, and without notice. This is the general rule in relation to licenses, but the licensee has a reasonable "packing-up period" after termination of his licence and becomes a trespasser only if he fails to withdraw after the expiry of that period. See, e.g., **Minister of Health v. Bellotti** (1944) 1 K.B. 298 at pp. 305-306 per Lord **Greene** M.R.; at p. 308 per **MacKinnon** L.J.; **Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.** (1955) 1 W.L.R. 761. In modern times this period goes beyond the minimum period necessary to withdraw and extends to what is reasonable in all the

circumstances: **Minister of Health v. Bellotti** (supra), at pp. 304-305. There may, of course, be unusual cases where in all the circumstances it may be necessary to imply a term requiring the giving of reasonable notice of intention to terminate, the length of which will depend on the relevant circumstances existing at the time when notice is given. It may, for example, be proper to imply such a term when the licensee is providing a public service or would in the nature of his business have to enter into long-term commitments which cannot easily be terminated during a "packing-up period": see, e.g., **Canadian Pacific Railway Co. v. The King** (1931) A.C. 414. The profitability or otherwise of the licensee's previous operations on the land or his future business prospects are equally irrelevant in assessing what is a reasonable time for the giving of notice of intention to terminate, but the past history of dealings between the parties, including the giving of previous informal notices, is relevant: cf. **Stickney v. Keeble** (1915) A.C. 386, at p. 419 per Lord **Parker** of Waddington. In cases where such a term is to be implied and notice is given, the onus lies on the licensee of showing that the period allowed is unreasonable: **Wintergarden Theatre Case** (1948) A.C., at p. 208 per Lord **MacDermott.** In cases where notice is unnecessary, but is given and is unreasonably short, the licence is nonetheless terminated and the licensee becomes a trsepasser after the expiry of a "packing-up period" commencing at the time of the giving of the notice: **Minister of Health v. Bellotti** (supra).

13. It is submitted that in the circumstances of the present case it is unnecessary to imply a term in the June agreement requiring the giving of notice and the licensee had an ample "packing-up period" prior to the institution of its suit on 22nd May 1958. The Appellant in fact received five notices of termination of its licence:—

RECORD:
p. 144, l. 7.
p. 175, l. 43. (i) On 7th August 1957 verbal notice was given by Victor Hughes to Thomas Buckley on behalf of the Appellant.

p. 421. (ii) On 19th August 1957 a letter was written from Tester Porter & Co. to the Appellant (Ex. "C").

p. 426. (iii) On 11th September 1957 a letter was written from the solicitors for the said Respondents to the solicitors for the Appellant (Ex. "17").

p. 428. (iv) On 16th October 1957 a letter was written by the city agents for the solicitors for the said Respondents to the Appellant (Ex. "2").

p. 431. (v) On 19th November 1957 a suit was instituted by the lessees under the Mining Lease against the Appellant to restrain it, inter alia, from further remaining on the land (Ex. "20").

14. Alternatively, it is submitted that the notice given by the
p. 428. letter of 16th October 1957 (Ex. "2") was in the circumstances

RECORD:
p. 129, l. 26.
p. 131, l. 30.
p. 208, l. 9.
p. 212, l. 42.
p. 167, ll. 23-33.
p. 223, ll. 10, 32.
p. 223, l. 46.
p. 168, l. 6.
p. 172, l. 2.
p. 225, ll. 26, 36.

reasonable. The Appellant has not shown why it should not have ceased mining operations on the land immediately after receiving notice of termination of the licence and the evidence does not show that 16 days was insufficient time for the removal of plant and stock. The equipment used by the Appellant in the mining operations was mobile, a hut with a concrete floor erected by it was not on the subject land and there were in fact no permanent improvements installed by the Appellant there at all. The evidence showed that the Appellant's equipment could be moved from one lease to another in twenty-four hours. Filling the last hole might have taken the Appellant two or three days. Its staff, numbering about seven men on this project, could have been paid off. There was on the ground from time to time 500 or 600 tons of metal mined; the greatest amount of metal so accumulated at any one time was 1,000 tons. One truck could carry from seven to eight loads a day and even on the assumption that only two trucks were available to carry mineral to the railway siding, a total of approximately 128 tons of mineral won could have been transported from the subject land to the siding each day.

15. Being terminable at will, the June agreement cannot be enforced in equity. Neither specific performance nor an injunction in aid of specific performance will be decreed in respect of an agreement which the defendant would be entitled to revoke or terminate since it would be idle to enforce that which might instantly be set at naught by one of the parties: **Hercy v. Birch** (1804) 9 Ves. Jun. 357; **Sheffield Gas Consumers' Co. v. Harrison** (1853) 17 Beav. 294. The Appellant would therefore not be entitled to this relief whether or not the June agreement had in fact been effectively terminated by the Respondents prior to the institution of its suit.

16. These questions of terminability and notice have been approached simply as questions of construction to be decided by the application of the ordinary rules of legal interpretation. This approach appears to be justified, and indeed required, by the provisions of section 129(1) of the Mining Act, which reads as follows:—

> "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."

This approach to the matter differs from that which was adopted by His Honour who, despite the provisions of section 129, stated that the question of terminability could "only be determined by applying the analogy of a **profit à prendre**" and that "the only way in which

p. 361, l. 13.

RECORD: p. 361, l. 31.

(the June agreement) can be construed is by analogy to the interests which can be created by (an owner in fee simple)". It is submitted that this view of the matter as expressed by His Honour is incorrect, although one may arrive at the same ultimate conclusions by a different route. At the most, interests in real estate may furnish some general analogy, but the doctrines and learning of the common law relating to interests in real estate, developed in an entirely dissimilar historical context, can be of no real assistance if sought to be applied to interests in the nature of personalty created or acquired under the provisions of the Mining Act. The nature and incidents of interests under the Mining Act must be decided by reference to the provisions of the Mining Act, in particular section 129, and the instruments by which under that Act they are created or acquired; the nature and incidents of any dispositions thereof by the grantee must be decided by reference to the language used in the documents by which they are disposed of construed in the light of the relevant surrounding circumstances. The foregoing submissions have been based on the view that this is the correct approach to the matter.

II. WANT OF CONSIDERATION FOR, LACK OF MUTUALITY IN AND THE OPPRESSIVENESS OF ENFORCING THE AGREEMENT DISENTITLE THE APPELLANT TO RELIEF BY WAY OF SPECIFIC PERFORMANCE.

Want of Consideration.

17. No consideration passed from the Appellant for the June agreement. There was created no reciprocal obligation on the part of the Appellant which would necessarily be of any benefit to the Respondents nor any detriment to the Appellant. There was no express obligation imposed on the Appellant by the said agreement to mine or to continue mining on the subject land nor can any such obligation be implied, and indeed counsel for the plaintiff at the hearing conceded as much.

Cf. p. 363, l. 23.

18. As no implication of an obligation to mine could be made, the agreement in effect reserved to the Appellant the right to refrain from any action at all without thereby involving itself in breach of contract. A supposed consideration which is entirely dependent upon the will of one party to the agreement is illusory and no consideration at all. **Leake** on Contracts (8th edn.) p. 3 states:—

> "An agreement as the source of a legal contract imports that the one party shall be bound to some performance, which the other shall have a legal right to enforce and the intention of the one party as to the performance, expressed to and accepted by the other for the purpose of creating the right, constitutes a promise. Promissory expressions reserving to the promisor an

option as to the performance do not create a contract."

Where an agreement in terms or in effect provides that one party has a right to choose one of two alternatives, and by choosing one will escape without suffering a detriment or giving the other party a benefit, the agreement lacks consideration. This was the effect of the agreement in the instant case since the obligation on the Appellant was to pay a royalty in respect of such magnesite, if any, as it saw fit to mine. The American Restatement of the Law of Contract (s. 79) expresses the proposition thus:—

> "A promise or apparent promise which reserves by its terms to the promisor the privilege of alternative courses of conduct is insufficient consideration if any of these courses of conduct would be insufficient consideration if it alone were bargained for."

Words that express an undertaking to do something if the promisor "so desires" or "sees fit" are apparently a promise, but not a promise in fact. An apparent promise which according to its terms makes performance optional to the promisor is in fact no promise. The insufficiency of such a promise as consideration is most commonly illustrated in agreements to buy or sell goods where the quantity is fixed by the wishes of one of the parties. A promise to buy such a quantity of goods as the buyer may thereafter order, or to take goods in such quantities "as may be desired" or as the buyer "may want" is no consideration since the buyer may refrain from buying at his option and do so without incurring legal detriment to himself or benefiting the other party. These propositions are illustrated in **Sykes v. Dixon** (1839) 9 A. & E. 693; **Westhead v. Sproson** (1861) 6 H. & N. 728. This reasoning is not affected by the fact that when the Appellant in fact mined it was liable to pay for the mineral taken. The event which brought into being the Appellant's obligation to pay money was then fulfilled but the bringing about of this event lay in the unfettered discretion of the Appellant.

19. It may be submitted by the Appellant that, by going on the land and mining for magnesite, it had by that act accepted an offer by the Respondents of the right to extract magnesite upon certain terms in exchange for an act of that nature, and that the contract was complete as soon as the act was done. Even accepting that proposition, however, the question would still remain: what was the offer so accepted? It is submitted that, truly understood, the June agreement really amounted to a standing offer, liable to be revoked at any time, whereunder the Appellant was entitled (but not bound) to go on to the Lease and mine for magnesite at any time prior to revocation of the offer, whereupon the terms of the agreement would regulate the rights of the parties in relation to the magnesite so mined. The Appellant, on the other hand, attempts to construe it quite differently, as an offer to allow it to come on to the Lease and extract magnesite

as and when it pleased at any time and from time to time, throughout the whole term of the Lease and any renewal thereof without incurring any obligation or having performed any act except such as it might choose to perform for its own benefit for the purpose of extracting magnesite. The latter is not an acceptable interpretation of what was intended by the June agreement; on that view the Appellant would gain so much in exchange for so little that one is compelled to adopt the former interpretation. The Appellant did not come on to the land or carry out mining operations at the request of the Respondents or in exchange for any promise by them; it came on and mined for its own purposes and its own benefit alone, in exercise of what it believed to be its rights. In the circumstances its acts could not be regarded as good consideration for a promise by the Respondents to permit the Appellant to mine as and when it pleased.

RECORD: p. 212, l. 45.

20. If, contrary to the above submissions, it should be held that the June agreement (and hence the agreement of 31st January 1957 which preceded it) **were** intended to confer rights to enure throughout the term, for which promise the Appellant's entry or continuance on the land thereafter could be regarded as sufficient consideration, it is submitted that the June agreement was ineffective to vary the January agreement, with which it was identical except for a reduction in the royalty rate for which reduction there was no consideration. Thus the June agreement was unenforceable, and it was in respect of that agreement alone that relief was sought.

p. 415.
p. 409.

21. The June agreement is not a document which equity will lend its aid to perfect since, even though what the Appellant is seeking to enforce by injunction or specific performance is in form a deed, the Appellant must show a real consideration for the Respondents' promises and here there is none. (**Fry** on Specific Performance (6th edn.) p. 53).

22. It may be submitted by the Appellant that the June agreement is a deed and that, for this reason, no consideration is necessary for the agreement to confer valid rights at law. The said Respondents submit that, in so far as the June agreement may be alleged to be or may purport to be a deed, Logan Hunter Caldwell, who executed it, was not, by deed, authorised by the said Respondents to execute it nor have they, by deed, ratified it. An agent cannot bind his principal by deed unless he has authority under seal: **Harrison v. Jackson** (1797) 7 T.R. 207; **Steiglitz v. Egginton** (1815) Holt 141; **Berkeley v. Hardie** (1826) 5 B. & C. 355. Ratification of sealed instruments must likewise be under seal: **Bowsted** on Agency (11th edn.) p. 41; **Taylor** on Evidence (3rd edn.) p. 811.

Lack of Mutuality

23. Equity will not grant specific performance of a contract unless the plaintiff's own promises so far as still unperformed are themselves capable of specific enforcement. Where the plaintiff has made no promise at all he will not be entitled to equitable relief. See, e.g., **Mortimer v. Beckett** (1920) 1 Ch. 571, at p. 582.

Oppressiveness

24. It is also submitted that a Court of Equity would not enforce the June agreement against the Respondents because it would by reason of the absence of obligations imposed on the Appellant be oppressive so to do. (See **Fry** on Specific Performance (6th edn.) Ch. VII.) To enforce the agreement would be to perpetuate a situation in which the Respondents would be entirely at the mercy of the Appellant with no reciprocal or commensurate benefit to the Respondents or detriment to the Appellant. So far as the land the subject of the June agreement is concerned, the Respondents would be under an obligation to allow the Appellant to mine as and when and from time to time as the Appellant chose for the whole period of the Respondents' Lease and (on the Appellant's case) any renewal thereof, whilst at the same time the Appellant would be under no obligation to mine at all. So far as the land the subject of the Lease is concerned the Lease itself would remain in continual jeopardy of forfeiture or cancellation for acts or omissions of the Appellant constituting breaches of the Lease for which the Respondents would be responsible, the Appellant being under no obligation to perform the conditions of the Lease.

III. ANY GRANT TO THE APPELLANT OF A RIGHT TO MINE TERMINATED IN ANY EVENT ON THE EXPIRATION OF THE MINING LEASE.

RECORD:
p. 384.
p. 420.
p. 436.

25. The Mining Lease was for a term of 20 years expiring on 2nd September 1957 (Ex. "A"). On 17th July 1957 the lessees, Robert Frank Hughes and Clarence Vivian Hughes, made application for renewal of the said Lease (Ex. "DM") and the renewal was granted on 31st July 1958 (Ex. "B"). No period of time having been expressed in the June agreement, its duration fell to be determined as a matter of implication. If not merely terminable at will there were at least seven periods which it would have been possible to imply:

(i) The term of the existing lease.
(ii) The term of the existing lease and any renewal thereof.
(iii) Until the interest of the lessees might for any reason determine.
(iv) Until the last of the magnesite was won.
(v) During such period as the grantee might find it economic to continue mining.

(vi) A reasonable period.
(vii) In perpetuity.

RECORD: p. 367, l. 21.

As appears from His Honour's judgment, counsel for the plaintiff sought to rely on a combination of (iii) and (iv) above. Of the possible implications, (iii), (iv), (v) and (vi) would introduce an uncertainty which would avoid the grant and an intention to agree to (vii) could not be imputed to the grantors. It would be equally impossible to impute to the grantors an intention that the grant should continue during every subsequent renewal, upon the number of which the Mining Act places no limitation: see s. 62A. Once the agreement is treated as extending beyond the duration of the existing lease there is no ground for limiting the number of renewals thereof through which it is to run.

It is submitted that, in the absence of any reference in the June agreement to renewal of the Lease or of any obligation to renew imposed on the licensor, it is not possible reasonably to imply any term for the grant other than the unexpired term of the Lease itself.

IV. LOGAN HUNTER CALDWELL HAD NO AUTHORITY, EXPRESS OR IMPLIED, TO ENTER INTO A NON-TERMINABLE AGREEMENT WITH THE APPELLANT AND SUCH AN AGREEMENT WAS NEVER RATIFIED.

26. In view of His Honour's finding that the June agreement was terminable it was not strictly necessary for him to state a 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 licensor syndicate endured. His Honour did, however, clearly indicate that his view was that Logan Hunter Caldwell had no such authority, express or implied. When dealing with actual authority His Honour said: "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." Later in the judgment, treating of implied authority, His Honour's finding that it existed in relation to the January and June agreements was expressly subject to the proviso that His Honour had "correctly construed them as agreements at will only." It was clearly implied that, if otherwise construed, His Honour would have held the agreements to be unauthorised. It is submitted that His Honour's views so expressed were in each case correct.

p. 368, l. 2.

p. 368, l. 8.

p. 371, l. 20.

27. The evidence discloses that Logan Hunter Caldwell's functions and the scope of his authority were essentially those of a secretary and bookkeeper to the partnership. Under the partnership agreement of 14th August 1943 (Ex. "O") he was to keep the books (Cl. 10)

p. 399, l. 30.

RECORD:
p. 398, l. 26.
p. 399, l. 3.
p. 400, l. 5.

and was appointed one of the persons to sign cheques (Cl. 3). Neither he nor any other partner was required to devote any of his time to the affairs of the partnership (Cl. 6) and no partner was to be entitled to any salary or allowance (Cl. 11). Neither he nor any other partner was given executive powers or express powers to bind the partnership and the absence of any such provision suggests that no one partner was intended to have them.

p. 14.
p. 80, l. 6.
p. 123, l. 27.

The Appellant has not made good the allegations contained in paragraphs 14 and 14A of the Amended Statement of Claim that Logan Hunter Caldwell received moneys on behalf of the partnership and distributed profits. Exhibits "AB" and "BG" establish that he wrote out cheques of which it may no doubt be inferred that he was one of the signatories. But in calculating and writing out cheques he was not paying money or distributing profits any more than a secretary or clerk who keeps accounts and writes out cheques does so. The fact that he entered into correspondence with the Mines Department, the Appellant and others on behalf of the partnership did not give him a greater status than that of a secretary and in none of the correspondence relied upon did he purport to negotiate or make any agreement on behalf of the partnership or do anything of an executive character. The only possible exception is the letter of 30th June 1957 to the Appellant (Ex. "BX") in which he requested the Appellant to pay the Government royalty, and then he expressly stated that he did so after discussion witht the others. The agreements with the Australian Blue Metal Syndicate in 1942 and 1943 (Ex. "P") were signed by Joseph Peter Hughes as well as by himself on behalf of the partnership.

p. 498.
p. 395, l. 24.
p. 397, l. 12.

There is no evidence that before 1957 Logan Hunter Caldwell ever attempted to negotiate or make on behalf of the partnership any agreement for or grant of mining rights over the Lease. There is considerable evidence that he had no authority as sole signatory on behalf of the partnership to enter into the written agreements of January and June 1957:—

p. 132, l. 6.
p. 154, l. 6.

(a) Victor Hughes told Buckley that he would have to see "the others" about the Appellant going into the old pits.

p. 158, l. 38.
p. 525, l. 21.

(b) The Appellant admitted that permission to enter the Mining Lease came from Victor Hughes **and** Logan Hunter Caldwell (interrogatories answer 14(h)).

p. 139, l. 12.
p. 139, l. 40.
p. 473.

(c) When Buckley approached Logan Hunter Caldwell for a reduction in royalties he said he would discuss it with the others and that it would have to wait until Frank Hughes finished shearing. This is borne out by the letter of 28th May 1957 from Buckley to Driscoll (Ex. "CT").

p. 235, l. 42.
p. 283, ll. 8-13.

(d) When Driscoll spoke to Logan Hunter Caldwell on 5th June 1957 the latter said "I will have to confirm it with my partners." Driscoll admits that Logan Hunter Caldwell made that clear and that he accepted the situation. He advised Buckley that the reduction depended upon "final confirmation

RECORD:
p. 479, l. 10.

after discussion with the partners" (see letter 6th June 1957, Ex. "CU").

p. 190, l. 46.
p. 191, l. 7.

(e) Buckley admitted that he knew on all three occasions (dumping spoil, entering the old pits and reducing royalties) that the others had to be consulted.

p. 24.
p. 26.

(f) Logan Hunter Caldwell himself swore in paragraphs 16 and 25 of the original Statement of Defence that he had no authority to enter into the January and June agreements.

p. 98, l. 21.
p. 99, l. 11.

(g) At the meeting of the partnership of 14th August 1957 Logan Hunter Caldwell's authority to enter into the said agreements was challenged.

28. In the course of his judgment His Honour said: "I do not think that he (Logan Hunter Caldwell) was in the full sense the
p. 371, l. 36. Managing Director . . . of the partnership." Logan Hunter Caldwell in paragraph 9 of the original Statement of Defence even denied that
p. 23. he was managing partner. But even if he were accurately described as manager of the partnership it does not follow that he would have any right on behalf of the partnership to grant any interminable licence to mine since that would depend on whether a power to dispose of partnership assets was a managerial act, which it is submitted it is not.

There is evidence that the partnership from its inception carried on a business of mining in the course of which licences were granted to work and win minerals. The evidence does not establish, however, that its business included the granting of non-terminable licences to mine and take minerals from the lease. Apart from the evidence that members of the syndicate and some others were permitted to mine on payment of a royalty, the only formal grant of any rights over the lease in the 20 years from 1936 to the beginning of 1957 was the 1942 agreement with the firm Australian Blue Metal Company (Ex.
p. 393. "P"). This agreement was an isolated transaction and imposed limitations in time and quantity upon the grantee's rights. It was executed by Joseph Peter Hughes as lessee and by him and Logan Hunter Caldwell on behalf of the partnership. It is no evidence that the partnership's business consisted of granting irrevocable licences of uncertain duration without obligation to mine and unlimited as to quantity or that the usual way of carrying on the partnership business was the granting of such licences. There is no evidence of the usual way of carrying on a business of a like kind so as to show that the making of an agreement in the form of the June agreement was a usual way for mine proprietors or holders of a Mining Lease to carry on business. An act done by one partner in the course of a partnership business but not done in the usual way in which the partnership carries on its business is not binding on the partners: **Partnership Act** 1892 (N.S.W.), s. 5; **Kirk v. Blurton** (1841) 9 M. & W. 284; **Nicholson v. Rickets** (1860) 2 El. & El. 497; **Mandelberg v. Adams** (1930) 31 S.R. (N.S.W.) 50.

29. His Honour found that the June agreement was ratified by the partners on whose behalf Logan Hunter Caldwell had purported to make it by the acceptance and retention of royalty payments in the months of August and September 1957. His Honour said, however: "I stress, however, that I do not think that the evidence establishes any ratification of a grant for the period contended for by the plaintiff company. There is nothing before me to indicate that any of the partners ever regarded the rights conferred on the plaintiff company as extending so far or ever had it in mind that the rights could be so extensive. Lack of appreciation of this vital matter would, in my view, prevent their acts being regarded as a ratification." It is submitted that this statement is correct.

RECORD: p. 374, l. 19.

The evidence discloses that no member of the partnership other than Logan Hunter Caldwell had knowledge of the written agreements before 7th August 1957. (See answers to interrogatories 29, 29B, 32.) Mr. Giugni, solicitor, had no communication with anyone but Logan Hunter Caldwell when the agreements were signed. Buckley did not mention a written agreement in conversations with Norman Regan, Victor Hughes and Robert Hughes. At the meeting on 14th August 1957 Logan Hunter Caldwell did not suggest that the other partners did know about the written agreements. When the partners did become aware of the June agreement there is no evidence that they were told that it was or treated it as a non-terminable agreement. Such evidence as there is concerning their understanding of its effect points the other way. Ratification must be evidenced by clear adoptive acts or by acquiescence equivalent thereto accompanied by full knowledge of all the essential facts: **De Bussche v. Alt** (1878) 8 Ch. Div. 286; **Marsh v. Joseph** (1897) 1 Ch. 213; **Taylor v. Smith** (1926) 38 C.L.R. 48. The burden of proof of ratification lies on him who alleges it and he must prove full knowledge of the facts: **Wall v. Cockerell** (1863) 10 H.L.C. 229.

pp. 529-530.
p. 84, l. 46.
p. 153, l. 34.
p. 166, l. 10.
p. 176, l. 39.
p. 208, l. 29.
p. 104, l. 13.
p. 98, l. 19.

V. THE AGREEMENT WAS INDUCED BY THE APPELLANT BY AN UNFAIR CONCEALMENT OF RELEVANT FACTS.

30. The Appellant induced the June agreement by a representation made on 5th June 1957 by its Secretary, Robert Mitchell Driscoll, on its behalf to Logan Hunter Caldwell that mining on the Lease had become uneconomic for the Appellant. This was admitted by the Appellant in paragraph 24 of the Amended Statement of Claim. At the same time a representation was made by Driscoll on behalf of the Appellant to Logan Hunter Caldwell that unless a reduction in royalty were obtained by the Appellant it would withdraw from the Lease. In making these representations the Appellant concealed matters which rendered the representations misleading. The matters which were concealed by the Appellant from Logan Hunter Caldwell at the

p. 17.
p. 235, ll. 31-35.

time of making the representations which induced the agreement of June 1957 were the following:—

(i) News of good prospects which had been received by the Appellant from its representative at the mine, Thomas Buckley.

(ii) The fact that the Appellant had received the promise of a quantity bonus from the Broken Hill Proprietary Co. Ltd.

(iii) The fact that it was likely that the Appellant would be able to produce sufficient mineral to obtain the quantity bonus.

(iv) The fact that the Appellant, far from having a firm resolve to leave the lease at the end of June if the royalty were not reduced, had not applied its mind to the question and had not even made necessary preliminary calculations for such a decision.

(v) The fact that without the requested reduction in royalty the Appellant would be able to mine economically on the Lease.

31. The evidence disclosed the following matters:—

(i) **As the Appellant worked the Lease it had progressively increased production and effected economies, particularly in the period immediately preceding the telephone conversation of 5th June 1957.**

From the time the Appellant first entered the Lease until June 1957 its output of mineral from that Lease steadily increased. Up to the end of 1956 its production was 345 tons (Ex. "4"), from 1st January 1957 to 31st March 1957 its production was 1,750 tons (Ex. "5") and from 1st April 1957 to 30th June 1957 its production was 2,350 tons (Ex. "5").

RECORD:
p. 440.
p. 419, l. 13.
p. 419, l. 17.

In the letter of 31st January 1957 to the Broken Hill Proprietary Co. Ltd. (Ex. "CL") the Appellant requested an increase of 10/- in the sale price of the mineral stating that if this were granted it would be an economic proposition to carry on. In reply the Broken Hill Proprietary Co. Ltd. in its letter of 15th February 1957 (Ex. "CM") suggested that payment of the 10/- per ton royalty made it difficult for the Appellant to operate economically but in its letter of 18th February 1957 (Ex. "9") the Appellant informed the Broken Hill Proprietary Co. Ltd. that the increase in price was not being sought to cover a royalty payment. Driscoll on behalf of the Appellant stated in evidence that the Appellant had sought an increase in price from the Broken Hill Proprietary Co. Ltd. not because the royalty was too high but for other reasons; the royalties being paid by the Appellant were not the only factor which had made its operations uneconomic.

p. 447.
p. 448.
p. 449.
p. 284, l. 3.
p. 293, l. 29.

In addition the request expressed by Driscoll in his letter of 10th May 1957 (Ex. "CQ") to Buckley that the cartage

p. 468.

rate payable to Lark the carrier be reduced to 30/- an hour had by 16th May 1957 been complied with: see letter of that date from Buckley to Driscoll (Ex. "CS").

RECORD:
p. 470.

(ii) **Before 5th June 1957 the Appellant knew of its improved mining prospects on the Lease.**

p. 164, l. 36.
p. 238, ll. 27-31.
p. 202, l. 18.
p. 164, l. 43.
p. 195, l. 16.
p. 264, l. 30.
p. 171, l. 3.
p. 474.
p. 475.
p. 255, l. 22.

Driscoll kept in regular contact with Buckley, the Appellant's representative on the Lease. Buckley possibly told Driscoll on the telephone that there was magnesite south of the gully before in fact he crossed over to mine it; he probably told Driscoll on the telephone when he started test-boring south of the gully and Driscoll admitted that this could have been the Friday before the conversation which he had with Logan Hunter Caldwell on 5th June 1957. Early in June the area south of the gully showed promise and by letter dated 2nd June 1957 (Ex. "13") Buckley had written to Driscoll saying that he had every hope of getting 1,000 tons away that month. By a memorandum dated 4th June 1957 (Ex. "14") Driscoll wrote to Buckley: "Glad to receive your advice this morning of the big tonnages you are getting." Driscoll in evidence admitted that at this time "it looked hopeful."

(iii) **The difference of 4/- per ton royalty did not as at 5th June 1957 make the difference to the Appellant between economic and uneconomic mining.**

p. 479.
p. 285, ll. 9-15.
p. 264, ll. 4, 41.
p. 258, l. 11.
p. 267, l. 20.

Prior to the telephone call between Driscoll and Logan Hunter Caldwell on 5th June 1957 the economies which the Appellant had achieved in its mining operations were as recorded in Driscoll's letter to Buckley of 6th June 1957 (Ex. "CU"). As at 5th June 1957 the Appellant therefore did not need a reduction in royalty of 4/- per ton to make mining economic because it had received an increase in price and a quantity bonus from the Broken Hill Proprietary Co. Ltd., it had good prospects of mining a sufficient quantity of metal to enable it to collect the bonus and it had effected an incidental economy with Lark the carrier. Driscoll knew that the Appellant alone of the suppliers to the Broken Hill Proprietary Co. Ltd. had the benefit of a quantity bonus and this was in his mind when he rang Logan Hunter Caldwell.

Yet Driscoll admitted that on 5th June 1957 in his conversation with Logan Hunter Caldwell he put the Appellant's position in the same terms as he would have employed if he had been speaking in May notwithstanding, as he admitted in evidence, that between those two months important changes in the profitability of the Appellant's mining had occurred. This was for him the normal way of doing business, so he said.

RECORD:
p. 265, l. 34.
p. 265, l. 41.
p. 297, l. 36.
p. 297, l. 12.
p. 262, l. 17.
p. 295, ll. 23-31.
p. 298, ll. 16-24.

Driscoll admitted that the Appellant had never really applied its mind to what it would do if it did not obtain the royalty reduction yet he told Logan Hunter Caldwell that it would pull out of the Lease if it didn't get it. Driscoll admitted that at this time he was optimistic about collecting the quantity bonus from the Broken Hill Proprietary Co. Ltd. in the future and it was realistic at this time to assume that the Appellant would be able to continue removing 1,000 tons per month from the mine.

The Appellant aimed for a return of 25 to 30 per cent on capital. Driscoll had not calculated the return on capital as at June 1957 but even without the reduction in royalty the return on capital to the Appellant on a production of 1,000 tons per month would be much more than the minimum return required. A difference of £200 per month (which was the approximate amount involved in reducing the royalty) would certainly not render mining uneconomic.

p. 375, l. 33.
p. 375, l. 36.

32. In dealing with this matter His Honour found that "the royalty rate did not of itself make the difference between profitable and unprofitable working as at 5th June 1957 because of the concessions which the company had already achieved." His Honour then proceeded:

> ". . . but there was no reason for it (the Appellant company), in my view, to alter the plan of economy which it had formulated in May. Driscoll at 5th June 1957 was informing Logan Hunter Caldwell in detail of the considerations which had led Buckley some weeks earlier to raise the question of lower royalties. He fairly told Caldwell of the concessions so far obtained, but it would be unreal to expect him to have attempted to formulate the precise degree to which those concessions had improved the position of the company and to convey that formulation to the defendants."

It is respectfully submitted that in this His Honour was in error. While it may be unreal to expect Driscoll to have precisely formulated the extent to which concessions obtained had improved the position of the Appellant and to have conveyed that formulation to Logan Hunter Caldwell, it was nevertheless unfair, by concealment of relevant facts, to induce a belief that the Appellant did not have prospects of conducting further mining operations economically and that unless a reduction in royalty were agreed to it would withdraw from the Lease. The representations were not a fair appraisal of the then existing situation but consisted of a calculated series of half-truths designed to precipitate a reduction of royalty.

It may be conceded that the June agreement was not **uberrimae fidei** placing on the Appellant an obligation of complete disclosure of

all matters which could conceivably affect the mind of the other contracting party. There are nevertheless cases where silence is not actually fraudulent but yet prevents the interference of the Court by way of specific performance: **Fry** on Specific Performance (6th edn.) pp. 192, 339; **Ellard v. Lord Llandaff** (1810) 1 Ball & Beatty 241; 12 Revised Reports 22. An obigation to disclose which might not have initially existed can arise by the course which negotiations take: **Fry** p. 333. There was a lack of candour on the Appellant's part which disentitles it to specific performance: **Summers v. Cocks** (1927) 40 C.L.R. 321, at p. 324; **Suttor v. Gundowda Pty. Ltd.** (1950) 81 C.L.R. 418, at p. 437.

VI. BY REASON OF THE PROVISIONS OF THE MINING ACT THE JUNE AGREEMENT WAS INEFFECTUAL TO CONVEY ANY RIGHTS TO THE APPELLANT.

33. The said Respondents submit that, by reason of the operation of section 109 of the Mining Act, the June agreement was and is ineffectual to convey any rights to the Appellant because:—

(a) It was not executed by the registered lessees of the Mining Lease; and

(b) It was not sanctioned by the Minister or registered pursuant to that section.

The said section was at all material times in the following terms:—

"109(1) Every lease under this Act shall be registered with the Registrar, Department of Mines, Sydney, and thereafter every transfer or assignment thereof or of any interest therein (except in the case of an assignment by operation of law), and every sublease of or tribute or option contract affecting the land, or any portion thereof, comprised in such lease, or in any lease or agreement registered under section sixty-nine or seventy of this Act shall be submitted within the time and in the manner prescribed for—

(a) the concurrence or sanction of the Minister and registration, or

(b) registration.

The Minister may refuse such concurrence or sanction or may grant the same subject to any amendments, modifications, or stipulations which he may think necessary in the public interest to impose.

Every instrument, which by this subsection is required to be registered, shall be lodged by such person as is prescribed.

(2) Any person claiming interest in any lease under this Act or any Act hereby repealed, or under any lease or agreement under sections sixty-nine or seventy of this Act may, prior

to the registration of any instrument required by subsection one of this section to be registered, lodge with the Minister a caveat in the prescribed form, and accompanied by the prescribed fee against such registration.

On receipt of such caveat the Minister shall stay registration for fourteen days, unless the caveat is sooner withdrawn, but may then register the instrument, unless the person lodging the caveat has obtained and served upon him an order of some competent court forbidding such registration.

(3) Any person who acquires an interest in any lease or agreement as aforesaid, and who fails to comply with the provisions of subsection one of this section, shall be guilty of an offence against this Act and shall be liable upon conviction to a penalty not exceeding fifty pounds, and to a penalty not exceeding five pounds for each and every day such failure continues."

34. The Mining Lease in the present case is one granted under section 70B of the Mining Act. It is submitted that no agreement or instrument is effectual at law to grant or convey an interest in or mining rights over land which is the subject of a Mining Lease granted under that section unless it is sanctioned by the Minister and registered or, in the case of a tribute agreement, registered; and only the registered lessees can execute a registrable instrument. Whether considered from the point of view of the mineral lessees Robert Frank Hughs and Clarence Vivian Hughes, or the Respondents as co-owners, or the Respondents as owing the beneficial interest in the Lease as partners, their right to possession of P.M.L. 1, their right to work and win the minerals and their right of ownership of minerals won all stem entirely from a Lease which in turn derives its force solely from the Mining Act.

A Lease granted under the Mining Act creates special rights depending entirely on the Act: see section 70B (2), 70B (3) and sections 58(1), 59, 62, 63, 65, 66, 67, 70C, 184 (xix), 184(xxxv), regulation 110 and schedule 43C (with special reference to conditions for section 70B Leases at the end of Schedule 43C). The Act defines the legal character of the rights conferred and itself permits the holder to dispose of his rights but, "subject to this Act and the regulations"; when section 129(1)—set out in full in paragraph 16 above—says that the holder may dispose of them "subject to this Act and the regulations" it means **only** subject to the Act and regulations, and not otherwise. Section 109 of the Act then comes into play and in mandatory terms imposes a condition precedent for the legal disposition of an interest in a "lease under this Act" which, it is submitted, must be construed as being essential to its validity. The requirement is that the dealings specified in the section shall be submitted within the time and in the manner prescribed for concurrence or sanction of the Minister and registration, or for registration (depending on the nature of the dealing). There is clearly an implied prohibition against un-

registered dealings of the kind specified in the section. The provisions of section 109(1) empowering the Minister to refuse concurrence or sanction and to require amendments, modifications and the insertion of stipulations **in the public interest** are consistent only with an intention that the dealings shall be of no effect unless the section is complied with. If this were not so, the section could be ignored and the holder could grant and the grantee exercise legal rights which were inimical to the public interest and which the Minister would never have permitted. Furthermore, a refusal by the Minister would be of no significance unless it had the result that the purported disposition by the holder was and remained void. As to the requirements for registration, this also must have been intended to go to legal validity otherwise the right of a person claiming an interest to lodge a caveat under section 109(2) is of no significance. The caveat prevents registration until the caveator has had the opportunity to obtain a Court prohibition against registration. To this there would be no point unless registration was intended to give legal efficacy to something otherwise devoid of it. If registration did not itself give legal rights, no right of the caveator could be defeated by it.

35. Section 109 applies to "every lease" under the Act and to (i) "every transfer or assignment thereof or any interest therein"; (ii) "every sub-lease"; and (iii) every "tribute . . . contract", affecting the land or any portion thereof. (Note that even an "option contract" is included.)

The Appellant claims to have acquired a right to possession and to work and win minerals and to ownership of the minerals won subject to payment of a royalty. This is either the transfer of an interest in the lease, or a sub-lease or a tribute. If it were held that the Appellant had acquired a right to possession of part of the land and to the minerals won its interest would be in the nature of a sub-lease. If it acquired something in the nature of a **profit à prendre,** this necessarily involves a grant and therefore a transfer of an interest. If it had acquired no more than a contractual right to work and win minerals, it was a tribute contract.

If the Appellant had only a tribute contract, then it appears that only registration was required: see regulation 117(4); contrast sub-regulations (1), (2) and (3). If it is a transfer of an interest or a sub-lease, sanction of the Minister and registration was required: regulation 117(1), (3). (It may be noted that "concurrence" in section 109 applies to sub-leases of land comprised in a lease or agreement under sections 69, 70: see section 69(1), (3), (4), (7); section 70(2), (3), (4), (5); "sanction" applies to other leases).

36. Accordingly it is submitted that the June agreement, not being executed by the registered lessees, nor sanctioned nor registered under the Act, conferred no legal rights on the Appellant. At most

it could be given effect to only by treating it as an agreement to make a valid transfer of the Respondents' rights under the lease enforceable in equity by a decree for specific performance: **Carberry v. Gardiner** (1936) 36 S.R. (N.S.W.) 559, at p. 569; but no such decree would be pronounced in the absence of consideration: **Dalton v. Angus** (1881) 6 App. Cas. 741, at pp. 765, 782; **Moffatt v. Sheppard** (1909) 9 C.L.R. 265, at p. 286; **Frogley v. Lovelace** (1859) Johns. 333; nor if there were want of mutuality or oppressiveness in the making of such a decree. The said Respondents rely upon their earlier submissions as to these matters and submit that the Appellant has no enforceable rights either at law or in equity arising out of the June agreement.

The said Respondents therefore submit that this appeal should be dismissed for the following amongst other

REASONS

1. The agreement which the Appellant seeks to enforce was on its true construction terminable by the Respondents and was duly terminated by them prior to the institution of the Appellant's suit.

2. The said agreement terminated in any event upon the expiration of the Respondents' Mining Lease which expired prior to the institution of the said suit.

3. If the said agreement was not terminable Logan Hunter Caldwell was not authorised by the Respondents to execute the same nor was it ratified by them.

4. The said agreement was unenforceable for want of consideration.

5. The Appellant was not entitled to or, alternatively, ought not to be granted, the relief sought or any relief because—

(a) there was no consideration given by the Appellant;
(b) the agreement lacked mutuality;
(c) the agreement was induced by the Appellant by unfair concealment of relevant facts;
(d) it would be oppressive to the Respondents to grant the said relief.

6. The said agreement was ineffectual to confer any rights upon the Appellant because section 109 of the Mining Act was not complied with.

7. The judgment of the learned trial Judge was right.

EDWARD ST. JOHN
K. J. HOLLAND
PHILIP JEFFREY