Judgment of the Lords of the Judicial Committee of the Privy Council on the appeal of James Brown v. *John Campbell Dibbs, from the Supreme Court of New South Wales; delivered 4th of May* 1876.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS is an appeal from an order of the Supreme Court of New South Wales confirming a report of the Master in a suit in which the present Respondent was the Plaintiff, and the present Appellant the Defendant for specific performance of a contract on the part of the Defendant to sell to the Plaintiff the half of a mine, together with the plant and machinery. A decree for specific performance was made in favour of the Plaintiff, the material portion of which decree for the present purpose is this: " His Honour doth declare that the Plaintiff " is entitled to the value of the coal as *in situ* " *naturali* taken from the Defendant's moiety " of the said New Lambton Colliery from the " 1st February 1873 to the date upon which " the Defendant shall give possession thereof to " the Plaintiff. His Honour doth further order " and decree that it be referred to the Master in " Equity of this honourable Court to inquire " and state to the Court what quantity of coal " has been extracted from the said New Lambton " Colliery by the Defendant, his agents, and " workmen, from the first day of September in " the year of our Lord 1873, to the date of the

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" giving of possession by the Defendant to the " Plaintiff as aforesaid; and to inquire and " state what was during that period the market " value per ton of such coal *in situ naturali*, " without taking into account any dealings by " sales or otherwise by the Defendant therewith, " or any profits made by the Defendant in, by, or " after removing such coal *ab situ*." That decree was appealed against, and varied to some extent by an order of the Supreme Court, the variations being as follows: It is ordered that "The said " decree be varied so far as the same declares " 'that the Plaintiff is entitled to the value of " 'the coal as *in situ naturali*,' and that instead " thereof the said decree do declare that the " Plaintiff is entitled to the value of the coal " as *in situ naturali*, that is to say, in the mine " as it stood with the machinery, plant, and " appliances of all kinds attached to and belong- " ing to it." Then it is further ordered "That " the said decree be varied so far as it directs " it to be referred to the Master in Equity of " this honourable Court 'to inquire and state " 'what was during that period the market " 'value per ton of such coal *in situ naturali*, " 'without taking into account any dealings by " 'sales or otherwise by the Defendant there- " 'with, or any profit made by the Defendant " 'in, by, or after removing such coal *ab situ*,' " and that instead thereof the said decree do " direct it to be referred to the Master 'to " 'inquire and state what was during that " 'period the market value per ton of such coal " 'in the mine aforesaid, without taking into " 'account any dealings by sales or otherwise " 'by the Defendant therewith, or any profit " 'made by the Defendant in, by, or after " 'removing such coal *ab situ*, except so far as " 'the same be evidence to aid in enabling the " 'Master to ascertain such market value.'"

The Master made the inquiry directed by this reference, and reported the value of the coal taken between the dates to which his attention was directed as amounting to 4*s*. 9*d*. per ton. That report was excepted to, but confirmed by the Court of First Instance, and on appeal to the Supreme Court it was again affirmed by an order of that Court.

If the question had been one merely of value and depending upon matters of fact only, their Lordships would have acted on their ordinary rule of not disturbing the concurrent decisions of two Courts. But it has been contended that the Master adopted a wrong principle. It does not indeed appear from his report what principle he adopted, but it is sought to be inferred that he must have adopted what the Appellant contends to be a wrong principle, because he appears to have acted upon the evidence of the witnesses for the Plaintiff, who gave one measure of value, and not to have acted upon the evidence of witnesses for the Defendant, who gave another.

The effect of the evidence on the part of the Plaintiff may be conveyed by an extract from the deposition of Mr. Charles Smith, Chairman of the Waratah Coal Company, near Newcastle, who says he has had great experience of coal in the neighbourhood, and knows the New Lambton Colliery, the colliery which is the subject of sale. He is asked this question, "What is the net market value per ton of the "New Lambton coal in the mine, with ma-"chinery, plant, and appliances of all kinds "attached to and belonging to it, between the "1st of September 1873 and the 6th of March "1875?" His answer is, "I should think that "the net value was 4*s*. 9*d*. per ton; that I think "would be the difference between getting, ship-"ping, and all expenses attached to working "the colliery and the selling price of the coals

" during that period. The price of coal was " uniform during that period. The value of the " coal is the value of it *in situ naturali*." That was the view which he took of the value of the coal according to the terms of the order of the Court. His evidence is substantially the same as that of three other witnesses on the part of the Plaintiff. On the part of the Defendant, one witness, Mr. Kenrick, their own manager, is called, who gives the amount of profit which he says the Defendant actually made; and he arrives at that by making allowance, as he says, for "bad debts, working expenses, salaries, &c.," rather a wide term, and he is not able to say whether he includes law costs; but he says that he does include interest on money borrowed and some discounts, and he subsequently says that he has spoken of the bad debts of this particular concern.

It may be observed with respect to his evidence that he does precisely that which the Supreme Court directs should not be done, namely, takes an account of the actual profit and actual loss incurred by the Defendant. The other witnesses of the Defendant adopt a mode of estimation which has been contended to be the right mode by the counsel for the Appellant. They treat the value of the coal per ton as the royalty rent which it would fetch, that is to say, the amount which, if the Plaintiff were owner of the colliery and chose to let it to a miner, the miner would give him by way of royalty for the coals unsevered, of course the miner calculating upon a profit. In other words, the contention on the part of the Appellant is that, as between the Plaintiff and the Defendant, the Defendant should be treated as if he took an underlease from the Plaintiff at a certain royalty, and that he should pay the amount of that royalty, he himself of course having tenant's profits. In this view he

would at the same time be receiving interest on his purchase money, and receiving an allowance for supposed profits made by him in working this colliery at a time when he was not entitled to work it, and when the Plaintiff was entitled to work it.

Their Lordships observe that the High Court have assumed, no doubt properly, that the Master acted upon the view of the Plaintiff's witnesses, and they express an opinion that that view was right.

It may be here observed that although undoubtedly it would be competent to their Lordships, if they thought fit, to decide that a Court of Justice had put a wrong construction upon its own order, nevertheless before coming to such a conclusion they would require to be very clearly satisfied that the Court was wrong; and in cases where the order admitted of more than one construction, would be disposed to give some credit to the Court for rightly interpreting its own language. But their Lordships are clearly of opinion that the Court in this case rightly interpreted its own order. After observing that they ought not to interfere with the Master's report unless they could see plainly that he was wrong, they go on to say, "He has before him "five or six witnesses called on behalf of the "Plaintiff for the purpose of proving the value "of the coal estimated in the manner directed "by the Court, that is to say, the value of the "coal in the mine as one already for some time "in working order, with its machinery, shafts, "and other necessary appliances. What was "the market price of coal in a mine of that "kind? That was to be ascertained by finding "out the value at the place where it was to be "sold, and deducting therefrom the cost of "taking it from the mine to that place." Their Lordships are of opinion that the test of value here pointed out is the right one; understanding the Court, by the use of the words "the cost of

taking it from the mine," to include the cost of cutting and severing the coal as well as all other expenses.

Their Lordships think it very probable that the order was drawn in its present form for the purpose of not subjecting the Defendant to what may be called penal damages; such damages as were awarded against a wilful trespasser in *Martin* v. *Porter*, reported in 5 Meeson and Welsby, where it was held that where a Defendant broke through a barrier and worked coal in the land adjoining, without any reasonable ground for believing he was right in doing so, the proper estimate of damages was the value of the coal when gotten, without deducting the expense of getting it; that is, without deducting the expense of severing it from the freehold. Their Lordships think it extremely likely that inasmuch as undoubtedly the Defendant in this case was not, properly speaking, a wrongdoer, but nevertheless was working a mine which the Plaintiff was entitled to work at that time, the Court desired to avoid subjecting him to the rule laid down in *Martin* v. *Porter*, and therefore gave the market value of the coal unsevered, that is, *in situ naturali*, calculating that value upon what the coal would sell for, and deducting therefrom the expense not only of carrying it to market, but of severing it so as to make it a chattel. They think it not improbable that the Court may have had in view the case *Jegon* v. *Vivian* which has been called to their attention in the Sixth Volume of Chancery Appeals, in which an order which their Lordships regard as very much of a similar character seems to have been made by Lord Hatherley.

On these grounds their Lordships are of opinion that the decision of the Court below was right, and they will, therefore, humbly advise Her Majesty that this Appeal should be dismissed, with costs.