C.E.I.G.G.

30/62

No. of

In the Privy Council

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

HUGH THOMAS MILLER of Glenorchy Farmer — APPELLANT

AND

THE MINISTER OF MINES AND THE ATTORNEY GENERAL OF NEW ZEALAND — RESPONDENTS

RECORD OF PROCEEDINGS

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Agents for:
THE CROWN LAW OFFICE,
Wellington, N.Z.
Solicitors for the Respondents

In the Privy Council

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN HUGH THOMAS MILLER of Glenorchy Farmer

APPELLANT

AND THE MINISTER OF MINES and THE ATTORNEY GENERAL OF NEW ZEALAND

RESPONDENTS

INDEX

PART I

EXHIBITS

PART II

Exhibit No.	Description of Document	Date	Page
1	Certified copy of Certificate of Title Volume 91 folio 128	8 September 1890	75
2	Certified copy of Transfer No. 23730 registered on the 26th October, 1893 from Kate Mason to David Aitken	16 October 1893	79
3	True copy of Agreement between David Aitken and the Glenorchy Scheelite Mining Company Limited dated 29th January, 1916	29 January 1916	80
4	True copy of Application for Mineral Licence	29 January 1916	84
5	True copy of Memorandum of Consent	undated	86
6	True copy of Memorandum of Consent dated 24th March 1916	24 March 1916	86
7	True copy of Mineral Licence No. 1697	27 April 1916	87
8	True copy of Agreement between David Aitken and the Glenorchy Scheelite Mining Company Limited dated 21st November, 1919	21 November 1919	90
9	True copy of Memorandum dated 17th day of August 1916	17 August 1916	92
10	True copy of Deed between the Glenorchy Scheelite Mining Company Limited and Patrick Charles Webb the then Minister of Mines dated 28th July 1944	28 July 1944	93
11	True copy of Deed between the Glenorchy Scheelite Mining Company Limited and Patrick Charles Webb Minister of Mines on behalf of His Majesty the King dated 28th July 1944	28 July 1944	95
12	True copy of Agreement between the then Minister of Mines and William J. Sanders dated 16th February 1956	16 February 1956	97
13	True copy of Transfer No. 164678 registered on 14th October 1949 from Charles Lloyd Veint to Thomas Hugh Miller	4 October 1949	100
14	True copy of Memorandum of Consent of Land Sales Court to Transfer Charles Lloyd Veint to Thomas Hugh Miller	20 September 1949	101

In the Privy Council

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

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HUGH THOMAS MILLER of Glenorchy farmer

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RESPONDENTS

RECORD OF PROCEEDINGS

NO. 1

In the Supreme Court of New Zealand

No. 1

Statement of Claim

STATEMENT OF CLAIM

In the Warden's Court of the Otago Mining District, holden at Cromwell

THE plaintiff sues the defendants and says—

1. THAT he is recorded in Register Book Volume 91 Folio 128 Land Registry Office of Otago as the registered proprietor of an estate in fee simple in inter alia ALL THAT parcel of freehold land situated in the Land District of Dart containg 317 acres 3 roods 36 poles and being Sections 29, 30, 31, 32, 33, 39 and 42 Block II on the Public Map of the said Land District.

2. THAT Her Majesty the Queen is registered in the office of the Warden's Court at Cromwell as the holder of Mineral Licence No. 1697.

3. THAT Her Majesty the Queen claims by virtue of the said Mineral Licence No. 1697 to be entitled to mine and to authorise persons to mine for scheelite upon part of the freehold lands of Plaintiff described in paragraph (I) hereof.

In the Supreme Court of New Zealand

No. 1

Statement of Claim

continued.

4. IN so far as notice of this action is necessary at law such notices have been properly given.

WHEREFORE the Plaintiff claims as follows:—

1. A declaration that Her Majesty the Queen is not entitled by virtue of the said Mineral Licence 1697 to mine for scheelite or to authorise persons to mine for scheelite upon the above-mentioned lands of the Plaintiff or any part thereof.

2. Such further or other relief as to the Court may seem just.

The Plaintiff's address for service is at the office of Messrs Brodrick & Parcell, Solicitors, Melmore Street, Cromwell. 10

Solicitor for the Plaintiff.

NO. 2

ORDER DIRECTING REMOVAL INTO THE SUPREME COURT OF NEW ZEALAND

In the Supreme Court of New Zealand

No. 2

Order directing removal into Supreme Court of New Zealand 9th May 1959

In Chambers

Thursday the 9th day of May 1957.

UPON READING the Notice of Motion of the Defendants dated the 1st day of May 1957 and the Affidavit of John Raymond Mills filed herein the Honourable Mr Justice Henry HEREBY ORDERS by consent that the action commenced by the Plaintiff against the Defendants in the Warden's Court at Cromwell under No. 1 be removed into this Court AND FURTHER ORDERS that the costs and disbursement of and incidental to the said Notice of Motion and this Order be reserved.

(Signed) "J. CARROLL"

Registrar.

L.S.

In the Supreme Court of New Zealand

No. 3

Agreed statement of facts 24th April 1958

NO. 3

AGREED STATEMENT OF FACTS

1. PURSUANT to the provisions of "The Land Act 1885" a Crown Grant was issued on the 22nd day of July 1890 to Kate Mason the said Crown Grant comprising inter alia Section 39 Block II Dart Survey District containing 88 acres and 35 poles more or less. The said Crown Grant was registered under the provisions of "The Land Transfer Act 1885" and recorded in Register Book Volume 91 Folio 128 Otago Land Registry. There was no reservation of minerals to the Crown under the said Grant. A certified copy of the Certificate of Title Volume 91 Folio 128 is marked as Exhibit No. 1 on the accompanying Folio of Documents.

2. THE lands comprised in the said Certificate of Title were transferred from the said Kate Mason to David Aitken by Transfer No. 23730 registered on the 26th day of October 1893. A certified copy of the said Transfer is marked as Exhibit No. 2 in the accompanying Folio of Documents.

3. ON the 28th day of January 1916 the said David Aitken (the then registered proprietor) entered into an agreement with the Glenorchy Scheelite Mining Company Limited whereby he purported to assign and transfer to the said Glenorchy Scheelite Mining Company Limited the whole of the minerals and mineral rights in and upon or to be won and extracted from the said Section 39 Block II Dart Survey District. The true and legal effects of the said agreement are matters for the determination of the Court. A true copy of the said agreement is marked as Exhibit No. 3 in the accompanying Folio of Documents.

4. ON the 27th day of April 1916 the Glenorchy Scheelite Mining Company Limited filed an application No. 4 in the Office of the Mining Registrar at Queenstown pursuant to the provisions of The Mining Act 1908 Section 102 for the Mineral Licence in respect of the lands comprised in the said Section 39 covering scheelite tungsten and other minerals of the tungsten class. A true copy of the said application is marked as Exhibit No. 4 in the accompanying Folio of Documents.

5. IN support of the said application No. 4 the said Glenorchy Scheelite Mining Company Limited also filed a copy of the said agreement dated the 29th day of January 1916 and in addition it filed Memoranda of Consent signed by the said David Aitken and by The Loyal Hand and Heart Lodge which was at that time the registered Mortgagee of the said lands under Memorandum of Mortgage No. 41174. True copies of the said Memoranda of Consent are marked Exhibits Nos. 5 and 6 respectively in the accompanying Folio of Documents.

6. THERE was no opposition to the said application and it was granted for a period of forty-two years by the Warden of the Otago

Mining District at Queenstown on the 27th day of April 1916 and registered there as No. 1697. A true copy of the said Licence No. 1697 is marked Exhibit No. 7 in the accompanying Folio of Documents.

7. ON the 21st day of November 1919 the said David Aitken and the said Glenorchy Scheelite Mining Company Limited entered into a further agreement whereby in consideration of the sum of £600 the said David Aitken purported to give up his rights to one-fifth of the profits reserved to him by the agreement dated 29th January 1916 and to authorise the said Glenorchy Scheelite Mining Company Limited to put certain works upon his land. The legal effect of this agreement is a matter for the determination of the Court. A true copy of the said agreement is marked Exhibit No. 8 in the accompanying Folio of Documents.

8. FOLLOWING the granting of the said Mineral Licence No. 1697 the said David Aitken filed in the office of the Mining Registrar at Queenstown on the 17th day of August 1916 a document purporting to be a Memorandum pursuant to Section 58 of "The Mining Act 1908" intimating that no rent royalties or license fees were payable to him in respect of Mineral Licence No. 1697. The said Memorandum was not registered under the provisions of "The Mining Act 1908". The legal effect of the said Memorandum is a matter for the decision of the Court. A true copy of the said Memorandum is marked Exhibit No. 9 in the accompanying Folio of Documents.

9. ON the 12th day of March 1925 the Glenorchy Scheelite Mining Company Limited registered Caveat No. 2812 against the said Certificate of Title stated to be for the purpose (inter alia) of protecting its rights under the said agreements dated 29th January 1916 and 21st November 1919. The said Caveat was withdrawn on the 13th day of October 1925.

10. ON the 20th day of January 1930 Isabella Jane Heffernan registered Transmission No. 15649 as Executrix of the Will of the said David Aitken who had died on the 13th day of October 1928 and therein referred to the Glenorchy Scheelite Mining Company Limited as having "certain rights" relating to minerals mineral rights and general incidental rights and powers to enter and mine on the said Section 39 by virtue of the said agreements dated 29th January 1916 and 21st November 1919.

11. EXCEPT as set forth in the last two preceding paragraphs there is no mention of the said agreements dated 29th January 1916 and 21st November 1919 or of the said Mineral Licence No. 1697 upon the said Certificate of Title or in any document registered under the provisions of "The Land Transfer Act".

12. THE following transfers and transmissions are registered upon the said Certificate of Title between the 20th day of January 1930 and the 8th day of March 1944 viz:

In the Supreme Court of New Zealand

No. 3

Agreed statement of facts 24th April 1958

continued.

(a) Transfer No. 104268 Isabella Jane Heffernan to Jane Amelia Aitken, John Bartlett Aitken and the said Isabella Jane Heffernan as tenants in common in equal shares produced 20th January, 1930.

(b) Transfer No. 104269 of their interest Jane Amelia Aitken and John Bartlett Aitken to the abovenamed Isabella Jane Heffernan produced 20th January, 1930.

(c) Transfer No. 109694 Isabella Jane Heffernan to Olgar Archibald John Thornton of Glenorchy Storekeeper produced 22/10/1932.

(d) Transmission No. 21055 to Johanna Thornton of Glenorchy Widow as administratrix de bonis non produced 29th June, 1938.

(e) Transfer No. 123834 Johanna Thornton to the said Johanna Thornton produced 29th June, 1938.

(f) Transfer No. 142747 Johanna Thornton to Charles Lloyd Veint of Queenstown, Miner, produced 8th March, 1944.

There is no mention of the said agreements or of any reservation of or disposition of minerals in any of the said documents.

13. ON the 28th day of July 1944 the said Glenorchy Scheelite Mining Company Limited entered into a Deed with Patrick Charles Webb the then Minister of Mines for the Dominion of New Zealand whereby it purported to assign to His Majesty the King all its rights and obligations under the said agreements of 29th January 1916 and 21st November 1919. The legal effect of the said Deed is a matter for the decision of the Court. A true copy of the said Deed is marked Exhibit No. 10 in the accompanying Folio of Documents.

14. BY a further Deed dated the 28th day of July 1944 and made between the said Glenorchy Scheelite Mining Company Limited of the one part and Patrick Charles Webb Minister of Mines for the Dominion of New Zealand on behalf of His Majesty the King of the other part the said Glenorchy Scheelite Mining Company Limited purported to assign to the said Patrick Charles Webb on behalf of His Majesty the King its rights and obligations under (inter alia) the said Mineral Licence No. 1697. The said Deed was registered in the Office of the Mining Registrar of the Warden's Court at Queenstown on the 12th day of August 1944 as No. 7111. The legal effect of the said Deed is a matter for the decision of the Court. A true copy of the said Deed is marked Exhibit No. 11 in the accompanying Folio of Documents.

15. ON the 1st day of January 1946 the then Minister of Mines entered into a Tribute Agreement with one William James Sanders purporting to authorise the said William James Sanders to carry out mining operations as therein specified upon the said Section 39. The

said Tribute Agreement was approved by the Warden under the provisions of Section 240 of "The Mining Act 1926". From time to time further Tribute Agreements have been entered into between the said William James Sanders and the Minister of Mines for the time being and such agreements have been approved by the Warden. None of the said agreements has been registered under the provisions of "The Mining Act 1926". All the said agreements contained the same provisions. A true copy of the Agreement in force at the present time is marked Exhibit No. 12 in the accompanying Folio of Documents.

16. ON the 28th day of July 1949 Charles Lloyd Veint the then registered proprietor of the said Section 39 entered into an agreement with Thomas Hugh Miller the Plaintiff whereby he agreed to sell the said lands together with the other lands comprised in the said Certificate of Title Volume 91 Folio 128 amounting in all to 317 acres 3 roods 36 poles to the said Thomas Hugh Miller for the sum of £2,350. At the same time the said Charles Lloyd Veint agreed to sell to the said Thomas Hugh Miller certain stock and chattels for the sum of £1,650. No reference was made in either of the said agreements to any rights of the Crown or anyone else over the said Section 39.

17. THE lands comprised in the said Certificate of Title Volume 91 Folio 128 (including the said Section 39) were transferred by the said Charles Lloyd Veint to the said Thomas Hugh Miller by Transfer No. 164678 registered on the 14th day of October 1949. There is no reference in the said transfer to any rights of the Crown or anyone else over the said Section 39. A true copy of the said Transfer is marked Exhibit No. 13 in the accompanying Folio of Documents.

In the Supreme Court of New Zealand

No. 4

Plaintiff's Evidence Hugh Miller Examination

NO. 4

NOTES OF EVIDENCE TAKEN BEFORE THE HONOURABLE MR JUSTICE HENRY

19th MAY 1958

PLAINTIFF'S EVIDENCE

NAME IN FULL HUGH MILLER

Farmer, Glenorchy—plaintiff. Do you recall going to Glenorchy in 1949 to inspect Mr Veint's Property? In 1949 I visited Paradise, yes. Is Paradise the name of Mr Veint's property—the house? Paradise House. Did you eventually purchase Mr Veint's property? I did. Before you signed the sale and purchase agreement did you see a mine there in walking over the property, yes. Were you given any explanation by him about that mine. It is almost 9 years since the conversation took place. Tell us the effect it had on your mind. I gathered that the operations had been taken over during the war as a war measure, it being a very important thing at the time, I was told it was taken over by the Crown and it would be given back whenever the Crown saw fit. Did you pursue any inquiries further? At that moment, No. Was there any work going on at that time? I think there was a man there at that time, one man. Did you later make some further inquiries? In 1950 I took the matter up casually with Mr Sheehan—solicitor in Queenstown. Did you receive certain advice? He wrote me a letter. Did you make inquiries from Mr Sheehan, solicitor Queenstown? Yes. Did he tender you certain advice? Yes.

At this time what was your state of mind about the matter. I thought that something was definitely wrong, but I thought it would need further investigation.

BY BENCH. So you came to no particular conclusion just then. No definite conclusion, no.

BY COUNSEL. When next did you do anything about it? The exact time—I took it up with Mr Dolan—it would be 1955 or 1956. Would it be correct to say that these proceedings followed your move on that occasion? Yes. Can you tell His Honour what mining if any took place between when you went in and the present time? One or perhaps two man operation and very sporadic I would say—very long lapses between actual mining operation—I don't visit the property very often except to look at the stock on the freehold part of it and that is when I would see what was going on.

CROSS-EXAMINED RICHARDSON

I think it is correct that you first visited Paradise in June 1949? Either June or July. And you stayed in the boarding house on the Veint's property at that time? Yes. Then you returned there again after visiting

Queenstown? Yes. Would it be correct to say you would be staying on the boarding house on the property for about 3 weeks before the agreement for sale and purchase was signed about the end of July? Two or three weeks. Would you agree that after the agreement was signed you returned to Paradise some time early in August and for the bulk of the time from then until this transaction was settled early in October you lived on the cottage on Veint's property? The entire time. That would be about two months that second period? Yes, 2nd or 4th October when the agreement was signed. So all in all you lived on the property for about 3 months before the matter was settled, money paid over, and the title transferred to you? Three winter months, yes. When you contemplated buying the property you walked over the property with Mr Veint's? I made no trip over the property that I can recall except when the Land Sales Court representative came up—that is the only time. Was there an occasion when Mr Veint pointed out the boundaries of the property to you? One boundary was pointed out which certainly wasn't anywhere near the boundary during the time the L.S.C. representative was there—that was the n.w. boundary. Mr Veint will say he went over virtually the whole of the property on foot with you at the time you originally contemplated buying—if he says that will you say he is wrong? To the best of my knowledge and memory that is not true. But could he be right when he says he virtually went over the whole of the property with you on foot? I can't say that he would be right. If Mr Veint says that he pointed out a scheelite mine to you—and showed you a piece on inspection—would you say he is wrong about that?—I am talking about the property generally? I can't recall that. I can recall no visit over the property with him—except that is, to the far reaches of the property—we may have looked round the homestead, but the only visit to the mine that I remember was on the visit of the L.S.C. Representative. If you can't recall walking over the property with Mr Veint, I suppose while living on the property for the 3 months you must have walked over the property yourself? Various parts. Did you walk over the area where the mine is during that period? I spent more time in the back part trying to gather how much water could be got for a hydro. By road the mine would be a mile or slightly more from the house. Do you agree you were over the land where the mine is on several occasions before the title to the property was transferred to you? Alone, yes. During that 3 months period before the title was transferred to you you would have numerous general conversations with Mr Veint about the property? Yes. And Mrs Veint? I had very little conversation with Mrs Veint.

You mentioned in your evidence there was one man at the time—during the 3 months period? I only remember one man. That would be Mr Sanders? Yes. You would meet him at that time? I don't remember meeting him until I actually was the owner. Mr—if Mr Sanders says he met you down by the cottage one day, would you say he could be right—this is when you were living in the cottage? It is a possibility

—the point is we have a bureau telephone, it is possible Mr Sanders could have come to use the telephone. If Mr Sanders says that while you were still living at the cottage you came up to the mine and met him there? I cannot recall that. If Mr Sanders says that is so, would you say he could be right? After all but 9 years I don't feel I could express an opinion on it—I personally don't remember it. Could he be right in his recollection if he says that? From my recollection, no. If he says that he did see you up there would you say he is wrong? I don't think I would challenge that—his memory on this particular point could be sharper than mine. You mentioned that on your roaming round the property you saw this mine, explain what the mine looked like at that time—what could you see? You would see a hut, that would be the living quarters, I only remember one hut, a lean-to type. Did it look as if it was lived in? It looked as if it was a miner's hut, yes. Did you have any reason to think it was not lived in? I had no reason to think it was lived in or not lived in—I was merely taking a walk out there. I feel I understood that someone did live there. So far as the actual mine operations themselves, there is opencast mining there? Sluicing cut. And there would be some drives in off the outcrop? Shafts going into a hill, yes.

This main cut would be about 300 yards or more in length would it not? That is the sluicing cut—the sluicing cut would be from the river back, yes, it would be 300 yards. Did you see a water race and a dam there, above the mine? Yes, I think there was a water race and dam there at the time. Did you see 4 or 5 tip heads there? The old workings, yes there were three. Did you see some pipes there? Do you mean loose pipes. Yes, used for—could be formed into a pipe line? There was a pipe line, I don't remember any loose pipes. Would there be some rails there, trolley? Yes, I think there would. Would you agree that a lot of this mining gear was in quite good condition? I didn't examine it to that extent. I need hardly go into that because you assumed the mine was going on there? Yes. In general terms what area would the mining operations cover—3 or 4 acres of land—I mean you have the pit heads, the sluice cuts, the drives, the pumps and odd gear? The drives are underground, they don't actually show—it would be very long from the river, which is where the sluicing starts, there are markings where they have scratched around right up to the hill. Would you agree that various pieces of mining gear and huts and so forth—would take up an area of 3 or 4 acres? Oh no. What area would you say was taken up by the mine and the equipment? It would be perhaps 3 acres. You said that you understood this mine would be given back to the owner whenever the Crown saw fit? That was the impression I got from the conversation I remember. So it was your impression that the Crown had mining rights over the land? My impression was the Crown had seized or commandeered the mine as a wartime operation. Are you suggesting that you thought Veint owned the mine and was selling it to you? He owned the property and as far as I knew, until I was told the Crown

had been working the mine, I had no sentiment on the matter whatsoever. Your impression was that the Crown controlled the mining operation? Yes.

Who did you think received the profits from the mining operations? I was never told that, I presume the Crown was getting everything. Did you ask them? I don't remember. Did you ask Mrs Veint? I don't remember. Ask Sanders? I don't remember any conversation with him until I was the owner. Surely it was vitally important for you to know that? Not at the time. But you agree there was a mine on your land, you saw it there, and a man working it, and you didn't bother to inquire what rights the owner had over the mine? At the moment I didn't consider it very important. I suggest you were well aware at the time that the Crown had full mining rights over this land? No. In calculating how much you would be willing to pay for the property did you allow anything for the mine? The property was valued as far as I know. But in your calculation did you allow anything for the mine as being an asset? I don't remember that it was an accepted category at all—Mr Veint asked a figure for the overall property. You would consider the figure he gave you? Yes. When you considered it did you take into account that mine? I don't recall taking it into account. Would it be correct to say that you discounted the mine and just took into account the rest of the property. It was in the total acreage that I purchased. Did you allow anything for the mine in your calculations? I don't recall allowing anything in particular for the mine. What about mining gear, did you think you were buying all the gear? Understood the Crown had control of the operation as a war measure and had not at time given it back. When was this—this was in 1949 was it not? Yes. You thought that the Crown was still controlling the mine as a war measure? Commandeered it as a war measure and had not given it back up until that time. Did you inquire from anyone when the mine could normally return back to the owner? Until I became the owner in October I stayed there continuously at Paradise —there was no one to consult. Did you not ask Veint? He was the owner of the freehold in theory but the mining part had been taken over by the Crown, so he told me. Did you ask Veint when the Crown would be handing the mine back? I don't recall that. Did you regard it as a matter of importance? At that particular time, no. Were you quite happy to have the Crown continue mine operations at that particular time? There was nothing I could do about it. You said that you regarded it as of small importance—surely you can't have been too concerned in that case about the Crown's control of the mining operations? I wasn't as concerned with that as my other problems at the time. You said you understood the Crown had taken over the mine—to whom did you think the mining gear belonged? I didn't know. You were buying a property on which there is gear lying all over the place—I think you bought some £1600 worth of stock and chattels—did you not bother to inquire about this mining gear? No. Is

it not true that you were told that mining gear belonged to Sanders? No I don't remember that. Could it be true that you were told that, that it belonged to Sanders? No I don't recall that. Could it be true? No. Do you recall that at the time you were staying in the boarding house, before the agreement was signed you were interested in a power scheme for the property? Yes. You discussed this power scheme with the Veints? No I don't recall that. If the Veints say that you discussed this scheme generally with them, will you say they are wrong? I don't recall it. If the Veints say that you discussed purchasing some of the pipes of the mine from Sanders for your proposed power scheme what do you say to that? That is not so. So if they say that is correct, you say they are wrong? I do not recall it. If the Veints say on oath that you were talking about this power scheme and discussed buying the pipes at the mine from Sanders, will you say they are wrong? This happened 9 years ago —I would say they are wrong, yes.

If Mr Veint says that when he was showing you around one day before the agreement was signed, he pointed out the hut and gear at the mine and told you it belonged to Sanders—will you say he was right? If that was the day the Land Sales Court man was there I would say that could possibly have happened—but at no other time do I remember it. If he says it happened, could he be wrong or right? I think he is wrong. I am going to go further with this conversation . . .

Adjournment 11.20 a.m.

Court resumes 11.40 a.m.

Just before the adjournment I was asking you about the time Veint claims you inspected the mine with him—you said you could recall only one inspection and that was at the time the L.S.C. man came up to the property? That is the only time I recall visiting that particular piece with Veint. On that occasion did Veint point out Sanders' hut and gear to you? No. On that occasion when you were at the mine was there any discussion about the mine? No. So you say that at no time when you were at the mine was there a discussion there about it with Veint—you say that at no time did you have a discussion at the mine with Veint about the mine? That is correct. Mr Veint will say that he pointed out the hut and gear at the mine to you and told you it belonged to Sanders—if he says that will you say he is wrong? I do not recall that conversation. Would you think carefully because I want to take this further—could Mr Veint be right if he has that recollection? No. You say he is definitely wrong if he says that? I do not recall the conversation whatsoever. If Mr Veint says that he told you at the mine that the Mines Department had a mineral licence over the land—would you say he could be right? He certainly is not right.

If he says that he told you that Sanders was working at the mine on tribute would you say that he could be right? No. Veint will say that and he will explain the words used on that occasion—if he does that you

say he is wrong? That is correct. What exactly did he tell you about the control of the mine and the mining activities of the man you saw round the place? You want me to explain as I did before—I cannot remember —back 9 years word for word what the conversation was, but gathered to the best of my memory now that the Crown had taken that over as a war measure, commandeered it or whatever word is necessary, and that it would be given back when the Crown saw fit—that was my understanding. And you said you did not inquire about it any further from Veint or Sanders or Mrs Veint? No. Would you agree that you had ample opportunity to question Veint and Mrs Veint about these mining rights? May I have that again, please. Would you agree in the 3 months before the land was transferred to you you had ample opportunity to question Veint and Mrs Veint about these mining activities? It is possible I could have questioned them. You could have checked about the nature and extent of the rights over the land? I presume I had time, I could have done it. Do you recall ever having a general conversation with Mrs Veint about the mine? No. If Mrs Veint says that she told you that other people had been interested in the property until it was explained to them that the Crown owned the mine, would you say she is right? I not appear in that conversation do I. She told you that other people had been interested in the property? No. I don't remember that. Until it was explained to them that the Crown owned the mine—she told you that, she gave you that information? I don't recall a conversation at any time with Mrs Veint about the mine. If Mrs Veint says there was a conversation along those lines would you say she is right? I would say she is wrong.

Do you suggest that Veint misled you about this mine? Do you mean that he deliberately misled me. I am not suggesting deliberately—that he misled you about the mining rights over the land? My answer to that is that he only ever told me one thing about the mine, and we have been over it three times. But you are now saying you had no notice of the mineral rights—do you suggest that Veint misled you in not telling you about the mineral rights? I think he was lax in not bringing it to my attention. Have you ever complained to Veint about it? No. But surely you would if you felt badly treated over mining rights if which you knew nothing—surely you would speak to your vendor about it? No action was taken until 2 or 3 years ago. The Veints are neighbours of yours? They live next door. So you have had ample opportunity to mention it to them? The possibility did exist. Would you agree the first complaint made to the Mines Department was in June 1956—about its operations on your land? I don't remember the exact date but Mr Parcell has it. Would it about the middle of 1956? The letter that I saw would be approximately June 1956. That is 6 and a half years after you purchased the land? Approximately. Why did you not make any complaint before that? I didn't see my way clear to take it up with the Mines Department myself. What about Sanders—would you agree you saw him from time to time over the years? Yes. Seen him

at the mine itself? I have seen him on the property. You saw him at the house when he used the telephone? He came down, yes, but I wasn't always there, it is a public phone. Would you agree the first time you mentioned to him about your complaint was in 1956 about the same time as you advised the Mines Department? I had a conversation with Sanders in 1956. Would you agree you made no mention about your grievance until then? I don't recall ever discussing it with him.

But surely if you felt you had a grievance you would have taken it up with Sanders? I never looked on him as the proper person to approach —I looked on the Mines Department were the ones. Your answer was that you didn't feel you could take it up with the Department yourself —before 1956? I took no action at that time. Did you ever ask Sanders about the profits from the mine? I had no conversation with Sanders. If you thought you were entitled to be the owner of the mine, surely you would want to find out something about the profits? I would rather find out my legal position first. And you never bothered to inquire from Sanders about his rights to mine—the profits he was making—at any stage? I don't recall ever discussing the matter with Mr Sanders at any stage. When did you first decide to question the Crown's mining rights over your land—to challenge the Crown's mining rights? My first investigation was the time I mentioned it to Mr Sheehan—that was purely an exploratory investigation—that was in 1950—I was trying to get some information—but to actually challenge the Crown, I would say that was in 1955 or 1956. Could you tell us why you did nothing for that 6 year period, between 1950 when took some advice and you decided it would need further investigation—you did nothing from time until 1955 or 1956——could you explain why you did nothing during that period? I perhaps didn't get around to considering it in that time, it had been on my mind for quite some time. You didn't get round for considering it for 5 years? It was on my mind, but I didn't get round to doing anything concrete about it—employing legal advice and so forth. I put it to you it was not until 1956 you began to seriously question the Crown's rights over your land? I don't agree with that. Do you still ask the Court to believe that at the time the land was transferred to you you had no idea the Crown had mining rights over your land? (Question disallowed.)

NO RE-EXAMINATION

DEFENDANT'S EVIDENCE

NAME IN FULL CHARLES LLOYD VEINT

Farmer, Paradise. You purchased—in what year did you purchase the property now owned by Miller? 1944. Did you have any knowledge of mineral rights over the land at that time? Yes, I understood the Crown held the mineral licence over the land. Was mining being carried on at that time? Yes. When did Mr Sanders come into the picture? I should say about 2 years after—1946. Mr Miller has told us he came up to Paradise about the end of June or beginning of July 1949 and that he agreed to purchase the property from you after he had been there for a few weeks or so—the agreement was signed and that later, before the money was paid over, he and his family lived in the cottage on the property for about 2 months? That is so. At the time there were discussions over the purchase of the property—were any inspections made? I do recall one in particular, at one time I inspected the mine with Mr Miller. What happened on this occasion? I remember the occasion particularly—Mr Miller had his son David and after we had inspected the mine we carried on for a mile or so further on and got some rabbits, and at the time we came across another piece of reef and I showed Mr Miller some scheelite—that is actually beyond the mine itself, you have to pass through the mine property to get to that part. Was there any conversation or discussion when you were at the mine with Mr Miller? The mining gear was lying around and I just explained what it was, that it belonged to Mr Sanders who was mining there on tribute from the Crown. How the Crown had taken over the Glenorchy Scheelite Mining Co. until from after the war sometime. Did you refer to—in any way to the nature of the Crown's rights? The Crown were mining it under a mineral licence—they had taken it over.

BY BENCH. This is what you said to Mr Miller? Yes—I explained this to Mr Miller.

BY COUNSEL. You have used those "mineral licence" and "tribute"—can you say whether or not you would have used those words to Mr Miller? Yes I definitely would use those words because I was familiar with the terms, I had done mining myself and had had a mineral licence, and those would be given in explanation. In the negotiations before you reached agreement on the sale of the land, was the mining gear mentioned? As part of the chattels—there was nothing whatever on the 88 acres held by the Crown, nothing whatever charged to Mr Miller, nothing whatever on that property charged against the price. Was there ever any discussion with Mr Miller about the proposed power scheme? Yes. When was it, was it before or after the place was transferred to Mr Miller? It was while Mr Miller was still living in Paradise House. That was before the agreement was signed? Yes, definitely before the agreement was signed. What was the gist of the discus-

In the Supreme Court of New Zealand

No. 4

Defendant's Evidence

Charles Lloyd Veint Examination

continued.

sion? We inspected a creek on the property and Mr Miller proposed that he would build a dam and catch the water, proposed putting a pipelines from the dam to a hydro scheme and he had these pipes at the mine in mind to use them—they had finished sluicing and there was a chance the pipes might be sold and he thought it would be a good chance seeing the pipes were in the district. On what day did you shift from the house to the cottage? We shifted on the day the agreement was signed—the day of settlement. And the Miller family I suppose took possession of the house on the property on that day? That is so. How long were you in the cottage at that time? A very short time—I just don't recall exactly, but it would be under a week—then we went away for some time looking for another business—we were away a short time and then came back to collect our belongings. Did you see Miller while you were in the Cottage and before going down to Queenstown? Yes. Did you return to Paradise to live some time later? I took over the present property about 2 years later—it is about half a mile from Miller's property—the adjoining property. Do you see Mr Miller at all? Yes, quite often. Has he at any—had any discussions with you about the mining on the property? He has never mentioned the mining since he took over the property, it has never been mentioned between us.

CROSS-EXAMINED PARCELL

I understood you to say when you bought you knew there was a mineral licence over that land? Yes. Did you examine the licence? No. Did you know how long it was for? I understood it was until 1958. Did you know the terms contained in it? No. Did you see anything of any agreements relating to the property—apart from the mineral licence? Yes there was an agreement we discovered. Did you see the agreement? Yes. Who showed it to you? It was handed to us some time, perhaps 3 years after we took over the property. You didn't know about the agreement until about 3 years after you took over—who showed it to you? Mr Heffernan. What had he to do with it? He had been the son of the people—Mrs Heffernan—who had the property. Was it a signed agreement he showed you? Yes, it was a legal agreement. So you were in the property for 3 years before you knew about it? Yes, he had found it somewhere and he brought it along—it was nothing mentioned about it at the time of settlement when I bought—when I bought it there was no mention of any agreement, I didn't know about it then. Did you know about the mining licence when you bought—or did you find that out after too? I understood verbally that it was a mineral licence. Wasn't the true position that when you bought the Crown was actually mining it? That is so. You knew that? Yes.

You didn't investigate the position any further really, did you? That is so. You never really knew the extent of the Crown rights over your property? No. You didn't really know—you were prepared to let it go

on the way it was? I understood that the Crown were operating under a mineral licence, and it was up to the time of 1958. You expected in 1958 the thing would be finished? At the time I bought, yes. You remember Mr Miller staying for a few days on the first occasion? I remember him staying—I couldn't say if it was 2 days or more. You entertained him as your guest? Yes. You talked to him freely and at length? Yes I was with him most of the time. I take it you learned he was a strange just come to New Zealand? Yes. You considered him to be an American? He told me he was from America. Did you talk with them on that occasion about the mine? Probably not. You have no recollection of talking about the mine—you can't remember any specific conversation about the mine? No I don't believe we did—we were deerstalking. Wasn't he full of hunting and shooting deer—you talked freely and at length about that? Yes. Then he came back a little later and stayed with you a fortnight—remember that? Yes. I understood you to say during that visit you did talk to him about the mine? It was during that visit he inquired about buying the property. I understood you to say that on that occasion you told him the Crown was mining there under a mineral licence and Sanders was there under a tribute? When we went round the property we discussed that. Did you explain what a mineral licence was? I would say it was right . . . Did you explain to Mr Miller, he was a stranger from the U.S.A.? I explained to him it was a right to mine the minerals from the property but he still had the grazing rights. Did you make that explanation to him? Yes. You are sure of that? Sure of it. Did you explain to him what a tribute was? Yes. . . . Did you explain to Mr Miller what a tribute was? Yes. Sure of that? Yes, I would . . . Explain now what a tribute is? As far as I understand a tribute is a sublease of a mine at a percentage —the percentage goes to the owner of the mine. Did you explain that to Mr Miller—sure you told him a percentage of the output from the mine went to the owner? Yes. Did he ask you how much that amounted to? No I don't think so. Did you volunteer any information to him as to how much the percentage amounted to? As a matter of fact I never knew—I probably said it was 5 per cent or whatever it was. But Mr Miller looked on you as the owner of the land? I was on the land. Isn't it odd that you explained the owner was entitled to the percentage? I didn't mean he was the owner of the mine . . .

BY BENCH. When you speak of the owner of the mine to whom do you refer? I thought you were speaking in general terms of the tribute —in this case it would be to the Crown.

BY COUNSEL. But didn't Miller say to you: What do you get out of all this. I don't just recall the words that he said—it is some time ago. Did he address any inquiry of that nature to you? He would. You think he would? Yes. Are you giving evidence that he did? There would be an explanation forthcoming and I would supply it. Isn't this the correct position, you don't really recall but you are trying to

reconstruct something that you think must have taken place? I am saying what I explained to Mr Miller. You also told us about the visit to the proposed power scheme—when did that take place—the discussion about it?—was that during his first venture or the second venture when he negotiated for the property? I couldn't be sure, but Mr Miller did engage a small bulldozer from the Lakes County Council to scoop out a small dam—probably just before, I think it was actually before the final settlement.

Then am I to take it the conversation about the power scheme took place after the agreement was signed? After the first agreement. Do I understand you to say in the course of that conversation Miller stated that he would try and buy Sanders' pipes or some of them? Yes.
Did he say that or did you? I wasn't going to enter into any scheme. Did he say it or did you say it? I think it was Mr Miller. But according to your evidence in chief some one said Sanders was finished or finishing very soon? I never said that—I beg your pardon, I did say—he had indicated to me he had finished with the pipes, he wasn't going to do any more sluicing. I put it to you that you thought Sanders had finished sluicing and that the mining was virtually at an end? No, I never—Mr Sanders only used the pipes to sluice—to uncover the overgrowth and take the reef as far as he could, when he got it to the boundary fence he couldn't take the sluicing pipes any further. Sanders I take it told you that? Yes. You say you passed that information on to Miller? I did. Since you sold this place to Mr Miller have you had any occasion to refresh your memory as to the happenings at that time? No—what do you mean. You are giving evidence today about something that happened 9 years ago—have you had any occasion during those 9 years to recall these matters and conversations? No I haven't had any discussions with Mr Miller. I take it you haven't had any with anyone else? No, probably not. I take it also that at the time these discussions were in the ordinary course of conversation and didn't have any particular import? Mr Miller was inspecting the property—anything I would have to say about the mine being there or any gear would be important. But they haven't been brought up again until you had to consider giving evidence today? That is so. Why do you think after all those years your recollection must be correct—or faulty? The words themselves may be, but the gist of it is not. But you agree you couldn't be very definite as to when or where each conversation took place? The conversation relating to the mine took place at the mine. Are you sure that wasn't when you were all round the property? No, on a previous occasion. Did you tell Mr Miller about the agreement Heffernan had showed you? No I didn't—in the meantime I had had a conversation with Mr of the Mines Department and he had explained that if the department felt like carrying on with the mine after the time was up or if they felt like it they could revert it back to the owner—he said if they felt like reverting it back they would—or if they abandoned it or stopped working it they would hand it back—I

didn't think the agreement was of any further use. I gather from what you said that prior to you selling the property the conversation with the Inspector of the Mines led you to believe that the future of the mine would fade out? I wouldn't say that. Was doubtful? Scheelite mining fluctuates more than any other commodity. Didn't you think there was a very good chance that the Crown was just going to turn this thing in? No I wouldn't say that. Didn't you think that? No. You didn't—but it was sufficient to make you think that the agreement with Heffernan didn't amount to much—between the State—the agreement Heffernan had shown you? The agreement didn't say if the Mines Department were going to carry on or not—as long as the Crown carries on any mining. Isn't it a fact that you felt when you sold the property that the mining was private—you didn't worry about it? I didn't put much stock in the mining, when I bought the property I thought it had very little bearing. And when you sold you thought it had very little bearing? That is so—no price was put on it. That is so when you signed the Land Sales declaration you made no mention of the mine—no outside interests or leases? That is so. It was because you thought the mine didn't matter, that it was a trifle? I never ever took much stock of the mine.

RE-EXAMINED RICHARDSON

My friend has suggested that you may have thought the Crown was going to stop mining any day—what was your understood as to the term of the licence, at the time you sold to Miller? I understood it was taken out from 1914 or 1916 for a term of 44 years.

I take it you realised the Crown could let the licence lapse or carry it on, after the lapse of that time? That is so.

In the Supreme Court of New Zealand

No. 4

Defendant's Evidence Muriel Veint Cross examined

continued.

NAME IN FULL MURIEL VEINT

You are wife of previous witness? Yes. You recall the circumstances under which the Millers came to Paradise in 1949? Yes. It has been stated that Miller stayed about 3 months in all—on the property before he went into possession of the house? Yes. Two weeks or so of that was when he stayed in the house with you, and for the remainder of the time the Millers lived in the cottage while you were in the house? Yes. When you gave possession of the house to Millers you shifted over to the cottage the same day? Mr Miller took possession and we shifted out. Can you recall any discussion with Miller after you shifted to the cottage and before you went down to Queenstown? No, definitely no. Can you recall any discussions with the Millers about the mine on the property? Yes. When did this discussion take place? Every evening after dinner we used to go into the lounge and sit there with Mr and Mrs Miller and spoke about various things, and I remember talking about the mine. That would be prior to the agreement being signed? Yes. Can you recall the basis of the discussions? I can remember discussing the mine—telling them other folk had come up to buy the mine, that was before we took over, to try and make money out of owning the mine, and telling them they didn't buy because the Crown owned it. Can you recall any discussions during this period before you shifted out of the house of a power scheme? Yes, Miller talked quite a lot of a power scheme. Was there any discussion in connection with the power scheme of pipes? Yes, Mr Sanders had pipes at the mine and had finished the sluicing—we had discussed it—I remember him discussing it.

Can you remember seeing Mr Sanders at all during the period shortly before you handed over possession of the house to Millers? Yes we had the telephone bureau and Mr Sanders used to come to the house to ring up for his stores.

CROSS-EXAMINED PARCELL

Your conversations with Mr Miller were social—in the lounge after your evening meal? Yes. You would have no occasion to pay particular attention to what anyone was saying? No, it is very vivid in my mind. Just what is vivid? The whole visit when Mr Miller came to us—I can remember it very well. You remember very well your discussion? Discussions on various things. Do you remember any particular discussion? Yes, I remember discussions and telling Mr and Mrs Miller about other people trying to buy the property—that was, before we had bought it—I was telling them that before we bought it quite a few people had tried to buy it to make money out of the scheelite mine—I remember telling Mr and Mrs Miller about it. What you told Mr and Mrs Miller was that the Crown had the mine? Yes. I take it you talked about the Crown having a lot of men there during the war? Yes. How important the scheelite was for the war industry? Yes. That was the sort of thing

wasn't it? Yes. Mr Miller, I take it, showed that he appreciated the importance of the transfer to the Crown for war purposes? I don't remember. You remember the conversation vividly—you would remember that wouldn't you? I may have. But you don't know anything about mineral licences or tributes? I knew what my husband has just told you—I knew what a tribute means. Whereabouts were you when you talked about this power scheme? In the lounge in the evening—we did talk it over. You are sure it was Miller who said he could get Sanders' pipes? I didn't say Mr Miller said he could get them—I said he could try—if he bought the place, he hadn't finally settled it then. Do you mean to say he told you he would try and get Sanders' pipes? Yes.

In the Supreme Court of New Zealand

No. 4

Muriel Veint Cross examined

continued.

Did you tell him that Sanders was finishing up or something like that —how did it come about he thought he could get Sanders' pipes? Mr Sanders had finished sluicing. You knew that? Yes. Are you sure you or your husband didn't suggest that the pipes could be got from the mine? We probably told Mr Miller that they were there. Didn't you rather take it for granted Mr Miller knew as much about the mine as you did? After we had explained it he would know. Are you sure that you said anything about Sanders at all? Mr Sanders was working at the mine and came down to the house. Are you sure there was anything said about Sanders at all in these conversations in the lounge? We must have—Mr Sanders was working there—we would say. Again you are more or less working out what you would have said? No, I remember—we were talking with Mr and Mrs Miller and their family. Tell us something else that they said?* He was talking about building a vast hotel—he even talked of getting my husband to help him—various things. Don't you really mean all Miller's talk was about the tourist trade, deer stalking fishing? No—Mr Miller was very interesting, he talked about a lot of different things. He did most of the talking? Yes.

NO RE-EXAMINATION

NAME IN FULL WILLIAM JAMES SANDERS

Miner, Glenorchy. You have been a tributor from the Mines Department since 1946 under a series of agreements to work at the Paradise mines? Yes. That is on the property formerly belonging to Mr Veint and now to Mr Miller? Yes. Can you recall when you first met Mr Miller? I first remember meeting Mr Miller in the cottage at Paradise. At that time what were you doing? At that particular time I had just come back to the mine—I was contract ditching for the Lakes County Council, on the Lake Road. Can you recall meeting Mr Miller again on occasions before the Millers moved into the house? I came past one day to ring up at the bureau and Mr Miller was getting some firewood and I talked to him for a few minutes—one other day he was out at the mine, I was working on the outcrop just by a very big stone—we discussed shooting it and how to treat it. That is the only time I recall

In the Supreme Court of New Zealand

No. 4

Defendant's evidence William James Sanders

examination

In the Supreme Court of New Zealand

No. 4

Defendant's evidence William James Sanders

Cross examined

seeing him. Did Mr Miller discuss with you your right to mine on the land during that time? No I recall no discussion with Mr Miller about mining rights at all. Did he discuss with you during that time before they moved into the house about the profits from the mining operations? No. After Miller moved into the house, did you have occasion to see him? Yes, I saw him quite often after he moved into the house, he used to come round and look at the stock on the property—sometimes have a cup of tea with me—I didn't see him very often. Has Mr Miller ever complained to you about your mining activities? No he has never complained to me. Has he ever complained about the Crown? Only once, he came to the battery one day about May 1956—he asked me as a favour would I stay off the claim until he had finished his claim with the Mines Department otherwise he might very reluctantly have to put me off for trespassing—we agreed that I would stay off. At that time you were at the battery working? Yes.

That would be about the only time he discussed the Crown or their rights at all. During that period between 1949 when he bought the property and May 1956 when he asked you if you would stay away for a while, had you been mining the claim? Yes, I wasn't there all the time, just off and on—the price of scheelite was low and I used to work elsewhere. What portion of the time would you be there over that period? I would say I'd be there about roughly half the time.

CROSS-EXAMINED PARCELL

Did you in your mine close down for the winter months? No, not for the winter months. Most scheelite mines do? Yes. You didn't with this one? No. Can you tell me anything about your workings about 1949 when Veint sold out—had you been doing much prior to that? Prior to that I had been sluicing, but I stopped sluicing about—it is pretty hard to remember, but I'd say 5 or 6 months before Veint sold out—it was all over. My impression is that during 1948 and 1949 the underground mining there had pretty well given up? Yes. It was then a case of breaking new ground? Yes. So you sluiced off a bit of new country? Yes. The whole venture was in rather a doubtful state? Yes that is quite correct. Would you agree that anybody was justified in thinking the mine was on its last legs at that time? As far as the mine itself was concerned definitely not—as far as the price of scheelite was concerned, yes—it was very low. You must yourself have been very doubtful in 1949 whether you would do any more? Yes I was. You and Mr Miller have been friendly? Yes. You have really had no conversations to speak of about what your rights were? No I haven't.

RE-EXAMINED RICHARDSON

At this time in 1949 just describe briefly the nature of the equipment you had at the mine? There would be about 580 feet of steel mining pipes, valves, beams, about 600 feet of light steel mining rails, truck,

and there would be to—that would be about all, all the other tools would be in the lean-to outside. Was this mining equipment you have mentioned—in what condition was it in? The pipes were in good order—most of the rails were fairly good—the truck was a wreck. What value would you have set on the mining equipment that was lying around? I would say about £500—that would be mostly in the steel pipes.

In the Supreme Court of New Zealand

No. 4

Defendant's evidence William James Sanders.

BY BENCH. The pipes you speak of—where they in a heap, spread around the place? No they were still in the line. The light rails. Mostly just lying about. In heaps? No, just lying about.

Cross examined

(Evidence for defendants).

In the Supreme Court of New Zealand

No. 5

Judgment of Henry J. 10th October 1958

NO. 5

JUDGMENT OF HENRY, J.

This action was commenced in the Warden's Court of the Otago Mining District at Cromwell and was, by consent, removed into this Court. Plaintiff is a farmer residing at Glenorchy and he sought a declaration that Her Majesty the Queen is not entitled by virtue of a certain mineral licence No. 1697 to mine for scheelite or authorise any person to mine for scheelite on certain property owned by the plaintiff. A Statement of Facts was agreed upon by counsel and it is convenient to set this Statement out at length. It reads as follows:—

"1. Pursuant to the provisions of The Land Act 1885 a Crown "Grant was issued on the 22nd day of July 1890 to Kate Mason the "said Crown Grant comprising inter alia Section 39 Block II Dart "Survey District containing 88 acres and 35 poles more or less. The said "Crown Grant was registered under the provisions of The Land Trans-"fer Act 1885 and recorded in Register Book Volume 91 Folio 128 "Otago Land Registry. There was no reservation of minerals to the "Crown under the said Grant.

"2. The lands comprised in the said Certificate of Title were "transferred from the said Kate Mason to David Aitken by Transfer "No 23730 registered on the 26th day of October 1893.

"3. On the 28th day of January 1916 the said David Aitken (the "then registered proprietor) entered into an agreement with the "Glenorchy Scheelite Mining Company Limited whereby he purported "to assign and transfer to the said Glenorchy Scheelite Mining Com-"pany Limited the whole of the minerals and mineral rights in and "upon or to be won and extracted from the said Section 39 Block II "Dart Survey District. The true and legal effects of the said agreement "are matters for the determination of the Court.

"4. On the 27th day of April 1916 the Glenorchy Scheelite "Mining Company Limited filed an application No. 4 in the Office "of the Mining Registrar at Queenstown pursuant to the provisions of "The Mining Act 1908 Section 102 for a Mineral Licence in respect of "the lands comprised in the said Section 39 covering scheelite tungsten "and other minerals of the tungsten class.

"5. In support of the said application No. 4 the said Glenorchy "Scheelite Mining Company Limited also filed a copy of the said "agreement dated the 29th day of January 1916 and in addition it "filed Memoranda of Consent signed by the said David Aitken and by "The Loyal Hand and Heart Lodge which was at that time the regis-"tered Mortgagee of the said lands under Memorandum of Mortgage "No. 41174.

"6. There was no opposition to the said application and it was "granted for a period of forty-two years by the Warden of the Otago "Mining District at Queenstown on the 27th day of April 1916 and "registered there as No. 1697.

"7. On the 21st day of November 1919 the said David Aitken "and the said Glenorchy Scheelite Mining Company Limited entered "into a further agreement whereby in consideration of the sum of "£600 the said David Aitken purported to give up his rights to one-"fifth of the profits reserved to him by the agreement dated 29th "January 1916 and to authorise the said Glenorchy Scheelite Mining "Company Limited to put certain works upon his land. The legal effect "of this agreement is a matter for the determination of the Court.

"8. Following the granting of the said Mineral Licence No. "1697 the said David Aitken filed in the office of the Mining Registrar "at Queenstown on the 17th day of August 1916 a document purport-"ing to be a Memorandum pursuant to Section 58 of The Mining Act "1908 intimating that no rent royalties or licence fees were payable to "him in respect of Mineral Licence No. 1697. The said Memorandum "was not registered under the provisions of The Mining Act 1908. The "legal effect of the said Memorandum is a matter for the decision of "the Court.

"9. On the 12th day of March 1925 the Glenorchy Scheelite "Mining Company Limited registered Caveat No. 2812 against the "said Certificate of Title stated to be for the purpose (inter alia) of "protecting its rights under the said agreements dated 29th January "1916 and 21st November 1919. The said Caveat was withdrawn on "the 13th day of October 1925.

"10. On the 20th day of January 1930 Isabella Jane Heffernan "registered Transmission No. 15649 as Executrix of the Will of the "said David Aitken who had died on the 13th day of October 1928 "and therein referred to the Glenorchy Scheelite Mining Company "Limited as having 'certain rights' relating to minerals mineral rights "and general incidental rights and powers to enter and mine on the "said Section 39 by virtue of the said agreement dated 29th January "1916 and 21st November 1919.

"11. Except as set forth in the last two preceding paragraphs "there is no mention of the said agreements dated 29th January 1916 "and 21st November 1919 or of the said Mineral Licence No. 1697 "upon the said Certificate of Title or in any document registered under "the provisions of The Land Transfer Act.

"12. The following transfers and transmissions are registered "upon the said Certificate of Title between the 20th day of January "1930 and the 8th day of March 1944 viz.:—

"(a) Transfer No. 104268 Isabella Jane Heffernan to Jane "Amelia Aitken and the said Isabella Jane Heffernan as tenants "in common in equal shares produced 20th January 1930.

"(b) Transfer No. 104269 of their interest Jane Amelia Aitken "and John Bartlett Aitken to the abovenamed Isabella Jane "Heffernan produced 20th January 1930.

"(c) Transfer No. 109694 Isabella Jane Heffernan to Olgar "Archibald John Thornton of Glenorchy Storekeeper produced "22nd October 1932.

"(d) Transmission No. 21055 to Johanna Thornton of Glenorchy "Widow as administratrix de bonis non produced 29th June 1938.

"(e) Transfer No. 123834 Johanna Thornton to the said Johanna "Thornton produced 29th June 1938.

"(f) Transfer No. 142747 Johanna Thornton to Charles Lloyd "Veint of Queenstown Miner produced 8th March 1944.

"There is no mention of the said agreements or of any reservation of "or disposition of minerals in any of the said documents.

"13. On the 28th day of July 1944 the said Glenorchy Scheelite "Mining Company Limited entered into a Deed with Patrick Charles "Webb the then Minister of Mines for the Dominion of New Zealand "whereby it purported to assign to His Majesty the King all its rights "and obligations under the said agreements of 29th January 1916 and "21st November 1919. The legal effect of the said Deed is a matter for "the decision of the Court.

"14. By a further Deed dated the 28th day of July 1944 and "made between the said Glenorchy Scheelite Mining Company "Limited of the one part and Patrick Charles Webb Minister of Mines "for the Dominion of New Zealand on behalf of His Majesty the King "of the other part the said Glenorchy Scheelite Mining Company "Limited purported to assign to the said Patrick Charles Webb on "behalf of His Majesty the King its rights and obligations under (inter "alia) the said Mineral Licence No. 1697. The said Deed was registered "in the Office of the Mining Registrar of the Warden's Court at "Queenstown on the 12th day of August 1944 as No. 7111. The legal "effect of the said Deed is a matter for the decision of the Court.

"15. On the 1st day of January 1946 the then Minister of Mines "entered into a Tribute Agreement with one William James Sanders "purporting to authorise the said William James Sanders to carry out "mining operations as therein specified upon the said Section 39. The "said Tribute Agreement was approved by the Warden under the "provisions of Section 240 of The Mining Act 1926. From time to "time further Tribute Agreements have been entered into between the "said William James Sanders and the "Minister of Mines for the time

"being and such agreements have been approved by the Warden. None "of the said agreements has been registered under the provisions of "The Mining Act 1926. All the said agreements contained the same "provisions.

"16. On the 28th day of July 1949 Charles Lloyd Veint the then "registered proprietor of the said Section 39 entered into an agreement "with Thomas Hugh Miller the plaintiff whereby he agreed to sell "the said lands together with the other lands comprised in the said "Certificate of Title Volume 91 Folio 128 amounting in all to 317 "acres 3 roods 36 poles to the said Thomas Hugh Miller for the sum "of £2350. At the same time the said Charles Lloyd Veint agreed to "sell to the said Thomas Hugh Miller certain stock and chattels for "the sum of £1650. No reference was made in either of the said agree-"ments to any rights of the Crown or anyone else over the said "Section 39.

"17. The Lands comprised in the said Certificate of Title "Volume 91 Folio 128 (including the said Section 39) were transferred "by the said Charles Lloyd Veint to the said Thomas Hugh Miller by "Transfer No. 164678 registered on the 14th day of October 1949. "There is no reference in the said transfer to any rights of the Crown "or anyone else over the said Section 39."

In addition, by consent, a folio of documents was put in. It contains either original or agreed on copies of all relevant documents. Each party called viva voce evidence relative to the knowledge of plaintiff regarding mining activities which were being carried on on the property at the time when plaintiff acquired a title to it. This evidence refers only to the question of whether or not defendants can impute to plaintiff "fraud" within the meaning of that term in s.58 of the Land Transfer Act 1915 (now s.62 of the Land Transfer Act 1952), and thus escape the paramount title conferred by that Act in the absence of fraud. It is not necessary to consider this evidence until after certain submissions made by counsel for the defendants relative to the provisions of the Mining Acts have been considered and their effect determined.

The case is one of considerable difficulty and the Court is indebted to all counsel for the concise, yet thorough and comprehensive manner in which the arguments have been presented. Pleadings in the Warden's Court are not, according to a statement made at the Bar, very enlightening as to what the issues really are. I am afraid that that is very true of the present document. However, counsel have co-operated with a view to defining the issues and there is agreement as to the questions which this Court is now called upon to answer.

There is no occasion for any formal amendment to the pleadings and the Court will accept the invitation of counsel to deal with the points raised so that this matter may be adjudicated upon between the parties

In the Supreme Court of New Zealand

No. 5

Judgment of Henry J. 10th October 1958

continued.

and their respective rights over the land in question defined. All matters, except one aspect of plaintiff's claim that his Land Transfer title is paramount, are matters of the construction and effect of various statutory provisions and of admitted documents.

Plaintiff has a Certificate of Title issued under the Land Transfer Act 1885, and it does not disclose the registration of any right interest or title upon which defendants can claim to have any mining rights over plaintiff's property. Prima facie, therefore, it falls upon defendants to establish the right which is now claimed. The submission of counsel for defendants has been summarised as follows:—

> "The defence to the plaintiff's claim is that the Crown has mining "rights over the land in question both under the assignment of "the two original Agreements between Aitken and the Glenorchy "Scheelite Mining Company Limited and under the assignment "of the Mineral Licence No. 1697—and that these rights are not "affected by the indefeasibility provisions of the Land Transfer "Act."

Defendants claim primarily to be entitled to mining rights as assignees of mineral Licence No. 1697 and that these rights are valid as against plaintiff notwithstanding that plaintiff became the registered proprietor of the land in fee simple under a Certificate of Title which is silent as to the existence of any such rights. The submission by counsel is that, by virtue of the effect of the provisions of the Mining Act 1908, Licence No. 1697 is fully effective and binding against all successors in title after the time of its grant and that Licence No. 1697 has such effect and binding force without registration against the Certificate of Title issued in respect of the land which it effects. If that be so, then it disposes of all questions in issue, and the further matters raised do not require consideration. It is convenient, therefore, to deal with this claim first.

All proceedings for the grant of Licence No. 1697 took place under the provisions of the Mining Act 1908. The relative provisions of that Act have been brought forward into the Mining Act 1926, and, since there is no material alteration to the wording of such provisions in the later Act, it was found convenient to make reference to the provisions of the later Act. I propose also to follow that course. Mr Parcell first argued that s.58, which gives the Warden jurisdiction to grant any description of mining privileges on all lands in New Zealand other than Crown lands open for mining. applies only to gold, notwithstanding the wide terms used in the section which reads as follows:—

> "Notwithstanding anything hereinbefore contained, the following "special provisions shall apply in the case of all lands whatsoever "in New Zealand other than Crown lands open for mining:—
>
> " (a) The owner of any such land, or any person with the written " consent of the owner and occupier (if any), may, in the

" prescribed manner, apply to the Warden for any description " of mining privilege authorized by this Act in the case of " Crown lands in a mining district, and the Warden, in his " discretion, may grant a licence for the same.

" (b) Every licence so granted shall be deemed to be granted and " shall be held subject to this Act, and subject also to any " agreement made between the grantee and the owner or " occupier in so far as such agreement is not inconsistent with " this Act.

" (c) So long as such licence continues in force the land comprised " therein shall not be resumed for mining purposes, nor shall " any prospecting licence be granted in respect thereof."

"Mining privilege" is defined in s.4, if not inconsistent with the context, to mean "any license, right, title, or privilege relating to mining "lawfully granted or acquired under this Act or any former Mining "Act, and includes the specific parcel of land in respect whereof such "license, right, title, or privilege is so granted or acquired; it also "includes a timber-cutting right, a water-right not relating to mining, "and also a business, residence, or special site, but not an agricultural "lease nor an occupation license." Under s.106 the Warden is empowered to grant mineral licences authorising the licensees to occupy any Crown land within or outside a mining district for any specified metal or mineral other than gold, subject, of course, generally to the provisions of the Act. It was not contended that a licence in the form of Licence No. 1697 could not have been granted in respect of Crown lands in a mining district so, prima facie, it was a mining privilege which could be granted under s.58 unless that section is confined to mining privileges relating to gold. Mr Parcell's argument was based on a contention that any interpretation of s.58 which extended its operation beyond goldmining was inconsistent with the context of the Act and in particular drew attention to ss.53, 54 (f), (g) and (h), 55 (e), 59, 60, 90 (1) (d) and (e) and 90 (2). Counsel also drew attention to earlier legislation. The Mining Act 1891, confined a "claim" to land taken up or occupied for the purpose of mining gold. Section 27 of the amending Act 1896, first gave jurisdiction to the Warden to grant, in the case of all lands whatsoever in the Colony other than Crown lands, any description of claim authorised by the principal Act. The consolidating Act of 1898 dropped any references to claims and the power to grant rights in respect of lands other than Crown lands was enacted in the form in which it now appears, and it so remained in a compilation in 1905 and a consolidation in 1908. I have given the most careful consideration to counsel's argument, but it seems to me the words of the present s.58 are clear and unambiguous, and there is no ground upon which the Court is constrained to ignore that clear meaning so as to restrict the words "mining privilege" to "gold mining privilege". The history of the legislation appears to me

to show that the Legislature intended to widen the jurisdiction of the Warden when it substituted the words "mining privilege" for "claim". The word "claim" in the present legislation is now extended to all forms of mining and is not restricted to mining for gold. I am clearly of opinion that there is no ground for limiting the jurisdiction under s.58 to privileges for the mining of gold. Although I have made reference to the clear and wide terms used in s.58, I have done so only in relation to the present subject-matter, and I am not unmindful of the discussion in the judgments in *In re Cameron's Application* (1958) N.Z.L.R. 225, as to the purposes for which grants may be made by the Warden under s.58. No question of that sort arises here.

If the Warden had power to grant Licence No. 1697 as I have just held, then no question arises as to whether or not it was properly granted. Section 433 provides that, except in cases of fraud, the licence is conclusive evidence that all necessary matters have been complied with and that the document is what it purports to be and has been lawfully issued. After its issue it was duly registered under s.180 in the appropriate Mining Register. Since it was admitted in the agreed statement of facts that the licence was assigned to the Crown and that the assignment was duly registered, the Crown acquires the protection set out in s.97 which provides against revocation, cancellation, forfeiture, abandonment and determination by effluxion of time where the licence is held by or on behalf of the Crown.

The next question is whether or not plaintiff is entitled to set up that the Certificate of Title issued to him gives him an estate which, in the absence of "fraud", is free and clear of the rights now vested in the Crown by virtue of Licence No. 1697. The defences raised by defendants to plaintiff's claim that he has an indefeasible title were summarised by counsel as follows:—

(1) The plaintiff had such notice of the Crown's mining rights over the land as to constitute fraud for the purposes of the indefeasibility provisions of the Land Transfer Act.

(2) The mineral licence is not an instrument capable of registration under the Land Transfer Act *and the indefeasibility provisions of the Land Transfer Act do not apply to interests not capable of registration.*

(3) Alternatively, if it is held that the interest created by the mineral licence was capable of registration under the Land Transfer Act, then the Mining Act provides a statutory exception to the operation of the indefeasibility provisions of the Land Transfer Act in the case of rights granted under the Mining Act.

(4) The Crown is not bound by the indefeasibility provisions of the Land Transfer Act.

If the grant of a mining privilege under the provisions of s.58 of the Mining Act 1926, creates an interest which overrides the provisions of the Land Transfer Act, plaintiff's claim will not succeed since he will take his title subject to Mineral Licence No. 1697. A statutory provision may override the provisions of the Land Transfer Act, but, in the absence of express words to that effect, before such a construction as will derogate from the Certificate of Title is adopted, the language must be so clear and explicit that it can properly be held that such was the intention of the Legislature. Examples are not wanting and instances which come to mind are: *Barber v. Mayor etc., of Petone* 28 N.Z.L.R. 609 (statutory authority to lay pipes and to enter upon the land for purposes connected therewith); *Hawkes Bay River Board v. Thompson* (1916) N.Z.L.R. 1198 (right to erect and maintain stopbanks); *Makerua Drainage Board v. Wall* (1949) G.L.R. 110 (where Gresson J. reviews a number of authorities concerning drainage rights) and *In re Transfer from Fell to the Moutere Amalgamated Fruit Lands* 33 N.Z.L.R. 401 (the effect of Part XIII of the Land Act 1908, in respect of a Certificate of Title issued without the restriction endorsed). Mention may also be made of *Schollum v. Francis* (1930) N.Z.L.R. 504 (where specific performance was refused on an objection that the land was subject to Part XIII although such restriction was not endorsed on the relevant Certificate of Title). The only case cited at the Bar in which a mining privilege has been stated to be valid as against a purchaser who has taken without notice is the passage in the judgment of Williams J. in *Gray v. Urquhart* 30 N.Z.L.R. 303, at p. 308, which reads:—"So far as the Land Transfer question is con-"cerned, section 39 of the Land Transfer Act 1908, would prevent the "District Land Registrar from registering a right to a water-race. The "right in question is in the nature of an easement in gross, a kind of "easement our law now recognizes. By section 59 of the Land Transfer "Act the registered proprietor of any land holds the same free from all "other estates and interests, except so far as regards the omission or "misdescription of any right of way or other easement created in or "existing upon any land. The lodging of a caveat would be an inapt "way of protecting such a right as a right to a water-race. I think that "the holder of a certificate of title would take subject to a valid grant "of a water-race, although the grant had not been registered and no "caveat had been lodged." This passage was not necessary for the decision since His Honour decided the case on the basis that there was not satisfactory proof of the existence of the grant in question. Nevertheless, it is a deliberate statement by a very learned Judge whose opinion on mining law and land transfer law, even if obiter, should be given the greatest weight. Chapman J. *In re Transfer from Fell to the Moutere Amalgamated Fruit Lands* (supra) made the following statement at p. 404 whilst discussing the possible effect of statutory restrictions not being noted on the relevant Certificate of Title, namely:—"Thus a proprietor may have acquired under a clean certifi-

"cate a piece of land fronting a river, but it may turn out that the land "is subject to a serious statutory easement by force of section 132 of "the Mining Act 1908. In *Fabian v. The Borough of Greytown North* "(10 N.Z.L.R. 505 at p. 512) Richmond J. refers such overriding "statutory rights to what jurists call the right of eminent domain. It "is true that such an easement as that created by the Mining Act cannot "be registered, but it is paramount by virtue of the explicit provisions "of the statute." I propose now to consider generally the scheme of the Mining Act 1926.

After the constitution of mining districts and providing for the appointments necessary for administration, the Act proceeds to define the lands which are exempted from the provisions of the Act. These provisions are contained in Part III, comprising ss.18 to 63. It is in this fasciculus of sections that s.58 appears, that is, the section under which Licence No. 1697 was granted. In general, all Crown lands (as defined in the Act) within any mining district are declared open for mining. There are provisions also for Native lands to be declared open for prospecting or to be ceded to the Crown for mining purposes. In addition, by ss.52 to 57 certain lands are declared to be open for prospecting and liable to be resumed by the Crown for mining purposes. If any land is resumed, compensation is payable. It is necessary to set out the lands which may be resumed so as to show the very wide net which is cast. Section 52 is the particular provision in that behalf and it reads:—

"52. *Alienated Crown or Native lands open for prospecting, and "may be resumed.*—Subject to the provisions hereinafter con- "tained, it is hereby declared that all lands whatsoever that hereto- "fore have been or hereafter may be alienated from the Crown, or, "in the case of Native land, from the Native owners thereof to any "other person than the Crown, whether by way of absolute sale or "for any lesser estate or interest, shall be open for prospecting for "gold and any other metal or mineral, and shall also be liable to "be resumed by His Majesty for mining purposes: Provided—

" (a) That the consent of the owners or occupiers shall be neces- " sary in the case of such of the aforesaid lands as, having been " alienated as aforesaid from the Crown prior to the twenty- " ninth day of September, eighteen hundred and seventy- " three, or from the Native owners thereof prior to the " thirtieth day of August, eighteen hundred and eighty-eight, " were not comprised within any mining district on the " seventeenth day of October, eighteen hundred and ninety- " six; and also

" (b) That, in so far as relates to prospecting for other than gold, " the consent of the owners or occupiers shall be necessary in " the case of lands alienated as mentioned in the last preceding " paragraph, whether such lands were or were not comprised

" within any mining district on the date mentioned in that " paragraph; and also

" (c) That nothing in this section shall be construed to limit or " affect the provisions of this Act relating to prospecting or " mining on Crown lands, or the rights of His Majesty in " respect of any lands over which the right to authorize " mining operations has been, is, or may hereafter be pos- " sessed, reserved, or acquired by or ceded to His Majesty."

This section has the effect of making plaintiff's land liable to be resumed for mining purposes without his consent unless the provisions of s.58 prevent resumption. Immediately following are the machinery provisions for resumption and compensation. Then follows s.58 which reads:

"58. *Special provisions in case of lands other than Crown lands.*— "Notwithstanding anything hereinbefore contained, the following "special provisions shall apply in the case of all lands whatsoever in "New Zealand other than Crown lands open for mining:—

" (a) The owner of any such land, or any person with the written " consent of the owner and occupier (if any), may, in the " prescribed manner, apply to the Warden for any description " of mining privilege authorized by this Act in the case of " Crown lands in a mining district, and the Warden, in his " discretion, may grant a license for the same.

" (b) Every license so granted shall be deemed to be granted and " shall be held subject to this Act, and subject also to any " agreement made between the grantee and the owner or " occupier, in so far as such agreement is not inconsistent with " this Act.

" (c) So long as such license continues in force the land comprised " therein shall not be resumed for mining purposes, nor shall " any prospecting license be granted in respect thereof."

Section 59 provides that the Minister, instead of resuming the land, may agree in writing with the owner to make his land available for mining purposes as if it were Crown land. If the provisions of either ss.58 or 59 are invoked, the owner, and not the Crown, is entitled to all rents, royalties and fees (s.60). It will thus be noticed the provisions of s.58, if successfully invoked for the purpose of granting a mining privilege, enables an owner, so long as the privilege is in force, to escape the liability of having his land resumed for mining purposes. It also entitles him in that event to the rents etc. to arise from such mining purposes. Otherwise, of course, if the "resumption" provisions were resorted to, the owner would be dispossessed of his land and his only right would be in respect of compensation therefor.

Section 58 gives jurisdiction to the Warden to grant either to the owner, or, with the owner's written consent, to any other person any description of mining privilege authorised in the case of Crown lands in a mining district. The various types of mining privileges are dealt with in Part IV which comprises ss.64 to 240. It is not necessary to summarise all such privileges, but the nature of some of them may require further consideration. If so, they will be discussed in due course. The mining privilege which was, in fact, granted was a mineral licence for which provision is made in s.106. In essence, such licence authorises the licensee to occupy the land for the purpose of mining for any specified metal or mineral other than gold. It must contain certain provisions set out in subclause (j) as follows:—

> "(j) The licence shall contain due provisions—
> " For securing the payment of all rent and royalty;
> " For ensuring the regular, proper, and efficient carrying-on
> " of mining operations, and for the inspection of the mine
> " and workings:
> " For cancelling the license on breach of any condition to be
> " performed or observed by the licensee; and
> " For ensuring compliance with any other conditions the
> " Warden may deem it necessary to impose."

The form, term, renewal and conditions of licences for mining privileges are set out in ss.176 and 177. It is clear from these provisions that the licence is not in a form which complies with s.90(1) of the Land Transfer Act 1952, and therefore as such, it is not, by virtue of s.42, registrable under that Act. It should be noticed that the term may be for any period not exceeding forty-two years together with rights of renewal. Provision is made for the registration of mining privileges in a Register kept by the appropriate Registrar appointed under the Act, but there is no provision for registration under the Land Transfer Act. The licence is liable to forfeiture by decree of the Warden's Court; vide s.190. There are also provisions as to abandonment. By s.209 the holder of a mining privilege may apply for and have granted to him certain easements over the land in any other mining privilege, and, of course, his own mining privilege is also subject to the grant of a like easement.

Sections 227 to 238 provide for liens for wages and contract moneys together with a system of registration in the Warden's office. Such liens may be enforced through the jurisdiction of the Warden's Court.

In addition to the factors to which attention has already been drawn, jurisdiction is vested in the Warden whereby he may grant certain rights over private lands. The following is not intended to be exhaustive, but there is power in respect of private lands—

(1) Under s.108, to grant mining privileges in respect of water. The jurisdiction in this behalf is very wide;

(2) Under s.212, to grant easements with respect to moving dredges.

Section 139 affects riparian owners insofar as it creates certain rights in favour of persons lawfully engaged in mining operations. The section reads:—

"139. *Rights as to certain alienated lands.*—Notwithstanding any-"thing hereinbefore contained, the following special provisions "shall apply in the case of land heretofore or hereafter alienated "from the Crown, whether by way of absolute sale or for any "lesser estate or interest:—

" (a) In the case of land so alienated on or any time after the " twenty-first day of October, eighteen hundred and seventy-" five, no person shall be deemed to have any right or title to " the flow of any water-course constituted and set apart as " aforesaid by Proclamation under this Act or any former " Mining Act which would interfere with or prejudice the " right of the holder of any mining privilege to discharge into " such watercourse any tailings, mining debris, or waste water " produced or used in or upon such mining privilege.

" (b) In the case of land so alienated on or at any time after the " twenty-third day of December, eighteen hundred and " eighty-seven, such alienation shall be deemed to be and to " have been made subject to the full and free right of any " person lawfully engaged in mining operations under this " Act or any former Mining Act to discharge into any water-" course existing on or running through or past such land, " whilst and whenever such land is situate in a district, any " tailings, mining debris, or waste water produced by or result-" ing from such mining operations.

" (c) In the case of land so alienated at any time after the first " day of February, eighteen hundred and ninety-nine (being " the date of the coming into operation of the Mining Act " 1898), such alienation shall be deemed to be made subject " to the reservation in favour of His Majesty of all riparian " rights in respect of such land whilst and whenever such land " is situate in a district."

This will, of course, affect a Certificate of Title whether or not it is noted therein.

Section 98 should also be noticed. It provides as follows:—

"Every person by whom any claim or other mining privilege is "lawfully taken up, and every person lawfully deriving through "him, shall, according to his share and interest therein, be deemed "to be the holder thereof until, in the case of an ordinary alluvial "claim held otherwise than under license, it is forfeited or

"abandoned, or, in the case of any claim or other mining privilege "held under license, the license therefor is determined by effluxion "of time or by earlier surrender, or forfeiture, or abandonment, "under the respective provisions in that behalf hereinafter con- "tained."

In dealing with this section in a former Act, Williams J. in *In re Greenvale Gold-dredging Company Limited* 21 N.Z.L.R. 128, said at p.132: "The whole policy of the Act is that the registration shall indi- "cate who the holder is, and that the rights are to be determined by registration." That refers, of course, to registration under the Mining Act. Section 98 deals with mining privileges which have been lawfully "taken up". It is not necessary to consider whether or not these words apply to a grant under s.58. It is sufficient to note that express statutory recognition is given to registration under the Mining Act as being determinant of the identity of the holder.

From the foregoing it will be seen that extensive jurisdiction has been given to the Warden's Court to grant mining privileges and that such jurisdiction extends to "private lands", which term means lands owned in fee simple under title from the Crown. No distinction is made between land under the Land Transfer Act and other lands. The privilege granted may extend over a long period. Rights such as water rights may be vital for the proper working of mines. The form of the privilege is such that it is incapable of registration. It may be granted against the wish of the owner of the private land. But the rights granted are not capable of registration under the Land Transfer Acts and as stated by Williams J. (supra) protection by caveat is inapt. These circumstances, I think, compel a conclusion that the intention of the Mining legislation is that the holder of a certificate of title under the Land Transfer Act takes subject to all valid grants made under the Mining Acts and that neither registration nor the lodging of a caveat is necessary.

Particular reference must be made to s.44 subs. (1) and (2) which read as follows:—

" (1) No Crown grant or conveyance, nor any license for a mining
" privilege, shall have the effect of revoking or injuriously
" affecting any mining privilege or easement or tenement
" lawfully acquired and held under this Act or any former
" Mining Act, whether any reservation or exception thereof
" is contained in such grant, conveyance, or license or not.

" (2) Every such grant, conveyance, or license shall be construed
" as if it contained an express reservation of the right to hold,
" occupy, and use such mining privilege or easement or
" tenement, with all necessary and reasonable means of access
" to work, cleanse, repair, and efficiently use the same."

These provisions were enacted in the Mines Act 1877, as s.50, and have been re-enacted in subsequent Mining Acts as follows: 1886 s.54; 1891 s.244; 1898 s.42; 1908 s.42; and 1926 s.44. Legislation prior to the Act of 1877 is all intituled as being "Goldfields Acts"; vide First Schedule to that Act. I have not looked into the position prior to 1877, but that Act referred to gold and any metal or mineral other than gold. Section 50 provided as follows:

> "No Crown grant or conveyance shall have the effect of revoking "or injuriously affecting any right to any claim, water-race, dam, "or reservoir, mining tenement or easement, lawfully acquired "and held under or by virtue of the provisions of this Act, whether "any reservation or exception thereof be contained in such Crown "grant or conveyance or not: And every such Grown grant or con- "veyance shall be construed with reference to every such claim, "water-race, dam, reservoir, tenement, or easement as if such grant "contained an express reservation of the right to hold, occupy, and "use the same respectively, with all necessary and reasonable means "of access to work, cleanse, repair, and efficiently use the same."

At this time the Land Transfer Act 1870, was in force, and it contained, in s.46, a provision in the form substantially as at present declaring the registered proprietor's title to be paramount. Nevertheless in the Mining Acts subsequent to 1870, provisions similar to s.44 above set out appeared in each successive Act, and such a provision is still in force today. The Land Transfer Act 1885, by s.12 provided that no Crown grant should thereafter be issued in respect of lands subject to the Act, but in lieu of such grant the Registrar was directed to issue a certificate. of title in the form in the First Schedule. It was pursuant to this provision, and in that form, that the certificate of title exhibited in this case was issued. "Crown grant" was defined as meaning the grant of any land by the Crown, and included certificates of title issued in lieu of grant. This definition is still retained in the current Land Transfer legislation. Neither of the terms "Crown grant" nor "conveyance" was defined in the Mining legislation. In view of the general background of the legislation touching these matters, I do not think that the Court should adopt a restrictive interpretation of s.44 and confine it to a Crown grant strictly so called or to a conveyance in the form usually adopted under our Deeds Registration system. From 1885 all land thereafter alienated or contracted to be alienated in fee from the Crown was to be the subject-matter of a certificate in lieu of grant and for Land Transfer purposes at least, a Crown grant included such a certificate. It was not I think, the intention of the Legislature to defeat the protective provisions of the Mining Acts by the mere fact of the change in the form of making and recording grants from the Crown. Likewise, I consider that the word "conveyance" is used in the wide sense. Chitty J. in *In re Calcott and Elvin's Contract* (1898) s Ch. 460, 467, said: "I accept entirely the statement of Lord Cairns "in "*Credland v. Potter* (L.R. 10 Ch.8), that there is no magical meaning

In the Supreme Court of New Zealand

No. 5

Judgment of Henry J. 10th October 1958

continued.

"in the word 'conveyance', and that it denotes any instrument which "carries from one person to another an interest in land."

In the instant case the original purchaser from the Crown obtained a certificate in lieu of a Crown grant, and the subsequent holders took title by means of a series of instruments which carried the estate from one person to another. I think that such a grant and such transactions fairly come within s.44 and the sections to a similar effect which preceded it. A grant under s.58 is by subs. (b) deemed to be granted and held subject to the Act, so Licence No. 1697 would get protection under s.44. Counsel for defendants, besides relying upon *Gray v. Urquhart* (supra), strongly relied on *Carpet Import Co. Ltd. v. Beath & Co. Ltd.* (1927) N.Z.L.R. 37 (C.A.). I have not found it necessary to examine this submission.

In all these circumstances I am of the view that it was the intention of the Legislature that validly granted mining privileges should prevail over bona fide purchasers who acquire a "clean certificate of title" under the Land Transfer Act.

In *Bishop v. Rowe* 23 N.Z.L.R. 66, Stout C. J. held that a charging order made under s.32 of the Destitute Persons Act 1894, was defeated by a bona fide purchaser for value who, without notice, obtained registration as transferor under the Land Transfer Act. This was upheld on appeal. There was at that time (unlike the Destitute Persons Act 1910, now in force) no provision for the registration of such an order, but the charge could have been protected by the lodging of a caveat. The Court came to the conclusion that s.24 of the Destitute Persons Act 1894, must be read subject to s.55 of the Land Transfer Act 1885, and that the charge was a charge only upon the land belonging to the person against whom it was made. For the reasons earlier given, I think that there is a difference in the respective legislative provisions which requires a different construction in the case of grants of mining privileges. This case was discussed before Williams J. in *Gray v. Urquhart* (supra) and would have been short answer to the question there posed, but His Honour did not deal with counsel's argument on that head except to the extent that it is met by the passage already quoted from his judgment. *Bishop v. Rowe* (supra) was followed by Edwards J. in *McConochie v. Webb* 24 N.Z.L.R. 229, in respect of an unregistered lien under the Contractors' and Workmen's Lien Act 1892. The decision in that case turned upon the particular provisions of the Act which provided for registration of the claim, and the case is not in point. The case of *Mackenzie v. The Waimumu Queen Gold-Dredging Company* 21 N.Z.L.R. 231, was discussed at some length. In this case Williams J. held that in order to create an easement over land under the Land Transfer Act 1885, a transfer of the easement must be executed and registered. The learned Judge was there referring to a grant inter partes and not to the exercise of jurisdiction by the Warden's Court. This case was not mentioned in *Gray v. Urquhart* (supra), no doubt

for the reason that it did not apply to the question there under discussion.

I do not find it necessary to deal with the other points raised by counsel for defendants. The written agreement originally entered into by the registered proprietor on January 29, 1916, expired by effluxion of time at the beginning of the present year and is no longer in force. The Crown is in a position to rely on Licence No. 1697 if it binds plaintiff as the present registered proprietor of the fee simple. A further submission was made that the Crown is not bound by the provisions of the Land Transfer Act, but the Court was asked to determine the matter on other grounds and not to resort to that argument unless the Crown failed on the other grounds advanced.

There will accordingly be a declaration that Licence No. 1697 is binding upon plaintiff's land and that defendants are entitled to the privileges which are thereby conferred. The plaintiff shall pay to the defendants costs in the sum of £31.10.0 plus Court disbursements and witnesses' expense to be fixed by the Registrar.

In the Supreme Court of New Zealand

No. 6

Formal Judgment of Supreme Court 10th October 1958

NO. 6

FORMAL JUDGMENT OF SUPREME COURT

UPON READING the summons issued by the plaintiff in the Warden's Court at Cromwell AND UPON READING the Order removing the same into the Supreme Court at Invercargill by consent AND UPON HEARING Mr J. C. Parcell and Mr J. Whalan of Counsels for the Plaintiff and Mr I. L. M. Richardson of Counsel for the Defendants AND UPON READING the Statement of Agreed Facts filed herein and the evidence adduced on behalf of the Plaintiff and the Defendants IT IS HEREBY DECLARED that Mineral Licence No. 1697 to mine for scheelite issued to the Glenorchy Scheelite Mining Company Limited on the 27th day of April 1916 and assigned on the 28th day of July 1944 to His Majesty the King is binding upon that land owned by the Plaintiff being Section 39 Block II Dart Survey District containing 88 acres and 35 poles more or less and being part of the land contained and described in Certificate of Title Volume 91 Folio 128 Otago Registry AND THAT the Defendants are entitled to the privileges which are thereby conferred by the said Mineral Licence No. 1697 AND HEREBY ORDERS that the plaintiff shall pay to the Defendants costs in the sum of Thirty-one pounds ten shillings (£31.10.0) plus Court disbursements and witnesses' expenses to be fixed by the Registrar.

By the Court

L.S.

D. MALCOLM,
Deputy Registrar.

In the Court of Appeal of New Zealand

No. 7

Notice of Motion on Appeal 7th November 1958

NO. 7

NOTICE OF MOTION ON APPEAL TO THE COURT OF APPEAL

IN THE COURT OF APPEAL OF NEW ZEALAND

IN THE MATTER of "The Mining Act 1926"

BETWEEN THOMAS HUGH MILLER of Glenorchy Farmer

APPELLANT

AND THE MINISTER OF MINES AND THE ATTORNEY GENERAL OF NEW ZEALAND

RESPONDENTS

TAKE NOTICE that this Honourable Court will be moved by Counsel for the above-named appellant at the sitting of the Court to be held on the day of 1958 at 10 o'clock in the forenoon or so soon thereafter as Counsel may be heard ON APPEAL from the whole of the order of the Supreme Court at Invercargill on the 10th day of October 1958 in the above matter UPON THE GROUNDS that the said order is erroneous in law and fact.

DATED at Invercargill the 7th day of November 1958.

E. DOLAN

Solicitor for the appellant

In the Court of Appeal of New Zealand

No. 8

Gresson P.

Reasons given for Judgment in Court of Appeal

NO. 8

REASONS FOR JUDGMENT GIVEN BY THE COURT OF APPEAL

JUDGMENT OF GRESSON P.

This appeal raises two questions for determination, the first whether a certain Mineral Licence was validly granted, the second whether, if valid, it can prevail against what is commonly termed indefeasibility of title under the Land Transfer Act. The facts are not in dispute.

The appellant, Thomas Hugh Miller, became (by virtue of a Memorandum of Transfer registered on the 14th October 1949) proprietor of all the land described in a certain Certificate of Title comprising in all 317 acres, 3 roods, 36 poles, being sections 29, 30, 31, 32, 33, 39 and 42 of Block II of the Dart District. There were no encumbrances on the Title. Under the Land Transfer Act 1952 the expression "land" means and includes "land . . . together with all mines, minerals and quarries . . . unless specially excepted". There had previously been granted on the 27th April 1916 a Mineral Licence under the Mining Act 1908, with the consent of the then owner, David Aitken, which gave to the Glenorchy Scheelite Mining Company Limited authority for a term of forty-two years to occupy a portion of the land, namely, section 39 comprising 88 acres and 35 poles for the purpose of mining for scheelite, tungsten and other minerals of the tungsten class. The licence was subject to the provisions therein set out. On the 11th August 1944 H.M. The King acquired by Transfer the whole interest of the company in the licence. The appeal raises the issue whether the licence is binding upon the land of the appellant; though the original term has expired, now that the licence is held by the Crown it will, if valid, continue in force by virtue of s.97(1) of the Mining Act until surrendered.

The validity of the licence was attacked upon the basis that there was no power in the Warden to grant it. Lengthy submissions were made, the tenor of which were that it was not within the power conferred by s.56 of the Mining Act 1908 now represented by s.58 of the Mining Act 1926, for such a licence as was granted to have been granted. Some reliance was placed upon the decision *In re Cameron's Application* (1958) N.Z.L.R. 225 in which the section was considered, as was as well s.27 of the Mining Act Amendment Act 1896 from which the section originated; the legislative provisions over the years were reviewed. The Court held that notwithstanding the use in the section of the words "all lands whatsoever in New Zealand other than Crown lands open for mining," and the equally unqualified expression "any description of mining privilege," the section must be interpreted with the limitation that the Warden had no jurisdiction to entertain an application for a water race licence over land outside a mining district

in favour of land outside a mining district for purposes unconnected with mining. In the argument before us the appellant contended for a limitation of a different character, namely, that the words "any description of mining privilege" was to be interpreted as limited to mining for gold and silver. The argument advanced by counsel for the appellant has been carefully examined and considered in the judgments which follow, and since I am in respectful agreement with the views therein expressed, I do not propose to embark upon a re-examination. In my opinion the grant of Mineral Licence 1697 was a valid grant and I pass to consider whether it is effective against the appellant who obtained a title under the Land Transfer Act with no memorial thereon of the licence or of any other encumbrance estate or interest.

It was contended that by virtue of s.62 of the Land Transfer Act 1952 inasmuch as the interest created by the Licence was not notified on the Title the land was held "absolutely free from all . . . encumbrances, liens, estates or interests whatsoever". Section 75 of the Act too provides that the Certificate of Title shall be conclusive evidence that the person named therein has such an estate or interest in the "land" as is therein described.

In addition to the modification as to paramountcy of the estate of the registered proprietor expressly set out in s.62, there are (independently of fraud) cases in which a Land Transfer Title may be subject to a statutory charge or other statutory estate or interest. *Barber v. Mayor of Petone* 28 N.Z.L.R. 609 was a case in which the registered proprietor gave permission by letter to the defendant Corporation to use his land for any purpose for which it might require it. The Corporation intended to lay water pipes leading water from the reservoir and it made use of the land for that purpose. No instrument creating an easement was registered. Nevertheless a subsequent owner was held bound to take the land subject to the Corporation's rights for the reason that by virtue of s.291 of the Municipal Corporations Act 1900 the defendant Corporation, having secured permission to lay the pipes, had the right to keep them there so long as they formed part of the water works, and to enter upon the land for the purpose of repair. But for this statutory provision the last registered proprietor, even if he had had notice of the existence of the letter, and even if the letter had amounted to the grant of an easement, would have been entitled to rely upon the protection of the Land Transfer Act. So too in *Re a Transfer, Fell to Moutere Amalgamated Fruit Lands Limited* 33 N.Z.L.R. 401, where a purchaser sought to take from his vendor a title without complying with Part XIII of the Land Act because there had been no record on the title of the restrictions imposed by Part XIII it was nevertheless held that the land was so subject. This illustration was used in the course of the judgment—"Thus a proprietor may have acquired under a clean Certificate a piece of land fronting a river but it may turn out that the land is subject to a serious statutory easement by force of s. 132 of the Mining Act 1908". In *Gray v. Urquhart* 30

N.Z.L.R. 303 the Court was called upon to consider whether a Certificate of Registration of a water licence purporting to have been granted under the Mining Act 1908 could prevail over a Certificate of Title under the Land Transfer Act, the privilege not having been registered against the Title nor protected by a caveat. It was held that the licence granted was invalid for want of compliance with the Mining Act; but it was the view of Williams J. that if the licence had been validly granted it would have been effective notwithstanding the Land Transfer Title,—"I think that the holder of a Certificate of Title would take, subject to a valid grant of a water race, although the grant had not been registered and no caveat had been lodged. It must, however, be first established that there is a valid grant." *Hawkes Bay River Board v. Thompson* (1916) N.Z.L.R. 1198 is an illustration of a River Board being entitled pursuant to statutory authority to a right in the nature of an easement, namely, to enter on the land and maintain protective works thereon. The Licence which was granted in this case and which has since passed to the Crown is of a somewhat different character. It was a mining privilege expressed to be a Licence. It has some of the characteristics of an easement and some of a profit a prendre. But it has two features which distinguish it from either easement or profit a prendre. These are that its nature is defined by the statute (s.178) as a chattel interest (the exact meaning of which is somewhat obscure), and the other is that it does not arise ex contractu but is granted by a Warden exercising statutory power to make such a grant under provisions set out in some detail by Regulation 30 of the Mining Regulations. If it is to prevail over the Land Transfer Act it cannot be because it is a statutory right given to a local body or public authority or to anyone else. It was in its inception a private or personal right and in that respect the case of *Bishop v. Rowe* (1903) 23 N.Z.L.R. 66 presents some similarities. A Maintenance Order had been filed in the Supreme Court and this had the effect of making it a charge upon the land of the person liable under the Order who however disobeyed the Order and sold the land, the title to which was under the Land Transfer Act. It was held the section of the Destitute Persons Act making the Order upon registration a charge could not override the Land Transfer Act. As such a charge it was merely an encumbrance and in the same position as any other unregistered encumbrance; it was observed that the person interested could protect his interest by lodging a caveat.

There is an apparent repugnancy between the provisions of the Land Transfer Act which purports (with some exceptions) to confer an indefeasible title unaffected by any encumbrances, estates or interests not recorded on the Title and the provisions of the Mining Act which authorise grants of mining privileges of various types many of which from their very nature would not be readily capable, if capable at all, of registration under the Land Transfer Act; if however it should appear that the provisions of the Land Transfer Act as to indefeasibility cannot be reconciled with the provisions of the Mining Act

which provide for the grant of mining privileges of various kinds, since the last mentioned Act is a special Act it should prevail by virtue of the application of the maxim *"generalia specialibus non derogant"*.

The case is one to which in my opinion that maxim applies. The principle is well established as an aid to construction. It was expressed by Lord Selburne in *Seward v. Vera Cruz* (1885) 10 A.C. 59, 68, that—

> "where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words without any indication of a particular intention to do so."

Later in *Barker v. Edger* (1898) A. C. 748 it was said (at p.754)—

> "When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms. This case is a peculiarly strong one for the application of the general maxim."

A more modern application is to be found in *Blackpool Corporation v. Star Estate Company* (1922) A.C. 27, 34, where Viscount Haldane enunciated the rule of construction as being that—

> "Wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the Legislature had before provided for individually, unless an intention to do so is specially declared. A merely general rule is not enough, even though by its terms it is stated so widely that it would, taken by itself, cover special cases of the kind I have referred to. An intention to deal with them may, of course, be manifested, but the presumption is that language which is in its character only general refers to subject matter appropriate to class as distinguished from individual treatment. Individual rights arising out of individual treatment are presumed not to have been intended to be interfered with unless the contrary is clearly manifest."

There have been over the years a succession of statutes relating to the grant of mining privileges; these provisions must I think be regarded as specialia—a subject specially dealt with in our earliest legislation and not to be held derogated from merely by force of general words.

The various types of mining privileges which may be granted are limited as to the area in respect of which they exist, and the manner

In the Court of Appeal of New Zealand

No. 8

Gresson P.

Reasons given for Judgment in Court of Appeal

of applying for and securing such grants is dealt with in some detail by the Rules made under the statute. Moreover, provision is made for a register of mining privileges and of instruments affecting them (Rules 68–90 as amended by the Mining Regulations 1926 Amendment (No. 10) of the 8th August 1945). A transfer of a mining privilege passes no title until it is duly registered (Mining Act 1926, s.179) and registration is made obligatory—(ibid). There are also provisions for revision of the register (s.188) which is available to be searched (s.187). The system of registration of titles to mining privileges and transfers thereof has long been in force and has been gradually improved by successive Acts. Since therefore there is a particular statute applicable to a particular topic, the general provisions of the Land Transfer Act, though its terms might seem to be applicable, must give way to the provisions of the particular enactment since the mind of the Legislature is to be considered as having been specially directed to that topic when dealing with the subject in a particular enactment. Upon the basis therefore that the general provisions of the Land Transfer Act are not to be construed as derogating from the special provisions in the Mining Act, I am of opinion that the Mineral Licence is valid and effective against the title of the appellant, and that the appeal should be dismissed.

The appeal is dismissed with an allowance of costs to the respondent fixed at one hundred guineas.

Solicitors:

For the Appellant: Brodrick & Parcell, DUNEDIN.

For the Respondent: Crown Law Office, WELLINGTON.

JUDGMENT OF CLEARY J.

The Crown is the holder of a mineral licence No. 1697 granted by the Warden of the Otago Mining District at Queenstown on 27th April 1916. The licence was originally granted to the Glenorchy Scheelite Mining Co. Ltd., and authorised that company to occupy the land described therein for the purpose of mining for scheelite, tungsten, and other minerals of the tungsten class for a period of 42 years from the date of the grant. In 1944 the company assigned the licence to the Crown, and, notwithstanding the fact that the term of 42 years has since expired, the Crown relies on s.97(4) of the Mining Act 1926, which in effect provides that a mining privilege held by or on behalf of the Crown shall not be determinable by effluxion of time. The land in respect of which the licence was granted was freehold and was situate in the Otago Mining District. It had been granted by the Crown in 1890, and in 1916 one David Aitken held the land under a Land Transfer Title. After 1916 various transfers of the land took place and ultimately the appellant became the registered proprietor in 1949. In the present proceedings the appellant claims that the Crown is not entitled to mine for scheelite on his land, and he bases this claim on two distinct grounds. In the first place he claims that the Warden had no jurisdiction to grant the mineral licence which is now vested in the Crown, and secondly he claims that his Land Transfer title to the land is paramount to and unaffected by any rights granted under the mineral licence, which was never registered against the certificate of title to the land.

Henry J. held that the grant of the mineral licence was authorised by the provision which now appears as s.58 of the Mining Act 1926, and it will be convenient to continue to refer in general to the provisions of the 1926 Act rather than to the corresponding provisions of earlier Acts which are reproduced therein without material change. On the face of it, that section certainly appears wide enough to warrant the grant of mineral licence No. 1697, for it is expressed to apply "in the case of all lands whatsoever in New Zealand other than Crown lands open for mining", and it authorises the Warden to grant "any description of mining privilege authorised by this Act in the case of Crown lands in a mining district", and, by virtue of the definitions contained in s.4, the term "mining privilege" includes any licence relating to mining for gold or any other metal or mineral. When one turns to the authority for the grant of licences for mining minerals other than gold, it is found in s.106, which empowers the Warden to grant "mineral licences authorising the licensees to occupy any Crown land within or outside a mining district for the purpose of mining for any specified mineral other than gold". It is to be noted in passing that this section applies to Crown land within or outside a mining district, and has been in that form since the passing of the Mining Act 1898: see s.90 of that Act. Prior to that date the section was confined to Crown

lands in a mining district, and was so confined when the predecessor of s.58 was first enacted by s.27 of the Mining Act Amendment Act 1896. The extension of s.106 to Crown land outside a mining district does not make it any the less applicable to Crown land within a mining district, and as to such land there is no doubt that it authorises the grant of a licence to mine for a mineral such as scheelite, and it would appear to follow that s.58 authorises the grant of a similar mineral licence in respect of any other land, provided of course the owner and occupier consent thereto as required by the section.

Nevertheless, Mr Parcell argued that s.58 does not confer this jurisdiction. His basic proposition was that s.58 does not authorise, or at least should not be construed as authorising, the grant of licences to mine for minerals other than gold, a word which in mining legislation has for many years past included silver. Gold and silver are "royal metals", which belong to the Crown by virtue of the royal prerogative. This argument was founded on the fact that when the predecessor of s.58 was first enacted by s.27 of the Mining Act Amendment Act 1896, it was confined to licences for mining for gold, and it was said that the change in language which the section afterwards underwent in taking its present form involved no change in substance or meaning. Alternatively, it was said, if the change in language did extend the operation of the section, then it was only extended to authorise the grant of licences to mine for minerals which were expressly reserved to the Crown on the alienation of Crown land and which, like gold and silver, remained the property of the Crown. If the section were limited in either of these ways. then it could not be relied on as authority for the grant of mineral licence No. 1697. Notwithstanding the elaboration with which these arguments were advanced, I have not been persuaded by them, but before giving reasons for my inability to accept them I think it is desirable to say something by way of defining the limits of the enquiry in which we are engaged.

The question for decision is whether the Warden is empowered by s.58 to grant an application for a licence to mine for scheelite on private land. During the argument a good deal of discussion took place concerning the decisions in *Skeet and Dillon v. Nicholls* 30 N.Z.L.R. 611 and *In re Cameron's Application* 1958 N.Z.L.R. 225. In my opinion, nothing that was decided in those cases assists towards the determination of the point now under consideration. Those cases were not concerned with the grant of mineral licences, but with the grant of water-race licences, and in particular with the grant of such licences over land outside a mining district. In *Skeet and Dillon's* case the decision turned on the extent of the jurisdiction conferred upon the Commissioner of Crown Lands by the provisions now contained in s.171 of the Act of 1926. That section authorises the Commissioner to deal with applications for certain mining privileges (including privileges in respect of water) where the land, not being Maori land, is situate outside a mining district. It was held that the Commissioner has no

power to entertain an application for a water-race licence over land outside a mining district when the licence is to be used outside the district for purposes unconnected with mining, as for farm irrigation purposes. The reasoning in the judgments is dominated by the theme that s.171, which only applies to land outside a mining district, is an aid to the promotion of mining and cannot be employed to aid non-mining operations outside a mining district. In *Cameron's* case it was held that a Warden cannot entertain an application for a water-race licence over land outside a mining district (other than Maori land) for use outside the district for non-mining purposes; in other words, it was held that the Warden did not have the jurisdiction which *Skeet and Dillon's* case denied to the Commissioner. The majority of the Court expressed the opinion that the jurisdiction conferred on the Commissioner by s.171 is an exclusive jurisdiction to entertain applications for mining privileges of the classes specified in the section over land outside a mining district. It would seem to follow from this view of the majority that a Warden cannot entertain an application for a water-race licence outside a mining district, wherever or for whatever purpose the licence is intended to be enjoyed. I make these observations as to my understanding of the effect of these decisions because it appears to me that Mr Parcell relied on them as supporting propositions for which, in my opinion, they afford no authority. If I understood him correctly, he found some warrant in them for the view that s.58 is limited to authorising the grant of licences to mine for gold and non-auriferous minerals which are reserved to the Crown. In *Skeet and Dillon's* case the provision corresponding to s.58 was not considered, and, so far as I can see, it was not mentioned in the judgments. In *Cameron's* case s.58 certainly was considered, but only in relation to an argument by Mr Parcell, who was also counsel in that case, that it empowered the Warden to grant an application for a water-race licence over land outside a mining district to be used for non-mining purposes. This argument did not meet with acceptance, because all the members of the Court were of opinion that it would be inconsistent with the reasoning in *Skeet and Dillon's* case to invoke s.58 as authorising the grant of such a licence for non-mining purposes outside a mining district. It is, I think, plain that neither decision directly affects any power the Warden may have under s.58 to grant an application for a mineral licence, whether over land within or without a mining district. The effect of the decisions is that neither the Commissioner under s.171 nor the Warden under s.58 may entertain an application for certain mining privileges over land outside a mining district for use in non-mining operations outside the district. It is not valid reasoning to say that this limitation on the territorial jurisdiction of the Warden in respect of certain mining privileges (of which a mineral licence is not one), arising from the impact of s.171 on that jurisdiction, can in any indirect or oblique way affect his jurisdiction, territorially or otherwise, to grant a different class of mining privilege, namely a mineral licence, to which s.171 has no application.

I return to the question whether s.58 authorises the grant of a licence to mine for scheelite on private land. It was not disputed that the section applies to private land, but it was argued for the appellant that it only authorises a licence to mine for gold, and not for other minerals. Reliance was placed on the fact that when the provision was first enacted in s.27 of the Amendment Act of 1896 it empowered the Warden to deal with "any description of claim authorised by the principal Act", and the use of the word "claim" under the legislation then in force was confined to mining for gold: see s.4 of the Mining Act 1891. The provision assumed its present form in s.56 of the Mining Act 1898, and the words just quoted were replaced by the words "any description of mining privilege authorised by this Act". It was argued that the change from "claim" to "mining privilege" involved no change in substance or meaning, but I cannot agree. The change must be taken to have been made designedly, particularly as a definition of each of the terms, "claim" and "mining privilege", was provided in the Act of 1898. It follows, in my opinion, that the provision introduced in 1896 became enlarged in scope in 1898, and after the latter year it could no longer be said to be restricted to mining for gold only. Even if this be so, the argument for the appellant was that, in its present form, the section only enables the Warden to grant licences in respect of minerals —other than gold—which have been reserved to the Crown on the alienation of the land, and does not authorise licences in respect of minerals which have become the property of the owner of the land on its alienation by the Crown. It was said that a consideration of the history of the mining legislation supported this contention: that originally that legislation dealt only with mining for gold, which belonged to the Crown by virtue of its prerogative; that when in 1877 it was extended to regulate the mining of other minerals its operation was confined to Crown lands; and that the extension of the powers of the Warden to grant mineral licences over private lands in 1898 should be no wider than is necessary to enable him to regulate the mining for gold or reserved minerals on those lands. This argument was supported by a review of many aspects of the mining legislation, in the course of which it was pointed out that the authority in s.58 to grant a licence to the owner of private land is consistent with the application of the section to gold and reserved minerals only, for without authority the owner of the land cannot interfere with those substances, and it was also argued that the requirement for the owner's consent to the grant of a licence to another person is likewise consistent with this restricted application of the section, as without such consent the Crown cannot authorise entry upon and interference with private land for the purpose of mining for gold and reserved minerals. All this, it seems to me, is founded on one possible view as to the policy of the legislation, namely that it was restricted to the regulation of mining for metals and minerals belonging to the Crown. It is equally possible, however, that the legislation proceeded on the basis that the mining of all minerals whatever on private land was in the public interest and might be

regulated. Here, again, it appears to me, the language of s.58 is against the appellant's construction. The language used is quite general, whereas if it had been intended to confine the operation of the section in the manner suggested by the appellant appropriate restrictive language could and should have been used. The provision in s.60 that the owner is entitled to all royalties seems to me to indicate that the section contemplates licences in respect of minerals which belong to the owner and not to the Crown. S.52, which makes land alienated from the Crown after 1873 open for prospecting for any mineral, is not limited to reserved minerals, and I do not see why, in the absence of appropriate limiting words, some narrower application should be given to s.58. For these reasons I am of opinion that the Warden had authority to grant mineral licence No. 1697

I should add that I have not been able to gain any assistance in the construction of s.58 from the cases of *Wi Parata v. Bishop of Wellington* 3 N.Z.J.R. (N.S.) 72 and *Chambers v. Busby* 16 N.Z.L.R. 287, which were cited by Mr Parcell. Both cases were decided before the provision now contained in s.58 was first enacted. The former case was not a mining case at all, and I am unable to see how it can be relied on to detract from any statutory power which may be conferred on a Warden to grant mining privileges over private land. The latter case, which was a gold mining case, was decided at a time when, as I understand the position, there was no statutory power to grant mineral licences over private land, and, whatever bearing the decision might have on a discussion as to the Crown's right to gold in alienated land, it has no relevance that I can see to the Warden's powers under s.58.

Mr Parcell also advanced a subsidiary argument to the effect that if, contrary to his main submission, there was jurisdiction to grant mineral licence No. 1697, nevertheless the grant was not binding upon one who became owner of the land subsequent to the grant of the licence. This point was made quite independently of the appellant's argument as to the indefeasibility of his Land Transfer title, and was based, as I understood it, on a contention that the consent of the owner given pursuant to s.58 bound only the consenting owner and did not bind a subsequent owner, who was free, it was claimed, to repudiate the licence granted with the consent of his predecessor in title. I think the owner's consent pursuant to s.58 is required only to the initial grant of the licence, and when once granted the licence is valid for its term notwithstanding any purported withdrawal of consent subsequently or any change in the ownership of the land. It seems to me that it is only if the appellant can sustain his argument as to the indefeasibility of his Land Transfer title that the subsequent change in ownership of the land becomes material, and I accordingly turn to that argument.

It is somewhat strange to find that the question whether rights granted under the Mining Act should be registered under the Land Transfer Act has neither been dealt with in terms in either of those

Acts, nor been the subject of any judicial consideration save for certain views expressed obiter by Williams J. in relation to water-race licences in *Gray v. Urquhart* 30 N.Z.L.R. 303 at p.308. So far as the legislation is concerned, it is true that s.178 of the Mining Act 1926 provides as follows:—

> Every mining privilege shall be deemed to be a chattel interest, and may be sold, encumbered, transmitted. seized under writ of execution or warrant, or otherwise disposed of as fully as a chattel interest in land, subject nevertheless to the provisions of this Act.

A similar provision was in the mining legislation as far back as s.111 of the Gold Fields Act 1866, but it was not until the Mines Act 1877, s.96, that the reference in the section to "a chattel interest in land" made its appearance. In New South Wales, also, the mining legislation has long contained a similar provision, which, like our original section, made no reference to "a chattel interest in land". In that State it was held by the Full Court in *Williams v. Robinson* 12 N.S.W.L.R. Eq.34 that interests created under the Mining Act were not interests in land for the purpose of s.4 of the Statute of Frauds. In *In re Caveat* of *Gamboola Cabonne Phosphates Ltd* 19 N.S.W.S.R. 227 it was argued that the grant by the registered proprietor of land of an exclusive right to mine for "phosphates, copper, and other minerals" on the land did not create an interest in land capable of supporting a caveat. It became unnecessary to decide the point, as the rights protected by the caveat did not arise under any licence granted under the Mining Act but solely under an agreement *inter partes,* but at p.230 the learned Judge said:—

> If the whole of the interests conferred by this agreement depended for their existence, as between the parties to the agreement, upon the Mining Act of 1906, and were only enforceable as between the parties because that Act alone enabled the agreement to be made, it may be that these interests would be regarded as personal property and not as interests in land within the meaning of s.72 of the Real Property Act

It is not without interest to note that the current provision in New South Wales—s.129 of the Mining Act 1926—is more emphatic in its language than the provision considered in *Williams v. Robinson,* as it provides that any authority, right, title or interest acquired or created under the Act shall be deemed to be personal property and shall not be of the nature of real estate. However, whatever may be the position in New South Wales, there is some difficulty in saying that in New Zealand the provision now contained in s.178 of the Act of 1926 supplies an answer to the question why successive Mining Acts and the Land Transfer Act were enacted much about the same time without either set of legislation making express reference to the other, for it seems plain that Williams J., with his very special experience of both pieces of legislation at that time, did not think our section had the effect of making mining rights personal property and so removing them

from the operation of the Land Transfer Act. In *Mason v. McConnochie* 19 N.Z.L.R. 638 that learned Judge held, contrary to the decision in *Williams v. Robinson,* that a share in a mining claim was an interest in land within the Statute of Frauds. His view was that the section should be read as declaratory of what mining privileges were, namely chattel interests in land, and not as converting them into something they were not, namely purely personal chattels. This reasoning is open to the criticism that not all mining privileges constitute interests in land, as, for example, prospecting licences and warrants, which would appear to be licences only and nothing more; and that, whatever the section means, it is not declaratory only, but must on any view have the effect of altering the legal nature of certain privileges. For the contrary view there is the opinion expressed by the Chief Justice in Equity in *Williams v. Robinson* at p.40: "It was unnecessary "for the section to declare that a (mineral) lease was a chattel real. It "always was so. It was therefore manifestly the intention of the Legis-"lature to alter the law". Although I have considerable reservations concerning the judgment in *Mason v. McConnochie* I hesitate to pursue the matter further, not only because it received no stress at all from counsel, but also because if the predecessor of s.178 had been generally thought to have the effect of removing mining privileges from the ambit of the Land Transfer Act that would have been well known to Williams J. The fact that he could not have thought the section to have this result is shown not only by his judgment in *Mason v. McConnochie* but also by his observations in *Gray v. Urquhart.* In this latter case the question was whether the grant of a water-race over private land prevailed against the title of a subsequent purchaser of the land. Williams J. held that it did not, on the ground that no licence had been validly granted, but he went on to express the opinion that the registered proprietor would take his title subject to a valid grant of a water-race, although that grant had not been registered. I shall later refer to the reasons he gave for this view, but for present purposes the material point is that, although the provision now contained in s.178 was not referred to either in argument or in the judgment, I cannot think it could have been overlooked by Williams J. if it had been generally regarded as removing mining privileges from the operation of the Land Transfer Act. For these reasons I think it safer, after this long lapse of time, to consider the position of mining privileges in relation to the Land Transfer Act on the basis that s.178 has the meaning given to it in *Mason v. McConnochie.*

I should say at this stage that the Crown relies on the mineral licence granted by the Warden on 27th April 1916, and not on the preceding agreement dated 29th January 1916 between the owner of the land and the grantee. The agreement was one for the grant of a profit a prendre, an interest in land, and as it was unregistered it could not, of itself, prevail against the subsequent title acquired by the appellant. The existence of an agreement is not essential to the exercise of the

Warden's power under s.58 to grant a licence, as all the section requires is the consent of the owner; and it seems to me that the licence granted by the Warden and relied on by the Crown derives an independent existence of its own from the statute, quite apart from the agreement between the parties. Although, then, the Crown would not be able to set up the unregistered agreement of itself against the appellant's Land Transfer title, I think it is entitled to rely on its rights under the licence, and the question is whether those rights prevail against the appellant's title.

The language of s.62 of the Land Transfer Act is quite emphatic in declaring that the registered proprietor is to hold subject to the interests registered against his title, "but absolutely free from all other encumbrances, liens, estates or interests whatsoever" except those thereinafter named. It is nevertheless well settled that statutory rights, powers, and charges may prevail over the title of the registered proprietor. The impact of various statutory provisions on Land Transfer titles has been considered in a number of cases in New Zealand which are referred to in the judgment appealed from, of which *Barber v. Mayor of Petone* 28 N.Z.L.R. 609 is an example, and also in Australia in such cases as *South-Eastern Drainage Board (S.A.) v. Savings Bank of South Australia* 62 C.L.R. 603. It was said in argument that in all the cases where the statutory rights have been held to prevail over the Land Transfer title those rights were in the nature of easements, so that the exception in s.62(b), relating to the "omission or misdescription of any . . . easement", would in any case apply. But this is not so, for in some cases the statute imposed a charge on the land, as in *The King v. Mayor of Inglewood* 1931 N.Z.L.R. 177 and in the Australian case I have just mentioned. It was also said that in the generality of cases where a statutory right or interest had been held to prevail over the Land Transfer title, the right or interest was conferred in aid of some public purpose. I think, however, notwithstanding certain expressions to be found in some of the decisions, that the fundamental reason why statutory interests have been accorded priority over the registered title is neither because they were in the nature of easements nor because they aided some public purpose, but because the provisions of the particular statute required that they have priority. It is true that one or both of the two matters mentioned have often been present in those cases, but the existence of those matters cannot be essential in order to enable it to be said that the statutory interests have priority over registered interests. The determination of the question must depend upon the purpose and interpretation of the statute under which the interest arises. Upon a consideration of the Mining Act, I have formed the opinion that mining privileges granted under the Act are not subject to the provisions of the Land Transfer Act, and that for three principal reasons.

In the first place the grants of mining privileges are not registrable under the Land Transfer Act. They are granted by the Warden and

not by the registered proprietor, and, there being no statutory provision authorising their registration, they cannot be registered under the Land Transfer Act: cf. *Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd.* 1926 A.C.101 at p.106. Moreover, they are granted in a form directed by the Mining Act, and s.42 of the Land Transfer Act would appear to prohibit registration in this form. The fact that such interests are granted pursuant to statutory authority but are not registrable gives, I think, cogent support to the view that they were not intended to be defeated, because of non-registration, by the indefeasibility provisions of the Land Transfer Act. It is unlikely that the legislature would have prescribed an elaborate system for the grant of non-registrable interests in land for specified terms if, in the absence of fraud only, they would inevitably be defeated upon a change in the ownership of the land over which they were granted. This feature, however, is not in itself conclusive, for it seems to me that the further question arises at this point whether, in the language of s.62 of the Land Transfer Act 1915, these non-registrable interests are interests which "but for this Act might be held to be paramount or to have priority". Unregistered instruments which fall within the express exceptions contained in s.62 do not necessarily take priority over the registered title; before they do so it must be shown that, apart from the provisions of the Land Transfer Act, the interests they create would take priority over the registered proprietor's legal estate. So also, it seems to me, the fact that an interest arising under a statute is not registrable is not in itself conclusive, and the question whether such an interest prevails against the title of a purchaser of the land must depend upon the nature of the interest conferred and the purpose of the statute. It may be that the Courts would more readily accord priority to rights conferred by a statute which is intended to aid some public purpose, and which applies of its own force to all land that comes within its operation, than they would in the case of rights under a statute which does not possess these features. I doubt whether it can be said that the mining legislation aids some public purpose, at all events in the same sense as legislation which confers rights relating to land on the Crown or a public body. Further, mining privileges do not spring into existence merely by force of the statute, nor do they apply indifferently to all land. They require an application to and grant by the Warden, and when granted they affect only a specified parcel of land. As to interests so arising, it seems to me that a material consideration must be to enquire whether the rights granted are legal rights or merely equitable rights, for, apart from the provisions of the Land Transfer Act altogether, equitable rights will not prevail against a later bona fide purchaser of the land for value. In *Bishop v. Rowe* 23 N.Z.L.R. 66 it was held that an unregistered (and apparently unregistrable) order, which charged land under provisions then contained in the Destitute Persons Act 1894, did not prevail against the title of a subsequent purchaser of the land. In *The King v. Mayor of Inglewood* (supra) it was said at p.209 that the charge dealt with in *Bishop v. Rowe* was an

In the Court of Appeal of New Zealand

No. 8

Cleary J.

Reasons given for Judgment in Court of Appeal

equitable charge only, and, of course, on this footing it could not prevail against the title of a bona fide purchaser for value, even apart from the provisions of the Land Transfer Act as to indefeasibility. Although this ground was not stated in terms in the judgments in that case, it is at all events clear that the Court took the view that the particular statute could not have intended to give priority to the unregistered charge over the title of one who took the land for value and without notice of the order.

This brings me to the second ground for thinking that mining privileges are outside the operation of the Land Transfer Act. This is based upon a consideration of the nature and effect of a grant made by the Warden under the Mining Act. Licences are in the form prescribed under the Act, and the Warden makes his grant in expressed pursuance of the statutory power conferred on him, and the grant takes effect from the date it is made and ensures for a specified term: s.176. S.98 provides that every person by whom any mining privilege is lawfully taken up, and every person lawfully deriving through him, shall be deemed to be the holder thereof until the licence therefor "is determined by effluxion of time. or by earlier surrender, or forfeiture, "or abandonment, under the respective provisions in that behalf here- "inafter contained". Ordinarily an instrument affecting Land Transfer land can at best only operate to confer an equitable title until it is registered; s.41 of the Land Transfer Act. It is registration that makes the instrument operative and effectual to pass the interest it purports to pass. But a grant by the Warden is a presently operative grant conferring, I think, an immediate legal interest according to its tenor. In *R. v. Waiariki District Maori Land Board* 1922 N.Z.L.R. 417 a partition order made by a Maori Land Court was held to confer a legal title without registration under the Land Transfer Act, and in *The King v. Mayor of Inglewood* the charge created by the making of a rate was held to be higher than a mere equitable charge and to take priority over registered interests without itself being registered under the Land Transfer Act. So also, I think, it is inconsistent with the nature of the legal interest created by the grant of a mining privilege that it should require subsequent registration under the Land Transfer Act in order to make it fully effectual, or that it could be defeated by the registration of some other instrument under that Act.

In the third place, I think this view is confirmed when the system of registration provided by the Mining Act is considered. S.180 of the Act of 1926 requires that any licence granted by the Warden shall be registered before it is issued, and s.179 provides that no instrument of transfer of any mining privilege shall pass any title until registered, and while unregistered it shall be void against any person claiming bona fide and for value under a subsequent registered instrument. It is to be noted that by s.4 the transfer of a mining privilege includes the sale, lease, transmission, mortgage, lien, encumbrance or other disposition thereof. On the assumption that mining privileges required

to be registered under the Land Transfer Act, it is not difficult to imagine cases where conflict could arise between the similar provisions of the two Acts as to the effect of non-registration, as, for example, in the case of two competing transferees of whom one had obtained registration under the Mining Act only and the other under the Land Transfer Act only. The provisions of the two Acts as to the effect of registration and the consequences of non-registration could not both be applied simultaneously. When it is borne in mind that grants under the Mining Act are not registrable at all under the Land Transfer Act, it seems to me to be clear that the registration provisions contained in the Mining Act were intended to constitute a code applicable to mining privileges to the exclusion of the provisions of the Land Transfer Act. I think that this view receives support from the provisions contained in the Mining Act as to the registration and enforcement of liens for wages or contract moneys in respect of work done on mining privileges. S.228 requires such liens to be registered in the Warden's Court, and s.237 excludes the application to these liens of the Wages Protection and Contractors Liens Act 1939, which of course provides for registration under the Land Transfer Act. I think also that the view I have expressed is consistent with the provisions of the statutory Land Charges Registration Act 1928 as amended in 1959. The purpose of that Act was to provide for the registration of statutory charges affecting land, and the provisions of the Amendment Act of 1959 in particular appear to recognise registration under the Land Transfer Act and registration under the Mining Act as separate and mutually exclusive systems of registration.

I am conscious that it could be said that the system of registration and search under the Mining Act provides a means whereby the existence of mining privileges affecting land in a mining district may be ascertained, but provides no adequate or effective means whereby the existence of such privileges affecting land outside a mining district could be ascertained. The provisions as to registration go back to a time when privileges could be granted only in respect of land within a mining district. If, as I think, the legislation contemplated that these privileges should be registered only under the Mining Act, then it does not seem to me that the position could have become altered merely by reason of the fact that certain jurisdiction to grant mining privileges over land outside a mining district was afterwards conferred.

I have earlier mentioned that in *Gray v. Urquhart* Williams J. expressed the view that the holder of a Certificate of Title would take subject to the grant of an unregistered water-race. I am not wholly clear as to the reason on which he based this view. Insofar as he relied on the provision which now appears in s.42 of the Land Transfer Act as preventing the registration of mining privileges, I respectfully agree; but he also seems to suggest that a water-race licence would prevail over the title of the registered proprietor because it is in the nature of an easement, as the Land Transfer Act makes an express

In the Court of Appeal of New Zealand

No. 8

Cleary J.

Reasons given for Judgment in Court of Appeal

exception from the indefeasibility provisions where easements are omitted from the register: see now s.62(b). On this footing, the result would be that unregistered mining privileges in the nature of easements would not be defeated by the provisions of the Land Transfer Act, whereas privileges not in the nature of easements would be defeated unless registered. With respect, I am unable to agree, not only because the result would be that certain privileges would receive protection while others would not, but also because I think, for the quite different reasons I have set out, that all mining privileges fall outside the operation of the Land Transfer Act, whether they are in the nature of easements or not.

Finally, I would like to make clear the extent to which, in my opinion, unregistered mining rights may prevail over the Land Transfer title of a registered proprietor. Nothing I have said has application to any mineral lease affecting private land which is constituted solely by an instrument made *inter partes*. In respect of such an instrument, I see no reason why the provisions of the Land Transfer Act as to the necessity of registration and the effect of non-registration should not apply in the same way as they do to other unregistered interests, and what I have said is confined to mining privileges which arise only from the grant of a Warden.

The result is that I think the appeal should be dismissed. Although my reasons are somewhat similar to those which weighed with Henry J., I have thought it preferable, in view of the importance of the questions involved, to set them out in my own way. I agree also with the proposed order as to costs.

Solicitors:

For the Appellant: Brodrick & Parcell, DUNEDIN.

For the Respondent: Crown Law Office, WELLINGTON.

JUDGMENT OF McGREGOR J.

This matter came before the Supreme Court by way of action removed from the Warden's Court at Cromwell. The action was heard before Henry J. and judgment was given for the respondents. At the hearing in the Supreme Court there was admitted an agreed statement of facts and additional oral evidence was taken. The agreed statement of facts, and any necessary additional findings of fact, are set out in full in the judgment under appeal. It is unnecessary to repeat these facts.

The question at issue is summarised in the judgment of Henry J. as follows:—

> "Plaintiff has a Certificate of Title issued under the Land Transfer Act 1885, and it does not disclose the registration of any right interest or title upon which defendants can claim to have any mining rights over plaintiff's property. Prima facie, therefore, it falls upon defendants to establish the right which is now claimed. The submission of counsel for defendants has been summarised as follows:—
>
> > 'The defence to the plaintiff's claim is that the Crown has mining rights over the land in question both under the assignment of the two original Agreements between Aitken and the Glenorchy Scheelite Mining Company Limited and under the assignment of the Mineral Licence No. 1697—and that these rights are not affected by the indefeasibility provisions of the Land Transfer Act.'
>
> "Defendants claim primarily to be entitled to mining rights as assignees of Mineral Licence No. 1697 and that these rights are valid as against plaintiff notwithstanding that plaintiff became the registered proprietor of the land in fee simple under a Certificate of Title which is silent as to the existence of any such rights. The submission by counsel is that, by virtue of the effect of the provisions of the Mining Act 1908, Licence No. 1697 is fully effective and binding against all successors in title after the time of its grant and that Licence No. 1697 has such effect and binding force without registration against the certificate of Title issued in respect of the land which it effects. If that be so, then it disposes of all questions in issue, and the further matters raised do not require consideration."

The Mineral Licence No. 1697 in reliance on which the respondent's claim is based was originally granted by the Warden of the Otago Mining District at Queenstown on the 27th day of April 1916 and registered there as No. 1697. The original term of the mineral licence was for a period of forty-two years. It is now common ground that the licence purports to have been granted under the provisions of s.56 of the Mining Act 1908 (now s.58 of the Mining Act 1926).

It will be necessary in this judgment to consider various sections of the Mining Act and when the sections in the 1908 Act correspond with those in the 1926 Act I propose to refer to the latter Act.

The first submission of counsel for the appellant is that there was no power under s.58 to grant the Mineral Licence and that the power granted to the Warden by s.58 is limited to a power to grant mining privileges for the purpose of mining for gold and silver. If this is correct it is obvious that Mineral Licence No. 1697 being "for the purpose of mining for scheelite tungsten and other minerals of the tungsten class" would be invalid.

Before considering in detail the arguments on which the submissions of counsel for the appellant are based it is convenient first to examine the relevant sections of the Mining Act.

Section 58 is as follows (the italics being mine):—

"58. Special provisions in case of lands other than Crown lands.—Notwithstanding anything hereinbefore contained, the following special provisions shall apply in the case of all lands whatsoever in New Zealand other than Crown lands open for mining:—

(a) The owner of any such land, or any person with the written consent of the owner and occupier (if any), may, in the prescribed manner, apply to the Warden for any *description of mining privilege* authorized by this Act in the case of Crown lands in a mining district, and the Warden, in his discretion, may grant a license for the same.

(b) Every licence so granted shall be deemed to be granted and shall be held subject to this Act, and subject also to any agreement made between the grantee and the owner or occupier in so far as such agreement is not inconsistent with this Act.

(c) So long as such licence continues in force the land comprised therein shall not be resumed *for mining purposes,* nor shall any prospecting licence be granted in respect thereof."

"Mining privilege" is defined in s.4 of the Act as follows:—

" 'Mining privilege' means any licence, right, title, or privilege relating to mining lawfully granted or acquired under this Act or any former Mining Act, and includes the specific parcel of land in respect whereof such licence, right, title, or privilege is so granted or acquired; it also includes a timber-cutting right, a water-right not relating to mining, and also a business, residence, or special site, but not an agricultural lease nor an occupation licence."

"Mining" is also defined thus:—

" 'Mining' means mining operations, and includes prospecting."

From a reading of these provisions it is observed that mining means mining operations generally and is not limited to mining for gold or silver, and mining privilege is given an even wider application.

"Mining purposes" (s.4) means mining for gold or any other metal or mineral. Subsection (a) of s.58 would therefore seem to imply that any description of mining privilege in subs.(a) would include a mineral licence in respect of a metal or mineral other than gold.

Section 58 empowers the Warden to grant a licence in the case of all lands in New Zealand other than Crown Lands open for mining for any description of mining privilege authorized by the Act in the case of Crown lands in a mining district.

It would seem that s.58 is, in respect of lands alienated by the Crown, complementary to s.106 which authorises the grant of mineral licences authorising the licensees to occupy any Crown land for the purpose of mining for any specific metal or mineral other than gold.

Further it would seem to me that s.58 must be read together with s.60. The latter section refers to land being made available for "mining purposes" under s.58, and "mining purposes" means mining for gold and any other metal or mineral.

In my view therefore the plain reading of the section to which I have referred indicates the intention of the legislature that in respect of lands alienated by the Crown the warden has authority to grant a Mineral Licence authorizing the licensee to occupy such land for the purpose of mining any specified mineral other than gold.

Chambers v. Busby 16 N.Z.L.R. 287 was an appeal from the decision of a Warden granting an application for a special claim over land in respect of which a Crown grant had been issued. It was held on the authority of *Wi Parata v. The Bishop of Wellington* 3 N.Z. Jur. N.S.S.C. 72 that the issue of a Crown Grant free from any limitation operated to prevent the Crown from granting a licence to mine on the land. But in this case the grant by the Warden was in January 1896 before the enactment of s.27 of the Mining Act Amendment 1896 enacted on the 17th October 1896. Section 27 contained the original provision now found in an extended form in s.58 of the Act of 1926, and the question in this appeal as to the powers of the Warden under that provision is wholly different from anything considered in *Chambers v. Busby*. Section 58 is applicable to all private lands with the written consent of the owner or occupier.

It was also suggested by counsel for the appellant that a restricted meaning should be placed on the words in s.58 "any description of mining privilege", as being restricted to privileges in relation to precious metals by virtue of the restrictive meaning placed on other words in the section "all lands whatsoever in New Zealand". In *In re Cameron's Application* (1958) N.Z.L.R. 225 it was held that the

Warden had no jurisdiction to grant an application for a water race licence pursuant to s.58 of the Act over land outside a mining district in favour of land outside a mining district for purposes unconnected with mining. But this restrictive meaning was based on the reason that s.171 of the Act gave exclusive jurisdiction to the Commissioner of Crown Lands in respect of land outside a mining district, and in respect of the latter section it had already been held that the Commissioner had no jurisdiction to grant a right in respect of water over private lands for any purpose unconnected with mining: *Skeet & Dillon v. Nichols* 30 N.Z.L.R. 611. It does not seem to me that this totaly unconnected and understandable restriction of meaning in another phrase, the dominant purpose of the Act being to regulate matters relating or ancillary to mining, assists in the construction by way of limitation of a totally different phrase "mining privilege" already defined for the purposes of the Act.

I have considered the many subsidiary arguments of the appellant in support of the suggested restrictive meaning of s.58 but in view of the clarity and unambiguity of the legislative provisions I cannot accept the argument that s.58 is limited to mining privileges in respect of gold.

Mineral Licence No. 1697 was granted by the Warden to the Glenorchy Scheelite Mining Co. Ltd. on the 27th April 1916. Application for such licence was made on the 29th January 1916 and written consent to such application was given by David Aitken, the owner, pursuant to s.58(a) of the Act. On the same date the owner and the applicant for the licence entered into an agreement whereby the owner agreed to sell, assign, transfer and set over to the proposed licensee the whole of the minerals and mineral rights in upon or to be won from his freehold section there described, for a period of forty-two years or such other extended period as might be mutually agreed on or that might be granted in the Warden's Court at Queenstown, or by any other property authority. The agreement is subject to certain terms which can where necessary be referred to later.

Section 58 of the Act under which Mineral Licence No. 1697 was granted provides in subs.(b) that such licence shall be deemed to be granted and shall be held subject to the Act and subject also to any agreement made between the grantee and the owner in so far as such agreement is not inconsistent with the Act.

The agreement to which I have referred inter alia provides that the net profits from the mining operations shall be divided as to 1/5th to the owner and 4/5ths to the licensee but that no rent, royalties or licence fees shall be payable to the owner in respect of any mineral licences or renewal thereof.

The second schedule to Mineral Licence 1697 provides for certain payments to be made to the owner by way of rent and royalties.

By a subsequent agreement dated the 21st November 1919 in consideration of a lump sum payment the owner discharged the licensee from payment of any royalty or any sum of money on the net profits as mentioned in the earlier agreement or on any other amount.

By a certain notice dated the 17th August 1916 the owner, pursuant to the proviso to s.60 of the Act had by writing under his hand addressed to the Receiver of Gold Revenue an intimation that no rent, royalties or licence fee should be payable under Mineral Licence 1697.

It is now submitted by the appellant, as I understand his argument, that the rights of the parties are determined by the agreement, that for certain reasons the agreement is void and that the Mineral Licence falls with it. I cannot accept this submission. The Mineral Licence is granted with the consent of the owner, and by a competent authority will full jurisdiction. The licence incorporates the terms of the agreement, but only so far as such terms are not inconsistent with the Act. The licence has an independent existence. The subsequent agreement waiving payment of further rent, royalty or share of profit is in accordance with the Act and has been notified to the Receiver in accordance with the statutory requirement. The grant of the licence is made with the prior consent of the owner and occupier. Such required consent is that of the owner and occupier at the time of application for the licence, and I cannot accept the appellant's contention that the consent of the owner remains operative only so long as such owner continues to remain in ownership.

Mineral Licence 1697 was assigned by the licensee to the Minister of Mines on behalf of the Crown by Deed dated the 28th July 1944, and it appears that such assignment was duly registered in the office of the Mining Registrar at Queenstown on the 12th August 1944 as No. 7111. The effect of this is to vest the title to Mineral Licence No. 1697 and the rights of the licensee thereunder in the Crown (ss.178 and 179). The term of the original licence M.L. 1697 was a term of forty-two years from the 27th April 1916. By virtue of s.97(1) of the Act the Minister is authorised to purchase any mining privilege and an effect thereof is that such privilege then ceases to be determinable by effluxion of time and continues in force notwithstanding the expiry of the term for which it was granted until surrendered by the Minister. Such result may not have been in contemplation of the owner when his consent was given to the original application for the licence, but nevertheless it was granted subject to the Act and implied therein was the term that in the event of its acquisition by the Minister it would not be determinable. It does not seem to me that the events which have happened in any way avoid the licence or the rights acquired by the Minister thereunder, and it enures independently of whether the original collateral agreement between the owner and the licensee

has lapsed or been determined or avoided. The respondent's claim is based solely on his rights under the license.

Assuming, as I have held, that the grant of Mineral License 1697 was a valid grant and that such license remains valid and subsisting, junior counsel for the appellant has submitted an able and instructive argument to the effect that M.L. 1697 is not such an instrument as will override the provisions of the Land Transfer Act so as to bind a bona fide purchaser for value without notice—the position which he submits the present appellant now occupies, and further that if it is held that a mineral licence does bind the title it should not bind the title for any longer period than the original agreement upon which the mineral license is based.

Before considering this argument I would refer to further provisions of the Mining Act which itself provides a system of registration of mining privileges. Section 178 provides that every mining privilege shall be deemed to be a chattel interest and may be sold, encumbered, transmitted, seized under writ of execution or warrant or otherwise disposed of as fully as a chattel interest in land subject to the provisions of the Mining Act.

"Chattels real" come within the classification of chattels and are a species of personal property, but their special attribute is that the interests thereby possessed are partly real and partly personal.

"Chattels real" said Sir Edward Coke "are such as concern or savour of the realty; as terms for years of land, wardships in chivalry . . . the next presentation to a church, estates by a statute merchant, statute staple, elegit or the like. And these are called real chattels as being interests issuing out of or annexed to real estates; of which they have one quality, viz. immobility, which denominates them real, but want the other viz. a sufficient legal indeterminate duration and this want it is that it constitutes them chattels". *(Blackstone* Vol. ii p.386).

Section 179 of the Mining Act provides that no instrument of transfer of any mining privilege shall be deemed to pass the title to the transferee until such instrument is duly registered under that Act. Then follow provisions in respect of registration. Section 185 further provides:—

> "Effect of registration.—In any case where any person has in good faith and for valuable consideration duly taken a transfer of any mining privilege, and duly registered the instrument of transfer, such registration shall be an absolute bar to all proceedings for the forfeiture or abandonment prior to the date of such registration, unless such proceedings are actually commenced within six months after that date."

The regulations under the Mining Act (now N.Z. Gazette No. 76 11th November 1926 page 3173 as amended by Regulation 1945/107)

provide a system of registration of all Mining Privileges and of Instruments affecting the same. (Regs. 68–90 inclusive).

It is clear, therefore, that the Mining Act provides its own system of registration and no title to any mining privilege passes until the instrument creating the privilege is registered, and that instruments disposing of a mining privilege are void as against any person claiming bona fide and for valuable consideration under any subsequent instrument duly registered prior to the registration of the earlier instrument.

Counsel for the appellant relies on s.62 of the Land Transfer Act which reads as follows:—

> "Estate of registered proprietor paramount.—Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever.'

The broad question therefore is as to whether, assuming the mineral licence has created an interest in land not notified on the certificate of title, the now registered proprietor holds the land free from such interest.

The general rule (subject to an exception) in regard to land under the Land Transfer Act appears to be that easements and profits à prendre can be created only by a registered memorandum of transfer: (Land Transfer Act s.90). It is argued in the present case that the mineral licence is a profit à prendre. A profit à prendre is "a right to take something off another's land" (Lindley L. J. *Duke of Sutherland v. Heathcote* 1892 1 Ch. 484). It is the participation in the produce of the soil or in the soil itself that principally distinguishes a profit from an easement. *(Cheshire's Modern Real Property* 8th Ed. 445). An easement in gross might be defined as a right which allows the owner of that right either to use the land of another person in a particular manner or to restrict its user by that other person to a particular extent, but does not allow him to take any part of its natural produce or soil. An easement in gross is now registrable under the Land Transfer Act s.122. The right in the present case under M.L. 1697 is for the grantee to occupy the land for the purpose of mining for scheelite. "Mining purposes" by virtue of s.4 of the Mining Act includes:—

> "(a) The stacking, storing, and treatment of any substance supposed to contain gold or any other metal or mineral;

(b) The erection, maintenance, and use of machinery, and the construction or use of races, dams, channels, batteries, dredges, buildings, and other works connected with any such operations or purposes;

(c) The deposit or discharge of tailings, debris, refuse, and waste water produced from or consequent on any such operations or purposes;

(d) The lawful use of land. watercourses, and water, and the doing of all lawful acts incident or conducive to any such operations or purposes." 10

While the holder of a profit has a right to enter for the purpose of the taking of the soil or the produce thereof, it would seem to me that the full right of occupation of the land and the right to use the land for mining purposes as defined in the Act confers on the grantee something more than a profit. On the other hand the right amounts to more than an easement, as an easement does not allow the grantee to take any part of the natural product of the soil or the soil itself: (*Manning v. Wasdale* 1836 5 A. & E. 758). While the Mineral License is in the present case akin to both a profit and an easement, it is something more than either. In *Cheshire's Modern Real Property* 20 8th Edit. 455 the learned author considers the distinction between an easement and a licence:—

> "Having seen something of the nature of easements, we will conclude this part of the subject by adverting to other rights of a somewhat similar nature from which they must be distinguished.
>
> 1. Licences: A licence is created in favour of B. if, without being given any legal estate or interest, he is permitted to A. to enter A's land for an agreed purpose. It is an authority that justifies what would otherwise be a trespass. It is said to be 30 *coupled with a grant* when the licensee, having been granted a definite proprietary interest in the land or in chattels lying on the land, is given permission to enter in order that he may enjoy or exploit the interest. Such a licence, as distinct from a *bare* licence, is of this nature if given to a man who is entitled to chattels, or to growing timber or to game on the land. There are here two separate matters—the grant and the licence."

There the distinction is drawn between an easement and a contractual license, but the same distinction would seem to me to exist between easements and licenses granted by statutory authority. I doubt 40 whether this discussion as to the nature in law of a mineral license is germane to the true question here to be decided. Section 178 of the Act states that "every mining privilege shall be *deemed* to be a chattel interest". Whatever the real nature of a mining privilege, the legislature has by way of statutory fiction declared it to be a chattel interest. It may be that an instrument creating a chattel interest is not capable

of registration under the Land Transfer Act. But in any case for the reasons which I next propose to endeavour to develop I do not think it is necessary to form a concluded view on this point.

As I stated earlier, as a general rule once land has been brought under the Land Transfer Act easements can be created only by a registered memorandum of transfer (s.90). But it has been held in certain decisions that s.62 of the Act does not protect the registered proprietor against easements existing by virtue of a statute or granted under special statutory authority.

In *Barber & Another v. Mayor of Petone* 28 N.Z.L.R. 609 the registered proprietors of a parcel of land under the Land Transfer Act granted permission to the defendant Corporation by letter to use the land for any purpose for which they might require it, but no instrument was executed in favour of the defendant purporting to create any easement over the land. The purpose for which the defendant required to use the land was to lay water pipes in it leading water from the reservoir, and this was done. The proprietors subsequently transferred the land to the plaintiffs. After the land was so transferred the defendant entered upon it for the purpose of repairing the water pipes. It was held that apart from statutory authority, even if the plaintiffs had notice of the letter, and even though the letter would have amounted to the grant of an easement if the land had not been under the Land Transfer Act, the plaintiffs would have been protected by s.189 of the Land Transfer Act 1885 (now s.182 of the Land Transfer Act 1952) and would have been entitled to restrain the defendant from entering on their land, but that the consent of the owner for the time being having been given to the laying of pipes, by virtue of s.291 of the Municipal Corporations Act 1900 the defendant had the right to keep the pipes there so long as they formed part of the water works, and to enter upon the land for the purpose of repairing them, and that that right, notwithstanding the provisions of s.189 of the Land Transfer Act, ran with the land. Cooper J. at p.612 says:—

> "The land is under the Land Transfer Act, and no easement can be created in land under that Act except by a proper instrument duly executed and registered. So far, therefore, as the plaintiffs are concerned, and considering the question apart from section 291 of 'The Municipal Corporations Act, 1900', even if they had had notice of the existence of the letter of the 30th September, and even though the terms of that letter might have been equivalent to the grant of an easement if the land had not been under the Land Transfer Act, the plaintiffs would have been protected by section 189 of the Act: *Mackenzie v. Waimumu Queen Gold-dredging Company; Strang v. Russell*".

After reference to the rights conferred by s.291 of the Municipal Corporations Act 1900, which rights can be exercised only with the consent of the owner, Cooper J. says at p.615:—

> "If this is proved" (that is, the consent by the predecessor in title to the defendants to place the water pipes on the land) "then the Council have a right under section 291 of 'The Municipal Corporations Act, 1900', to keep the water-pipes there, and thereafter, and so long as the pipes are a part of the waterworks, to enter upon the land for the purpose of repairing them."

This decision seems to be authority for the proposition that if the right, even though in the nature of an easement, arises by virtue of statutory authority, a subsequent purchaser without notice is bound by the earlier consent, the right having arisen by statutory authority.

Although the remarks are obiter, the same question was considered by Williams J. in reference to the Mining Act in *Gray v. Urquhart* 30 N.Z.L.R. 303. There it was held that a license for a water race is in the nature of an easement in gross. Williams J. says at p.308:—

> "So far as the Land Transfer question is concerned section 39 of the Land Transfer Act, 1908, would prevent the District Land Registrar from registering a right to a water-race. The right in question is in the nature of an easement in gross, a kind of easement our law now recognizes. By section 59 of the Land Transfer Act the registered proprietor of any land holds the same free from all other estates and interests except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land. The lodging of a caveat would be an inapt way of protecting such a right as a right to a water-race. I think that the holder of a certificate of title would take subject to a valid grant of a water-race, although the grant had not been registered and no caveat had been lodged."

Although this statement is obiter, the opinion of Williams J., an acknowledged authority on mining law, must have very persuasive weight. The dedication by the learned author of Gilkison's *The Law of Gold Mining in New Zealand* to this judge, which I quote, is not without interest:—

> "To His Honor Joshua Strange Williams, Esq., Justice of the Supreme Court, Dunedin, who by his masterly judgments has done much to make the crooked straight and to lay the foundations of an equitable system of Mining Law in New Zealand, This Work is by permission most respectfully dedicated."

Again, in *Hawkes Bay River Board v. Thompson* 1916 N.Z.L.R. 1198 it was held that a River Board by virtue of its statutory authority might enter on land adjoining a river and maintain protective works thereon, that the rights of the River Board were in the nature of an easement and that such easement being created by statute was good without registration under the Land Transfer Act 1908. There Stout C. J. expressly follows the decision of Williams J. in *Gray v. Urquhart.*

It is sought to distinguish these and other cases on several grounds, firstly, that in each case the grant was within the exception provision of s.62(b):—

> "Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land;"

and that in no case have rights in the nature of profits à prendre been held to override the Land Transfer Act; secondly that in each case (except three which include *Gray v. Urquhart* (supra)) the rights are given by statutory authority to public authorities or the Crown to do something to or in relation to land and that only statutes affecting public rights can override the Land Transfer Act. In other words, it is suggested that the protection is given for the public weal.

I do not think this distinction is sound. In the present case the grant is more than a grant inter partes. It is a grant by the Warden under statutory authority. It seems to me that such a grant is at least analagous to the exercise of statutory authority which requires the precedent consent of the owner as in *Barber v. The Mayor of Petone* (supra). The grant is in effect a grant pursuant to statute. When it is suggested that the nature of the statutory grant in the cases quoted was in the nature of an easement I do not think such distinction is a valid distinction from the present grant, even if it is correctly described as the grant of a profit à prendre. It also seems to me that the public weal can be equally well invoked in the present case. It is in the public interest that mining should be developed and mining rights protected. In *Wilson v. Read* (1920) N.Z.L.R. 877 Sim J. refers to the object of the Mining Act at p.882:——

> "The object of the Mining Act is to develop mining, and, as pointed out by Mr Justice Williams in *In re Paterson,* applications for privileges to be used in connection with mining are to be dealt with quite differently from applications for privileges which are not intended to be so used. The importance of this distinction was referred to by the same learned Judge in his judgment in *Urquhart v. Gray.* It is not suggested that the respondents by their operations will assist directly or indirectly the mining industry. They desire to acquire a right to use the three heads of water in question for purposes connected only with farming. In order to enable them to do this, they ask that a right which was created for mining purposes, and which has been abandoned, should be kept alive so that it may be converted into something quite different. Such a conversion would operate seriously to the prejudice of the existing rights to water out of Thompson's Creek, because Lardner's right is prior to most of them. In my opinion it would not be just or equitable to put the respondents in a position to apply for such a conversion. The right to the three heads was created so that the water might be

used for mining purposes. It is not being used now for such purposes, and there is no intention or desire to use it for such purposes in the future."

It is submitted that the present case involves private rights as opposed to public rights, and in such case the provisions of the Land Transfer Act are paramount in favour of a bona fide purchaser for value without notice. Reference has been made to *Bishop v. Rowe* (1904) 23 N.Z.L.R. 68. There a charge upon the land had been created by the filing in the Supreme Court under s.24 of the Destitute Persons Act 1894, previously to the purchase, of a maintenance order against the then registered proprietor. Denniston J. in the Court of Appeal at p.71 says:—

"As has been pointed out during the argument, although section 24 of 'The Destitute Persons Act, 1894' creates a charge upon all the land of the person against whom the order has been made, which is 'to rank in priority next after any mortgage or other charge upon the said land made previous to the date of the said order', section 55 of 'The Land Transfer Act, 1885' declares that, notwithstanding the existence in any other person of any estate or interest, the registered proprietor of land under the Act is to hold it subject only to registered encumbrances, and free from all other encumbrances. The question is whether the section of the Destitute Persons Act overrides this provision of the Land Transfer Act. It seems to me that it does not do anything of the kind. Nothing but the most absolute and direct terms would justify us in holding that it did so. A charge is an encumbrance. The charge created by the Act therefore, in the absence of any direct provision to the contrary, is in the same position as any other unregistered encumbrance. The person interested in it can take the usual precaution by lodging a caveat."

Reference has also been made to *McConochie v. Webb* (1904) 24 N.Z.L.R. 229 but I do not think this decision is of assistance as the statute with which the Court was there concerned—The Contractors and Workmen's Liens Act 1892—specifically provides that until registration the land should not be affected by lien or claim of lien (see Edwards J. at p.233).

Bishop v. Rowe is, I think, distinguishable from the present case. There although the charge was created by the Court under statutory authority, it was a charge created inter partes and was in its nature purely an equitable charge (vide *The King v. Mayor of Inglewood* (1931) N.Z.L.R. 177, 209). Here the interest is a legal interest and itself is the creation of statute. The legal title to a mining privilege passes on registration under the Mining Act. The Mining Act in so far as mining privileges are concerned and in regard to land in a mining district has created a separate system of registration and it would seem that persons acquiring land in a mining district are

presumed to have notice of interests registered in the Register of Mining Privileges and affecting the land.

Moreover, although certain mining privileges may be the subject of a written grant by the Warden, and a subsequent memorandum of transfer could be registered, there are other mining privileges in respect of which it is difficult to envisage any document capable of registration under the Land Transfer Act, e.g. Mineral Prospecting warrants s.77, Alluvial Claims s.91 *et seq*. which may be granted by the Warden after notice to but irrespective of consent by the owner of the land.

In my view the effect of sections 178 and 179 of the Mining Act grants to the holder a legal interest in the mining privilege. Such interest may be sold, encumbered, transmitted or otherwise disposed of as fully as a chattel interest in land. The legal interest in the mining privilege is complete on registration under the provisions of the Mining Act. An unregistered mining privilege is void as against any person claiming bona fide and for valuable consideration under any subsequent instrument duly registered prior to the registration of the first instrument. Registration under the Mining Act therefore ordinarily gives priority. The Act contains provisions as to forfeiture and abandonment of mining privileges, but the transferee of a mining privilege who has taken a transfer in good faith and for valuable consideration is protected from all proceedings for forfeiture or abandonment on any grounds existing prior to the date of registration of the instrument of transfer. In other words the transferee for such purposes is entitled to rely on the title of the transferor as shown in the register of mining privileges. Certificates of easement conferring on the grantee the right to enter upon occupy and use land comprised in any other mining privilege for certain purposes may be granted by the Warden, and such certificates of easement shall be registered against the mining privilege affected. In my opinion, whatever the real nature of a mining privilege, the Mining Act has established a system of registration of mining privileges, and protection is thereby given to the registered holders of such privileges subject to the provisions of the Mining Act, and subject to encumbrances or other interests recorded in the register. Both by virtue of the facts that the Mining Act provides its own system of registration of privileges, and that the grant in the present case is by a competent officer, and by virtue of statutory authority, it seems to me that the mining privilege is not defeated by the fact that it is not registered against the land under the Land Transfer Act.

I would therefore hold that the appellant's claim should be rejected. It would also seem to me that the rights of the respondent being dependent on Mineral License 1697 granted by the Warden independently of the original agreement between the then owner and the Glenorchy Scheelite Company Ltd. enure for the term of the Mineral License plus any additional term granted by the Warden under the

In the Court of Appeal of New Zealand

No. 8

McGregor J.

Reasons given for Judgment in Court of Appeal

provisions for renewal contained in the Mining Act, and while vested in the Crown such license is not determinable by effluxion of time (s.97).

I agree that the appeal should be dismissed, with the result as to costs proposed by the learned President.

Solicitors:

For the Appellant: Brodrick & Parcell, DUNEDIN.

For the Respondent: Crown Law Office, WELLINGTON.

NO. 9

FORMAL JUDGMENT OF COURT OF APPEAL

In the Court of Appeal of New Zealand

No. 9

Formal Judgment 6th June 1961

Before the Honourable Mr Justice Gresson, President, the Honourable Mr Justice Cleary and the Honourable Mr Justice McGregor. Tuesday, the 6th day of June 1961

THIS APPEAL coming on for hearing on the 13th, 14th, 15th, 16th and 17th days of June 1961 UPON HEARING Mr Parcell and Mr Whalan of counsel for the appellant and Mr Bain and Mr Richardson for the Respondents IT IS ADJUDGED that the appeal be and the same is hereby dismissed AND IT IS ORDERED that the appellant do pay to the respondents the sum of One hundred and five pounds.

By the Court,

E. A. GOULD.

Deputy Registrar.

In the Court of Appeal of New Zealand

No. 10

Order granting leave to appeal to the Privy Council

5th October 1961

NO. 10

ORDER GRANTING LEAVE TO APPEAL TO THE PRIVY COUNCIL

Before the Honourable Mr Justice Gresson, President, the Honourable Mr Justice North and the Honourable Mr Justice Cleary
Thursday, the 5th day of October, 1961

UPON READING the notice of motion of the appellant dated the 27th day of June 1961 and the affidavits of Thomas Hugh Miller, David Wylie, John Gavin MacIntyre and Robert Faulks Landreth filed herein AND UPON HEARING Mr Parcell of Counsel for the appellant and Mr Cornford of Counsel for the respondents THIS COURT HEREBY ORDERS that leave be given to the appellant to appeal to Her Majesty in Council from the judgment of this Honourable Court delivered on the 6th day of June 1961 in this appeal UPON THE CONDITIONS that the appellant within three months hereof give security in the sum of Five hundred pounds (£500) for the due prosecution of the appeal and that within the like time the appellant take the necessary steps for the purpose of procuring the preparation of the record and the dispatch thereof to England.

By the Court
E. A. GOULD
Deputy Registrar.

Before the Right Honourable the Chief Justice, the Honourable Mr Justice Gresson, President and the Honourable Mr Justice North
Wednesday, the 13th day of December, 1961

UPON READING the Notice of Motion filed herein for an Order granting Final Leave to the Appellant to Appeal to Her Majesty in Council AND UPON READING the affidavit of James Hugh Cassidy Larsen filed in support thereof AND UPON HEARING Mr Inglis of Counsel for the Appellant and Mr Cornford of Counsel for the Respondents this Court DOTH ORDER that the appellant do have Final Leave to Appeal to Her Majesty in Council from the judgment of this Court delivered at Wellington on the 6th day of June 1961.

By the Court
A. W. KELLY
Deputy Registrar.

PART II

EXHIBIT NO. 1

CERTIFICATE OF TITLE UNDER LAND TRANSFER ACT. NEW ZEALAND

Reference: (Vol. 2 (Warrant No. 135 (P.R. Folio 10, Val. 9 Register-book, Vol. 91, folio 128.

THIS CERTIFICATE, dated the Eighth day of September, one thousand eight hundred and ninety under the hand and seal of the District Land Registrar of the Land Registration District of OTAGO, being a Certificate in lieu of Grant, under Warrant of His Excellency the Governor, in exercise of the powers enabling him in that behalf, WITNESSETH that KATE MASON wife of William Mason of Paradise, Dart District, Architect, is seised of an estate in fee simple for her sole and separate use (subject to such reservations, restrictions, encumbrances, liens, and interests as are notified by memorial underwritten or indorsed hereon; subject also to any existing right of the Crown to take and lay off roads under any Act of the General Assembly of New Zealand) in the land hereinafter described, as the same is delineated by the plan drawn hereon, bordered red be the several admeasurements a little more or less, which said land is in the said Warrant expressed to have been originally acquired by William Mason as from the twenty second day of July, one thousand eight hundred and ninety under the Land Act 1885, that is to say: All those parcels of land containing together three hundred and seventeen (317) acres three (3) roods thirty six (36) poles more or less situated in the Dart District being Sections twenty nine (29) thirty (30) thirty one (31) thirty two (32) thirty three (33) thirty nine (39) forty two (42) Block two (II) on the Public Map of the said District deposited in the Office of the Chief Surveyor Dunedin.

H. TURTON
District Land Registrar.

Lease No. 1574 Kate Mason to David Aitken term 6 years and 8 months from 31st October 1890 Entered 7th February 1891 at 12.20 o'c.

G. G. Bridges
Depy. D.L.R.

Transfer No. 23730 Kate Mason to David Aitken Entered 26th October 1893 at 2.45 o'c.

W. Wyinks
Asst. D.L.R.

Mortgage No. 16261 David Aitken to Kate Mason Entered 26th October 1893 at 2.45 o'c.

W. Wyinks
Asst. D.L.R.

Discharge of Mortgage No. 16261 Entered 16 July 1897 at 12.50 o'clock.
H. Turton
D.L.R.

Mortgage No. 19056 David Aitken to Henry Alfred Allan Entered 16 July 1897 at 12.50 o'c.
H. Turton
D.L.R.

Transfer No. 30383 of Mortgage No. 19056 Henry Alfred Allan to Philip Spence Bett and Herbert Webb, Entered 27 July 1899 at 3 o'clock.
H. Turton
D.L.R.

Transfer No. 31387 of Mortgage No. 19056 Philip Spence Bett and Herbert Webb to Clara Abigail Kerr Entered 8th May 1900 at 2.40 o'c.
H. Turton
D.L.R.

Transfer No. 34871 of Mortgage No. 19056 Clara Abigail Kerr to Trustees Loyal Hand and Heart Lodge No. 4358 Otago District Manchester Unity Independent Order of Oddfellows, Entered 18 July 1902 at 11 o'clock.
A. V. Sturtevant
Asst. L.R.

Discharge of Mortgage No. 19056 Entered 30th September 1912 at 3.45 o'c.
C. E. Nalder
D.L.R.

Mortgage No. 41174 David Aitken to The Trustees of The Loyal Hand and Heart Lodge Oddfellows Entered 30th September 1912 at 3.45 o'c.
C. E. Nalder
D.L.R.

DISCHARGE Produced 17/10/1919 at 10.30 o'c.
A. V. Sturtevant,
D.L.R.

Mortgage No. 66212 David Aitken to The Bank of New Zealand produced 17th November 1924 at 2.30 o'c.
F. E. McMillan,
A.L.R.

DISCHARGED 13/10/25.
F. E. McMillan
A.L.R.

Caveat No. 2812 against sections No. 30, 31, 32, 33 and 39 by the Glenorchy Scheelite Mining Company Limited Entered 12th March 1925 at 2.40 o'c.
F. E. McMillan
A.L.R.

Withdrawal produced 13.10.25.

F. E. McMillan
A.L.R.

Mortgage No. 69138 David Aitken to The State Advances Superintendent produced 13th October 1925 at 2.45 o'c.

F. E. McMillan
A.L.R.

Discharged 14th October 1949 at 2.45 o'c.

M. F. Dawson
A.L.R.

Mortgage No. 73741 David Aitken to Olgar John Thornton produced 16th March 1927 at 10 o'c.

F. E. McMillan
A.L.R.

Merged See T.109694.

Transmission No. 15649 to Isabella Jane Heffernan of Paradise Widow Entered 20th January 1930 at 11.30 o'c.

F. E. McMillan
A.L.R.

Transfer No. 104268 Isabella Jane Heffernan to Jane Amelia Aitken, John Bartlett Aitken and the said Isabella Jane Heffernan as tenants in common in equal shares produced 20th January 1930 at 11.30 o'c.

F. E. McMillan
A.L.R.

Transfer No. 104269 of their interest Jane Amelia Aitken and John Bartlett Aitken to the abovenamed Isabella Jane Heffernan produced 20th January 1930 at 11.30 o'c.

F. E. McMillan
A.L.R.

Variation of Terms of Mortgage No. 73741 produced 20th January 1930 at 11.30 o'c.

F. E. McMillan
A.L.R.

Transfer No. 109694 Isabella Jane Heffernan to Olgar Archibald John Thornton of Glenorchy Storekeeper produced 22nd October 1932 at 10 o'c. (Mortgage No. 73741 Merges).

F. E. McMillan
A.L.R.

Transmission No. 21055 to Johanna Thornton of Glenorchy Widow as Administratrix debonis non Entered 29th June 1938 at 2.30 o'c.

J. E. Aubin
A.L.R.

Transfer No. 123834 Johanna Thornton to the said Johanna Thornton produced 29th June 1938 at 2.30 o'c.

J. E. Aubin
A.L.R.

Variation of terms of Mortgage 69138 produced 22nd February 1944 at 2.45 o'c.

N. E. Wilson
A.L.R.

Transfer 142747 Johanna Thornton to Charles Lloyd Veint of Queenstown Miner produced 8th March 1944 at 3 o'c.

G. H. Seddon
D.L.R.

Mortgage 118375 Charles Lloyd Veint to Johanna Thornton produced 8th March 1944 at 3 o'c.

G. H. Seddon
D.L.R.

DISCHARGED 14th October 1949.

M. F. Dawson
A.L.R.

Transfer 164678 Charles Lloyd Veint to Thomas Hugh Miller of Queenstown Gentleman produced 14th October 1949 at 12.18 o'c.

M. F. Dawson
A.L.R.

I hereby certify the foregoing to be a true and correct copy of Certificate of Title, Volume 91, Folio 128.

DATED at DUNEDIN this Twentyfifth day of October, 1957.

L.S. District Land Registrar.

EXHIBIT NO. 2

MEMORANDUM OF TRANSFER

I, KATE MASON Wife of William Mason of Paradise, near Glenorchy in the Provincial District of Otago New Zealand Architect, being registered as the proprietor of an estate in fee simple for my sole and separate use subject, however, to such encumbrances, liens, and interests as are notified by memoranda underwritten or indorsed hereon, in all that piece of land situated in the Dart District containing Three hundred and seventeen acres three roods and thirty six poles be the same a little more or less and being Sections Numbered respectively Twenty nine, Thirty, Thirty one, Thirty two, Thirty three, Thirty nine and Forty two Block Two on the Map of the said District the whole of the land included in the Certificate of Title entered in Register Book Volume 91 Folio 128.

IN CONSIDERATION of the sum of ONE THOUSAND POUNDS paid to me by DAVID AITKEN of Paradise aforesaid Farmer the receipt of which sum I hereby acknowledge, do hereby transfer to the said David Aitken all my estate and interest in the said piece of land.

IN WITNESS whereof I have hereunto subscribed my name this Sixteenth day of October One thousand eight hundred and ninety three.

KATE MASON.

SIGNED on the day above named by the said KATE MASON in the presence of

Herbert Webb,
Solicitor, Dunedin.

MEMORANDUM OF ENCUMBRANCES

Lease Number 1574 Kate Mason to David Aitken.

No. 23730

Transfer of Sections 29 to 33, 39 & 42 Block II situated in the Dart District.

MRS KATE MASON Vendor.

DAVID AITKEN Purchaser.

Particulars entered in the Register-Book Volume 91, Folio 128, the 26th day of October, 1893, at 2.45 o'clock.

W. WYINKS
Asst. District Land Registrar.

L.S.

Correct for the purposes of the Land Transfer Act.

Herbert Webb.

I hereby certify the foregoing to be a true and correct copy of Memorandum of Transfer Number 23730.

DATED at DUNEDIN this Twenty-fifth day of October, 1957.

L.S.

District Land Registrar.

EXHIBIT NO. 3

AN AGREEMENT made this twenty-ninth day of January One thousand nine hundred and sixteen BETWEEN DAVID AITKEN of Paradise Lake County in New Zealand Farmer of the one part and THE GLENORCHY SCHEELITE MINING COMPANY LIMITED of Glenorchy in Otago New Zealand a Registered Company (hereinafter called "the Company") of the other part WHEREBY it is agreed between the parties hereto as follows:—In consideration of the sum of ONE HUNDRED AND FIFTY POUNDS paid by the Company to the said David Aitken (the receipt whereof is hereby acknowledged) He the said David Aitken DOTH HEREBY sell assign transfer and set over to the Company the whole of the Minerals and Mineral Rights in and upon or to be won and extracted from his freehold section 39 Block II Dart Survey District With full power and authority to the Company to sink drive sluice crush make pits shafts trenches water courses and generally to mine work and search for such minerals and take such other steps or proceedings as the Company may consider fit or advisable and to treat and deal with the ore to be obtained by such Company for a period of forty-two years or such other extended period as may be mutually agreed on or that may be granted in the Warden's Court at Queenstown or by any other proper authority Subject to the following terms stipulations and Agreements:—

1. The Company is hereby authorised and empowered to apply to the Warden in the Warden's Court Queenstown for a Mineral License for forty-two years over the said freehold section 39 Block II Dart District and he the said David Aitken doth hereby consent to such application being made and granted and the Company shall take all such necessary steps and proceedings and do all acts matters and things as may be necessary to have such mineral licence application granted and when granted to carry out the conditions and restrictions set forth in "The Mining Act 1908" and its amendments or in any Act amending the same or substituted therefor and he the said David Aitken will sign all necessary consents and papers to carry the foregoing into effect. Further the Company shall have full power and authority to erect a treatment plant or such other plant or machinery or any other necessary works in connection with the carrying on mining and other operations on the said freehold section 39 Block II Dart District.

2. At the expiration of the said forty-two years the Company can if it thinks fit make an application for and get a grant of a renewal of the said Mineral License over the said freehold section for another forty-two years or other term that may then be lawful or in lieu thereof make a fresh application for and get a grant for the said land for another forty two years or other term that may then be lawful.

3. The said David Aitken hereby agrees to allow the Company free of charge to bring water across and on to the said freehold section and through any other necessary section of his so as to construct water races

and bring water on to the said freehold section to mine or work the property under the terms of this agreement or use and work any treatment plant or machinery it may erect or use or wish to use.

4. The said David Aitken hereby agrees that no rent royalties or licence fees shall be payable to him in respect of any mineral licence or renewal thereof to be granted to the Company in pursuance of this agreement.

5. All ore produced or won under the terms of this Agreement shall be sold to the Company who will pay and divide the net profits with the said David Aitken as next hereinafter mentioned.

6. After payment of all material wages monies and charges incurred or spent in developing mining or working the said freehold section under the terms of this agreement or any Mineral Licence to be issued to the Company and also in working or winning the ore and also after payment of all rent royalties or licence fees (if any) that may require to be paid the net profits shall be divided between the said David Aitken and the Company so that the said David Aitken shall get and be paid by the Company a one fifth share or interest or twenty per cent of such net profits and the Company shall retain the remainder of the said net profits as its own absolutely.

RL. DA.

GR. JAR.

7. The said David Aitken will free of charge co-operate with the Company in every possible way and assist it in its mining and other operations and also to extract the ore and otherwise to make the operations or business a success.

8. Should any gold be discovered on the said freehold section it shall be subject and be deemed to be included in this agreement.

9. The said David Aitken is not and shall not be liable in any way for any wages material or expenses or for any other sum in developing or working the said freehold section or any part thereof or for any rent royalties or licence fees in connection with the said property or for the costs and outlay of this Agreement it being expressly agreed between the parties hereto that the Company alone shall be liable.

10. This Agreement shall include and bind the said David Aitken his heirs executors administrators and assigns and shall also include and bind the Company its successors and assigns and this Agreement shall be read and construed accordingly IN WITNESS whereof the said David Aitken has hereunto set his hand and the Company has hereunto affixed its common seal the day and year first above written.

SIGNED by the said David Aitken in the presence of:—

David Aitken
Paradise Otago
29th January 1916

Frederick Finch
Carpenter
Paradise
Otago

The Common Seal of The Glenorchy Scheelite Mining Company Limited was hereto affixed in the presence of:

L.S.

George Reid
Robert Lee

Glenorchy
29th January 1916

Two of the Directors of the Company

And of

James A. Reid
Secretary

THE STATE ADVANCES SUPERINTENDENT hereby consents to the foregoing Agreement BUT WITHOUT PREJUDICE to the Memorandum of Mortgage Registered No. from David Aitken to him and the rights powers and remedies of the Mortgage thereunder.

DATED at Wellington this third day of August 1925.

SIGNED by WILLIAM WADDEL the State Advances Superintendent and sealed with the Seal of his Office in the presence of

The State Advances
Superintendent
Wm. Waddel
MORTGAGEE.

J. B. Christie,
Solicitor,
Wellington.

L.S.

This is the Agreement dated the 29th day of January 1916 made between DAVID AITKEN and THE GLENORCHY SCHEELITE MINING COMPANY LIMITED mentioned and referred to in the annexed Agreement between the said parties.

DATED this twenty-first day of November 1919.

SIGNED by the said DAVID AITKEN in the presence of: } David Aitken D.A. G.R. R.D.

F. Finch
Carpenter Paradise Otago

The COMMON SEAL of the Glenorchy Scheelite Company Limited was hereto affixed in the presence of:— } L.S.

Geo. Reid
Robert Lee
Two of the Directors of the said Company

and of

James A. Reid
Secretary of the said Company.

The Trustees of The Loyal Hand and Heart Lodge (No. 4358) of the Otago District of The Manchester Unity Independent Order of Oddfellows Friendly Society as and being the Mortgagees of (inter alia) Section Thirty nine Block Two Dart District mentioned in the within Agreement DO HEREBY CONSENT to the said Agreement.

DATED this twenty fourth day of March 1916.

Witness to the signature of JOHN WOOD } John Wood

W. Drummond Ferguson
Captain N.Z.M.C.
Trentham M.C.

Witness to the signatures of CHARLES GRATER and JOHN MORRISON RODGER } C. Grater, John M. Rodger, Trustees of The Loyal Hand and Heart Lodge (No. 4358) Otago District M.U.I.O.O.F.

E. B. Binney
Clerk to Burton Patterson
Dunedin.

EXHIBIT NO. 4

No. 4/16

Under "The Mining Act, 1908"

APPLICATION FOR A MINERAL LICENSE

To the Warden of the OTAGO
Mining District at QUEENSTOWN

PURSUANT to "The Mining Act 1908" the undersigned THE GLENORCHY SCHEELITE MINING COMPANY LIMITED of Glenorchy Registered Company hereby applies for a mineral license in respect of the land referred to in the schedule hereto, which has been duly marked out for the purpose. Precise time of marking out privilege applied for:—3 p.m. on 29–1–16.

Date and number of miner's right: 21–12–15/108351.

Address for service: Office of Wesley Turton Solicitor Queenstown.

Dated this 29th day of January, 1916.

I CONSENT TO THIS APPLICATION:
David Aitken.
Owner of Sec. 39.
Block II Dart District.

WITNESS TO the signature of David Aitken:
Frederick Finch.

SCHEDULE

Locality where license is situated with its boundaries measurements, and area: Dart District being freehold section 39 Block II Dart Survey District owned by David Aitken Paradise Boarding House Keeper who consents in writing to this application Bounded on the West by the Dart River on the South by Crown Lands being part section 38 Block II Dart District and Mineral License Area, applied for by J. J. Lynch on the North East by J. C. Fenn's Freehold Sections 27 and 28 Block II Dart District and by David Aitken's Freehold Section 42 Block II Dart District measurements on the South about 50 chains on the West about 40 chains and on the East about 30 chains Pegs marked == Area 88 acres 35 poles. For scheelite tungsten and other minerals of the tungsten class.

Signature of applicant:
The Glenorchy Scheelite Mining Company Limited
by its Solicitor,
WESLEY TURTON.

Precise time of the foregoing application: 12.20 p.m. on 2–2–16.

Time and place appointed for the hearing of the application and all objections thereto: Thursday 24th day of February 1916 at 11 a.m. at Warden's Court at Queenstown.

Objections must be filed in the Registrar's office and notified to the applicant at least three days before the time so appointed.

A. J. THOMPSON,
L.S. Mining Registrar.

The foregoing is a copy of the application No. 4/16 filed in the Warden's Court Queenstown on 2–2–16. The hearing has been adjourned by the Warden to Thursday the 30th March 1916 at 11 a.m. at the Court House at Queenstown when any objections hereto will also be heard.

DATED at Queenstown this 1st March 1916.

A. J. THOMPSON,
Mining Registrar.

This is the Exhibit referred to as Exhibit No. 5 in the Statement of Agreed Facts.

EXHIBIT NO. 5

I CONSENT TO THIS APPLICATION:—
DAVID AITKEN.
Owner of Sec. 39
Block II Dart District.

WITNESS to the signature
of David Aitken:
FREDERICK FINCH.

EXHIBIT NO. 6

The Trustees of The Loyal Hand and Heart Lodge (No. 4358) of the Otago District of The Manchester Unity Independent Order of Oddfellows Friendly Society as and being the Mortgagees (inter alia) Section Thirty nine Block Two Dart District mentioned in the within Agreement DO HEREBY CONSENT to the said Agreement.

DATED this twenty fourth day of March 1916.

WITNESS to the signature of JOHN WOOD. } JOHN WOOD

W. Drummond Ferguson
Captain N.Z.M.C.
Trentham M.C.

WITNESS to the signature of Charles Grater and John Morrison Rodger. } C. GRATER
JOHN M. RODGER
Trustees of the Loyal Hand and Heart Lodge (No. 4358) Otago District M.U.I.O.O.F.

E. B. Binney
Clerk to Burton & Patterson
DUNEDIN.

EXHIBIT NO. 7

Precise time of marking out privilege applied for p.m. on 29th January 1916. Precise time of filing Application (No. 4/16) for this License: 12.20 p.m. on the 2nd day of February, 1916.

Mines, 1916/379

Under "The Mining Act, 1908".

MINERAL LICENSE

PURSUANT to "The Mining Act 1908", I, the undersigned, Henry Aitken Young, Warden of the Otago Mining District, do hereby grant to The Glenorchy Scheelite Mining Company Limited of Glenorchy Registered Company this mineral license, authorising the licensee to occupy the parcel of Crown Land described in the First Schedule hereto for the purpose of mining for scheelite, tungsten and other minerals of the tungsten class.

This license is granted for a term of forty-two years, commencing on the date hereof, subject to the payment of the rental and royalty as specified in the Second Schedule hereto, and subject also to the reservations, terms, conditions, and provisions set out in the said Act and in the regulations thereunder, and to the additional terms, reservations, conditions, and provisions specified in the Third Schedule hereto.

In witness whereof I have hereunto subscribed my name, and affixed the seal of the Warden's Court at Queenstown, this 27th day of April, 1916.

L.S.

FIRST SCHEDULE

All that area of Crown land, containing by admeasurement Eighty-eight (88) acres and thirty-five (35) poles more or less being Section numbered Thirty-nine (39) on the map of Block II Dart District deposited in the office of the Chief Surveyor at Dunedin as delineated hereon edged yellow.

SECOND SCHEDULE

1. A yearly rental of £11.2.6 (being at the rate of 2s. 6d. for every acre or fraction of an acre of the land) during the term of the license, all payments in respect thereof having been duly made up to the last day of June next following the date of the license and the subsequent payments to be made by equal half-yearly instalments of £5.11.3 in advance, computed from the last day of June aforesaid; and also

2. A royalty of one-fiftieth of the value, at the pit's mouth, of all the specified metals and minerals raised pursuant to the license.

3. The royalty shall be due and payable on the same days and for the same periods as the instalments of rent accruing due after the date hereof:

Provided that the first such payment of royalty shall be due and payable on the same day as the first half-yearly instalment of rent, and be in respect of the royalty for the period elapsing between the date of this license and such day:

Provided, further, all sums paid in respect of royalty for any period shall, to the extent of the rent payable for the same period, be deemed to be in or towards satisfaction of such rent.

THIRD SCHEDULE

1. On the last day of June next following the date of the license, and at half-yearly intervals thereafter during the term thereof, the licensee shall make to the Receiver of Gold Revenue at Queenstown true and accurate returns of all metals and minerals during the preceding half-year raised pursuant to this license, and of the value thereof at the pit's mouth.

2. The licensee shall at all times during the currency of the license duly carry out and observe all such provisions contained in "The Mining Act, 1908", as are applicable to mineral licenses or the holders thereof.

3. All the provisions of "The Mining Act, 1908", and the regulations made thereunder, for securing payment of the aforesaid rent and royalty, for insuring the regular, proper, and efficient carrying-on of mining operations on the land the subject of this license, and for the inspection of all mines and workings therein and thereon, and for the forfeiture or abandonment of this license, shall be deemed to form part of this license, and to be incorporated herein.

4. This license is granted subject to the condition that a fire-break be made and maintained by clearing and keeping cleared the fern for a distance of two chains around the bush on the area granted and along the southern boundary of the area.

M. A. Young
Warden.

RELEASE OF MORTGAGE No. 3132 by writing dated the 19th day of July, 1944, received and registered at Cromwell this 11th day of August, 1944, at 10 a.m.
Registration No. 7110.

M. Anderson
Mining Registrar.

TRANSFER of all interest in the within License from The Glenorchy Scheelite Mining Company Limited to His Majesty the King by writing dated the 28th day of July, 1944, received and registered at Cromwell this 11th day of August, 1944, at 10 a.m.

M. Anderson
Mining Registrar.

Block II Dart District
88a. Or. 35p.

(Plan)

No. 1697
Dated 27th April, 1916.
Warden
to
The Glenorchy Scheelite Mining Company Ltd.

Mineral License

Registered in the office of the Mining Registrar, Queenstown, on the 1st day of May, 1916, at 2 p.m., as No. 1697.

A. J. Thompson
Mining Registrar.

ASSIGNMENT BY WAY OF MORTGAGE from Glenorchy Scheelite Mining Company Limited to The Bank of New Zealand deposited and registered in the office of the Mining Registrar Queenstown this 7th day of July 1934 at 10 a.m. as No. 3132.

S. M. Mackerell
Mining Registrar.

EXHIBIT NO. 8

AN AGREEMENT made this twenty-first day of November One thousand nine hundred and nineteen BETWEEN DAVID AITKEN named and described in the annexed Agreement made between him the said David Aitken and The Glenorchy Scheelite Mining Company Limited and dated the 29th day of January 1916 of the one part and THE GLENORCHY SCHEELITE MINING COMPANY LIMITED also named and described in the said annexed Agreement (therein and herein called "the Company") of the other part. WHEREAS the parties hereto have mutually agreed to vary and alter the said Agreement in manner hereinafter appearing. NOW IT IS HEREBY MUTUALLY AGREED between the parties hereto as follows:—

1. In lieu of the Company paying to the said David Aitken a one-fifth share or interest or twenty per cent. of the net profits to be derived from the working or winning ore as in such agreement mentioned and provided the Company shall and will pay to the said David Aitken a lump sum of SIX HUNDRED POUNDS (£600) in full settlement and discharge of all past and future percentage or royalty payable under the said Agreement and particularly as shown and set forth in clause six thereof. On payment by the Company to the said David Aitken of the said sum of Six hundred pounds (£600) the Company shall not be liable to pay the said David Aitken any royalty percentage or any other sum of money on the net profits to be derived from the working or winning ore as mentioned in such agreement or on any other account whatsoever and the said Agreement shall mutatis mutandis be read and construed accordingly. It is also mutually agreed between the parties hereto that the payment of the said sum of Six hundred pounds (£600) by the Company to the said David Aitken shall entitle the Company and the said David Aitken agrees authorises and empowers the Company (free of any charge by or on the part of the said David Aitken or otherwise) to erect and maintain on the land described in the said annexed Agreement all dams, pipe lines, tramways, dumps, machinery and all buildings and other works that may be necessary or that the Company shall think necessary for carrying on its mining and other operations on or near to the land and premises mentioned and described in the said annexed Agreement.

2. Except as herein varied and altered, the said annexed Agreement shall remain in full force and virtue between the parties hereto.

3. This Agreement shall include and bind the said David Aitken his heirs executors administrators and assigns and shall also include and bind the Company its successors and assigns and this Agreement shall be read and construed accordingly.

IN WITNESS whereof the said David Aitken has hereunto set his hand and the Company has hereunto affixed its Common Seal the day and year first above written.

SIGNED by the said David Aitken in the presence of:— } David Aitken

F. Finch
Carpenter
Paradise Otago

The Common Seal of the Glenorchy Scheelite Mining Company Limited was hereunto affixed in the presence of:— } L.S.

Geo. Reid
Robert Lee
Two of the Directors of the Company

and of James A. Reid
Secretary

THE STATE ADVANCES SUPERINTENDENT hereby consents to the foregoing Agreement BUT WITHOUT PREJUDICE to the Memorandum of Mortgage . . . Registered No. from David Aitken to him and the rights powers and remedies of the Mortgagee thereunder.

Dated at Wellington this third day of August 1925.

SIGNED by WILLIAM WADDEL the State Advances Superintendent and sealed with the Seal of his office in the presence of } The State Advances Superintendent
Wm. Waddel
MORTGAGEE.

J. B. Christie
Solicitor
Wellington

L.S.

EXHIBIT NO. 9

The Receiver of Gold Revenue,
QUEENSTOWN.

PARADISE,
GLENORCHY DISTRICT.
17th August, 1916.

Dear Sir,

Referring to Mineral License No. 1697 dated the 27th day of May 1916 and issued under the provisions of Section 56 of "The Mining Act 1908" to The Glenorchy Scheelite Mining Company Limited with my consent as owner over my property (freehold section 39 Block II Dart District) containing 88 acres and 35 poles I now as such owner of the said section 39 intimate and give you notice in accordance with the provisions of Section 58 of "The Mining Act 1908" that no rent royalties or license fees are or shall be payable to me in respect of the said license No. 1697 or of any renewal thereof.

I may mention that there is a similar provision to the foregoing in paragraph 4 of the Agreement dated 29th January 1916 made between myself and the said Company a copy of which was filed with the application papers (No. 4/16 2–2–16) of the Company in the Warden's Court at Queenstown.

Yours faithfully,
DAVID AITKEN

Owner of the said Section 39
Block II Dart District.

Witness to signature of
David Aitken:
F. FINCH

EXHIBIT NO. 10

THIS DEED made the 28th day of July One thousand nine hundred and forty-four BETWEEN THE GLENORCHY SCHEELITE MINING COMPANY LIMITED a mining company incorporated in New Zealand (hereinafter called "the assignor") of the one part AND PATRICK CHARLES WEBB of Wellington Minister of Mines and his successors in office on behalf of His Majesty the King (hereinafter called "the assignee") of the other part WHEREAS the assignor has agreed to sell the whole of its undertaking and assets to His Majesty the King for the sum of Eight thousand one hundred and twenty-five pounds AND WHEREAS for the purposes of the carrying on of its business as a scheelite mining company the assignor entered into two agreements with one David Aitken of Paradise Lake County in New Zealand Farmer which are described in the Schedule hereto AND WHEREAS for the purpose of giving effect to the said agreement for sale it is desired to assign the said respective agreements with David Aitken to the assignee NOW THIS DEED WITNESSETH as follows:

1. IN CONSIDERATION of the sum of Eight thousand one hundred and twenty-five pounds paid by the assignee to the assignor (the receipt whereof is hereby acknowledged) the assignor DOTH HEREBY ASSIGN TRANSFER AND SET OVER unto the assignee all that the estate right title and interest benefit property claim and demand of the assignor in under or created by the said agreements described in the schedule hereto TO hold the same unto the assignee SUBJECT nevertheless to the observance and performance of the covenants and conditions in the said recited agreements set forth.

2. IN CONSIDERATION of the foregoing assignment the assignee DOTH HEREBY COVENANT with the assignor that the assignee will observe and perform all and singular the covenants conditions and provisions in the said recited agreements contained or implied and on the part of the licensee thereunder to be observed and performed and will indemnify the assignor from and against all claims demands costs actions and proceedings whatsoever arising through default in the future observance and performance of such covenants conditions and provisions respectively.

IN WITNESS WHEREOF these presents have been executed the day and year first hereinbefore written.

THE SCHEDULE REFERRED TO

Agreement dated 29th January 1916 between David Aitken above-mentioned and The Glenorchy Scheelite Mining Company Limited for the sale of the minerals and mineral rights in Section 39 Block II Dart Survey District.

Agreement dated 21st November 1919 between David Aitken abovementioned and The Glenorchy Scheelite Mining Company Limited for the variation of the terms of the agreement of 29th January, 1916.

THE COMMON SEAL of The Glenorchy Scheelite Mining Company Limited was hereunto affixed in the presence of— }

I. MacKintosh, Director.
R. T. Docherty, Director.
J. L. Oughton, Secretary.

SIGNED by the said Patrick Charles Webb Minister of Mines in the presence of— } P. C. Webb

R. E. Kemp
Private Secretary
WELLINGTON

EXHIBIT NO. 11

THIS DEED made the 28th day of July One thousand nine hundred and forty four BETWEEN THE GLENORCHY SCHEELITE MINING COMPANY LIMITED a mining company incorporated in New Zealand (hereinafter called "the assignor") of the one part AND PATRICK CHARLES WEBB of Wellington Minister of Mines and his successors in office on behalf of His Majesty the King (hereinafter called "the assignee") of the other part whereas the assignor is the registered holder of the Mining privileges held under licenses granted under the Mining Acts particulars of which are set out in the schedule hereto subject to the payment of the respective royalties thereby reserved and observance of the conditions therein respectively set forth AND WHEREAS the assignor has agreed to sell the whole of its undertaking and assets including the said mining privileges to His Majesty the King for the sum of Eight thousand one hundred and twenty five pounds NOW THIS DEED WITNESSETH as follows:

1. IN CONSIDERATION of the sum of Eight thousand one hundred and twenty five pounds paid by the assignee to the assignor (the receipt whereof is hereby acknowledged) the assignor DOTH HEREBY ASSIGN TRANSFER AND SET OVER unto the assignee all that the estate right title and interest benefit property claim and demand of the assignor in and to the mining privileges and the respective licences particulars of which are set out in the schedule hereto TO HOLD the same unto the assignee for the residue yet to come and unexpired of the respective terms of years created by the said licenses SUBJECT nevertheless to payment of the rent licence fee and/or royalty thereby reserved and the observance and performance of the covenants and conditions in the said recited licenses set forth.

2. IN CONSIDERATION of the foregoing assignment the assignee DOTH HEREBY COVENANT with the assignor that the assignee will at all times hereafter pay the rent license fees and/or royalty at the times and in the manner provided in the said recited licenses and will observe and perform all and singular the Covenants conditions and provisions in the said recited licenses contained or implied and on the part of the licensee thereunder to be observed and performed and will indemnify the assignor from and against all claims demands costs actions and proceedings whatsoever arising through default being made in the payment of such future rent license fees or royalty or in the future observance and performance of such covenants conditions and agreements respectively.

IN WITNESS WHEREOF these presents have been executed the day and year first hereinbefore written.

THE SCHEDULE REFERRED TO

Particulars of Licenses

Nature of License:	Registered No.:	Date of License:
Water Race	117	12th February 1900
Dam	154	2nd April 1900
Special Site	853	2nd February 1900
Mineral	875	29th March 1906
Special Site	1035	31st October 1907
Water Race	1036	31st October 1907
Water Race	1055	29th November 1907
Special Site	1069	30th January 1908
Water Race	1070	30th January 1908
Water Race	1104	28th May 1908
Mineral	1133	24th September 1908
Mineral	1148	29th October 1908
Mineral	1150	29th October 1908
Aerial Tramway	1198	29th April 1909
Mineral	1315	29th September 1910
Mineral	1337	15th December 1910
Water Race	1496	23rd January 1913
Mineral	1549	21st August 1913
Mineral	1697	27th April 1916
Water Race	1709	27th July 1916

All the foregoing licences being registered in the Warden's Court Queenstown.

THE COMMON SEAL of The Glenorchy Scheelite Mining Company Limited was hereunto affixed in the presence of }

J. MACINTOSH, Director
R. T. DOCHERTY, Director L.S.
J. OUGHTON, Secretary

SIGNED by the said Patrick Charles Webb Minister of Mines in the presence of } P. C. WEBB

R. E. KEMP
Private Secretary
Wellington

EXHIBIT NO. 12

MEMORANDUM OF AGREEMENT made this 16th day of February One thousand nine hundred and fifty-six BETWEEN HER MAJESTY THE QUEEN, acting by and through the Minister of Mines (hereinafter referred to as "the Lessor") of the one part, and William James Sanders of Glenorchy (hereinafter referred to as "the Tributer") of the other part: WHEREAS the Tributer has requested the Lessor to give and grant to him the right to enter into and upon certain areas of land for the purpose of mining for scheelite, AND WHEREAS the Lessor has agreed to grant to the Tributer such right of entry as from the 1st day of January, 1956, subject to covenants, terms and conditions hereinafter contained:

NOW THIS AGREEMENT WITNESSETH, and it is hereby agreed by and between the parties hereto as follows:—

1. The Lessor gives and grants unto the Tributer for a period of three years from the 1st day of January, 1956, the right to enter into and upon, and engage in the mining of scheelite contained within that area of land more particularly described in the schedule hereto.

2. The Tributer shall at all times employ upon or in connection with his prospecting and/or mining operations not less than two workmen provided that for purposes of this clause the Tributer shall to the extent to which he is personally engaged in prospecting and/or mining operations on the parcel of land hereinafter referred to be deemed to be a workman so employed.

3. The Tributer shall conduct his prospecting and/or mining operations in accordance with the rules of good and safe mining, and in such a manner as to render such operations as fruitful and productive as may be. The Tributer shall keep open and safely timbered the levels of the mine in which he is carrying out mining operations.

4. The Tributer shall supply all tools, equipment and timber required by him in connection with his mining operations under this tribute agreement.

5. The Tributer shall carry out his mining operations to the satisfaction of the Inspector of Mines, Dunedin.

6. The Tributer shall from time to time and at all reasonable times permit officers of the Mines Department to inspect the mining and/or prospecting operations being carried on by him and to take samples from any face or working.

7. The Tributer will insure and keep insured against accidents himself and all persons whether servants, agents, workmen, and/or employees engaged or employed by him upon the land hereinafter

referred to and will indemnify and keep indemnified the Lessor in respect of any such accident.

8. The Tributer shall and will within thirty days next after the last days of the months of June and December in each and every year make out and deliver to the Under-Secretary of the Mines Department at Wellington, a true and correct return or statement showing the quantity of scheelite won gotten or raised and also the number of workmen employed for and during the preceding half-year.

9. The Tributor shall pay to the Lessor a royalty equal to five per centum of the value of all scheelite gotten raised or won as a result of his prospecting and/or mining operations, and to permit of this being done shall give to the Mines Department a general authority authorising the firm through which scheelite concentrates will be sold by the Tributer to deduct from the proceeds of such sales amounts as may be due and payable in terms of this agreement.

10. If the Tributer shall make default in the due observance or performance of all or any condition or stipulation herein contained, it shall be lawful for the Minister of Mines or any person authorised by him to enter upon the land hereby demised and to take possession thereof together with all works in progress in the name of the Lessor and expel the Tributer therefrom and the Tributer shall thereupon have no claim on the Lessor for compensation for any loss or damage sustained as a result of such expulsion.

IN WITNESS WHEREOF the parties hereto have hereunto subscribed their names the day and year first hereinbefore written.

SCHEDULE

That block of ground containing 88 acres 35 poles more or less, being Section 39 Block II Dart Survey District.

SIGNED by the said William James Sanders in the presence of: } W. J. Sanders

D. Wotherston,
Storekeeper,
Glenorchy

SIGNED by WILLIAM SULLIVAN, Minister of Mines, on behalf of HER MAJESTY THE QUEEN, in the presence of:— } W. Sullivan

D. McIntyre,
Private Bag,
Lower Hutt

I, JOHN George Warrington, Warden of the Otago Mining District, do hereby declare that I have perused the within written agreement and do certify that the terms and conditions thereof are reasonable and proper insofar as concerns the interests of the Tributer.

Dated at Dunedin this 27th day of February, 1956

J. G. Warrington
Warden

EXHIBIT NO. 13

MEMORANDUM OF TRANSFER

I, CHARLES LLOYD VEINT of Queenstown Miner
being registered as proprietor
of an estate in fee simple
subject, however, to such encumbrances, liens, and interests as are notified by memoranda underwritten or endorsed hereon, in all those pieces of land situated in the Dart District
containing by admeasurement Three hundred and seventeen (317) acres Three (3) roods Thirty six (36) poles.
be the same a little more or less being Sections Twenty nine (29), Thirty (30), Thirty one (31), Thirty two (32), Thirty three (33), Thirty nine (39) and Forty two (42) Block Two (II) Dart District and being the whole of the land comprised in Certificate of Title Register Book Volume Ninety one (91) Folio One hundred and twenty eight (128) Dunedin Registry

IN CONSIDERATION of the sum of Two thousand three hundred and fifty pounds (2350)
paid to me by THOMAS HUGH MILLER of Queenstown, Gentleman
the receipt of which sum is hereby acknowledged
do hereby transfer to the said Thomas Hugh Miller
all my estate and interest in
the said pieces of land

IN WITNESS WHEREOF I have hereunto subscribed my name this Fourth day of October one thousand nine hundred and forty nine

SIGNED by the above-named CHARLES LLOYD VEINT
as Transferer in the presence of } C. L. VEINT

Witness: E. DOLAN
Occupation: Solicitor
Address: Queenstown

EXHIBIT NO. 14

IN THE LAND SALES COURT
DUNEDIN REGISTRY

IN THE MATTER of the Servicemen's Settlement and Land Sales Act 1943

AND

IN THE MATTER of an Application for consent to sale (lease sic.) from

CHARLES LLOYD VEINT

to

THOMAS HUGH MILLER

Valuation sic.

BEFORE the Otago Land Sales Committee

the day of 194 .

UPON READING the application of CHARLES LLOYD VEINT for consent to the sale
of the land described in the Schedule hereto from CHARLES LLOYD VEINT of Paradise, Glenorchy, Boarding-house Proprietor, to THOMAS HUGH MILLER, of Hamilton, Bermuda, Retired Civil Servant,
for FOUR THOUSAND POUNDS (£4000) apportioned £2350 for land and £1650 for stock and chattels:
and UPON HEARING

sic.

Valuation

IT IS HEREBY ORDERED that Consent of the Land Sales sic. Court be and such Consent is hereby granted to the transaction.

SCHEDULE

ALL THAT piece of land situated in the District of Dart containing 317 acres 3 rood 36 poles more or less being Sections 29, 30, 31, 32, 33, 39 and 42 Block II on the public map of the said District and being all the land comprised and described in Certificate of Title entered in Volume 91 Folio 128 of the Register Book at Dunedin.

DATED this 20th day of SEPTEMBER, 1949.

SEALED at the Office of the Land Valuation sic. Sales Court at Dunedin this 28th day September 1949.

R. A. GUY
Deputy-Registrar.

R. A. GUY
Deputy-Registrar of the Land Valuation Court.
L.S.

No. 164678

TRANSFER of Sections 29, 30, 31, 32, 33, 39 & 42 Block II situated in Dart District.

CHARLES LLOYD VEINT Vendor

THOMAS HUGH MILLER Purchaser

Particulars entered in the Register Book,
Vol. 91 Folio 128
the 14th day of October, 1949
at 12.18 o'clock

L.S.

M. F. DAWSON
Assistant/District Land Registrar
of the District of Otago

Correct for the purposes of the Land Transfer Act.

E. Dolan
Solicitor for the Purchaser

I hereby certify the foregoing to be a true and correct copy of Memorandum of Transfer Number 164678

DATED at DUNEDIN this Twenty-fifth day of October, 1957.

L.S.

I. R. SADLIER
District Land Registrar.

NO. 11

CERTIFICATE OF REGISTRAR OF COURT OF APPEAL AS TO ACCURACY OF RECORD

I, GERALD RONALD HOLDER, Registrar of the Court of Appeal of New Zealand, DO HEREBY CERTIFY that the foregoing 102 pages of printed matter contain true and correct copies of all the proceedings, evidence, judgments, decrees and orders had or made in the above matter, so far as the same have relation to the matters of appeal, and also correct copies of the reasons given by the Judges of the Court of Appeal of New Zealand in delivering judgment therein, such reasons having been given in writing: AND I DO FURTHER CERTIFY that the appellant has taken all the necessary steps for the purpose of procuring the preparation of the record, and the despatch thereof to England, and has done all other acts, matters and things entitling the said appellant to prosecute this Appeal.

AS WITNESS my hand and Seal of the Court of Appeal of New Zealand this ~~19th~~ 7th day of ~~April~~ May, 1962.

G. R. HOLDER

Registrar.

L.S.