Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Brown and others v. *The Commissioner for Railways, from the Supreme Court of New South Wales; delivered* 15*th March* 1890.

Present:

LORD WATSON.
LORD MACNAGHTEN.
LORD MORRIS.
SIR BARNES PEACOCK.

[*Delivered by Lord Macnaghten.*]

This is an application to set aside an order for the new trial of an action in which the Appellants were Plaintiffs.

At the date of the events which gave rise to the litigation the Appellants were, as they still are, landowners and colliery proprietors in the Colony of New South Wales, possessing land within the area of the Newcastle Coal Basin, and engaged in working a colliery on their property there known as New Lambton.

The action was brought to enforce a claim for compensation in respect of lands taken or resumed by the Government for the purpose of a proposed railway, and also in respect of injury by severance to adjoining lands.

The claim was presented under three heads:—

1. Surface value of the lands taken.
2. Value of coal under those lands.
3. Value of coal under adjoining lands severed by the railway.

As regards the first head of claim no question was raised before their Lordships.

The lands taken were 7 a. 23 p. The lands

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alleged to be injured by severance were 21 acres lying to the north or north-west of the railway, and forming a triangle of which the line of the railway where it passes through the Appellants' property is the base.

In the first instance the parties had recourse to arbitration. The arbitrators appointed as their umpire a Dr. James Robertson, who was an important witness at the subsequent trial. Dr. Robertson was a mining engineer of considerable eminence in his profession. He seems to have had experience in all parts of the world. He had spent ten years in England and six years in the Colony, acting principally as consulting engineer, and he had been appointed President of a Royal Commission by the Government of New South Wales.

The arbitrators were unable to agree, and Dr. Robertson as umpire awarded 6,555*l.* in respect of the Appellants' claim.

The Appellants were dissatisfied with the amount awarded, and duly served a notice to that effect in accordance with the Colonial Railway Act, 22 Vict., No. 19, Sect. 41. It then rested with them to enforce their claim by action.

Accordingly they brought an action against the Commissioner for Railways as nominal Defendant. The amount claimed by the declaration was 20,000*l.*

The action came on for trial before Mr. Justice Faucett and a jury of 12 persons in April 1887.

It was not disputed on the part of the Respondent that if there was workable coal under the lands severed, the Appellants were entitled to be paid for it as well as for the lands taken. But the Respondent's case was that there was no coal, or at any rate no coal that could be worked at a profit, under any part of the lands taken or severed. On the other hand, it was not disputed by the Appellants that there

existed a considerable roll or fault along the line of the railway, for which a large allowance ought to be made.

On obtaining possession of the land taken for the purpose of the railway the Government caused two trial shafts to be sunk, one at each extremity of the line passing through the Appellants' property. These trial shafts were each about 150 feet deep. About 15 feet from the trial shaft at the western extremity a bore was made with a drill to the depth of 200 feet. Near the eastern extremity, but beyond it and distant about 14 yards from the eastern trial shaft, there was an old pit called the Furnace pit, originally intended as a winding shaft, and afterwards used as an air shaft in connection with the New Lambton old workings. The persons employed to sink the trial shafts caused a drive to be made into the Furnace pit from the adjoining trial shaft.

There were no workings of the Appellants within the lands in question, nor did they sink any shaft or boring there for the purpose of testing the ground, nor was the ground tested in any way except by means of the two trial shafts, the drill bore, and the drive connecting the eastern trial shaft with the Furnace pit.

It was not disputed that no workable coal was to be found in either of the trial shafts or in the drill bore, or in the Furnace pit, which was admittedly sunk on a fault, or for some distance along the drive which connected the Furnace pit with the old workings.

The old workings lay to the north of the line of railway. The official plan of these workings was produced. It showed some faults and occasional disturbances, but nevertheless the workings appeared to be extensive. They reached southwards to a point very near the lands in respect of which compensation was claimed.

A few years before the action was brought—the exact date does not appear in the Record—the Appellants stopped working to the north of the railway, took out the pillars, and allowed the roof to fall in. At the same time they sank a new pit about a mile to the south of the railway, which is known as the C pit, and they commenced operations there which have been continued ever since.

The reason why the old workings were abandoned was a matter of dispute at the trial. The Appellants alleged that the coal was good where they left off, but that, as they had been working to the dip, the water came in upon them, and that it was for this reason, and this reason alone, that they transferred their operations to the C pit. In support of this assertion they proved that latterly the cost of pumping in the old workings was from 20*l.* to 25*l.* a week. They called the mining engineer under whose advice the move was made. He and their manager and several miners stated that the coal was good where they left off in the old workings. On the other hand, it was alleged by the Respondent that the real reason why the old workings were abandoned was that the coal was thinning out as the Appellants worked southwards. Some miners were called, who said that the coal was bad where they were working at the southern extremity of the old workings, and reference was made to the plan furnished to Government on which two notes were found in these words, "Coal bad, stopped November 1878," "Stopped January 1881, bad roof." A suggestion was hazarded by the Appellants' present manager, that the entry "Coal bad," was made dishonestly by a former manager in the interest of some or one of the partners who were then quarrelling among themselves. But there seems to be no foundation for this suggestion. Much reliance was placed upon

these entries both at the trial and in the Court of Appeal, and in the argument before their Lordships. It is possible that the words "Coal bad" may be explained by a circumstance deposed to by Mr. Neilson, a colliery manager of experience, who acted as arbitrator between the men and their employers in New Lambton, and was well acquainted with the old workings. He says, "At the K end" —that was taken by the learned Counsel on both sides to refer to some spot at the southern extremity of the old workings—"they got into "a lot of faults and dykes and disturbed coal, "and after a short distance they got into good "coal 4 feet 9 inches." This explanation would be consistent with what is said by Mr. Mackenzie, the Examiner of Coal Fields for the Colony of New South Wales, who was a witness for the Respondent. According to his statement it was in 1875, not in 1878, that it was found that the coal was bad there. In September 1875 he made, he says, a section showing where the seam was growing bad, and had a conversation with one of the Appellants on the subject. However this may be, it was not disputed before their Lordships that the character of the coal at the southern extremity of the old workings so far as it was material for the determination of the question in issue at the trial, was a matter entirely for the consideration of the jury.

There was also a dispute as to the character of the coal in the new workings at the C pit. It was in evidence that there were about 120 men employed there "raising 172 tons of best coal and 60 tons of good sack coal daily," and opening out the colliery in order to bring the long wall system into full operation. About half the men were working on the side nearest the railway. It was asserted on behalf of the Appellants that although faults and local disturbances were not infrequent there, as indeed seems to be the case throughout the district, there

was no difference in the quality or thickness of the coal in the direction of the railway. This assertion appears to be corroborated by the circumstance that in the C pit Dr. Robertson, in company with the arbitrators, took no less than seven measurements of the seam from which the coal was got, and that he was not cross-examined as to those measurements. Those measurements would have been obviously unfair if they did not show the thickness of the seam in the headings nearest the railway. If they had not shewn that, Dr. Robertson no doubt would have been cross-examined on the point. For the Respondent must have known where these measurements were taken: his arbitrator must have checked them. If they had shewn that the seam was thinning out in the direction of the railway that fact must have been brought out on cross-examination. On the other hand two miners who worked in the C pit were called by the Respondent, and they said the seam was getting worse towards the railway. One of them stated that in the north-west headings the men knocked off nine months before the trial—that would be about the time of the arbitrator's inspection,—and he added that he thought the coal was not payable there. This question again was a matter entirely for the consideration of the jury. They not only saw the witnesses, but they had before them explanations far more complete and precise than could be reproduced on a Judge's note. For example, it appears by the manager's evidence that the places where the men were employed were pointed out to the jury on the plan of the colliery. But no indications are to be found on the Judge's notes or on the plans accompanying the Record to show the exact situation of those places.

The case made by the expert witnesses on behalf of the Appellants was in substance this, that there was good coal to the north

of the railway, and also good coal to the south, and that there was every reason to believe that, but for the local disturbance at the Furnace pit, the coal ran through from north to south in continuous seams, and that the great probability was that that local disturbance affected only a part of the lands in question. In coming to these conclusions the witnesses were guided by their practical knowledge of coal fields in general, and of this coal field in particular. Whether this view be right or wrong it seems to be something more than mere conjecture.

The first and principal witness at the trial on behalf of the Appellants was Dr. Robertson, the umpire. He explained in detail how he had arrived at his award. He allowed for two seams of coal, the Borehole seam—the seam mainly worked in the district, and the only one worked by the Appellants in their old workings—and an upper seam locally known as the Yard seam. He made his calculations on a royalty value of 9*d.* per ton for the Yard seam, and 1*s.* per ton for the Borehole seam. In consequence of the roll he only allowed for coal under two thirds of the lands taken and under nine acres of the lands severed, and he based his calculations as to the thickness of the two seams on measurements which he had taken in company with the arbitrators when he inspected the workings of the C pit with them. In cross-examination Dr. Robertson was not asked one single question as to his calculations, or indeed as to any material point.

The other expert witnesses called on behalf of the Appellants took substantially the same line, though they did not go into calculations. One however thought the Yard seam not workable at a profit. One thought that Dr. Robertson had made too large an allowance for the roll; and two considered that the Appellants, as working owners, were entitled to more than a royalty al-

lowance as landlords, and that at least 1*s*. 6*d*. or 2*s*. per ton ought to have been allowed.

The expert witnesses on behalf of the Respondent put forward a very different view. They thought there was no coal, or at any rate no workable coal, under the lands in question. Their view was that, as those lands were approached, from whatever direction the approach might be made the coal thinned out or disappeared. They based their opinion on the fact or the assumption that the New Lambton old workings had been abandoned because the coal failed, and that in the new workings the coal deteriorated in the direction of the railway; on the fact that no workable coal was to be found in the two trial shafts or in the Furnace shaft, or in a pit sunk some little distance to the west by the Waratah Colliery Company, called the Stuart pit; and on the fact that some pits to the east or south-east, known as the Middle pit, the Mosquito pit, the Far pit, and the Raspberry pit, had been abandoned or were not then working. As regards these latter pits, however, there was some evidence to show that they all contained coal of a workable thickness, and perhaps the circumstances under which the working of these pits was stopped were not sufficiently before the jury to make any inference drawn from the stoppage of much weight.

The Respondent took his stand on the case made by his expert witnesses, and on that alone. He did not condescend to deal with Dr. Robertson's calculations either by counter evidence or by way of cross-examination. So the only alternative presented by the Respondent to the acceptance of Dr. Robertson's figures was the absolute and entire rejection of the Appellants' claim.

The trial lasted seven days. The jury deliberated for five hours. They were unable to

agree, and, by consent, the verdict of the majority was taken. By a majority of seven to five the Appellants obtained a verdict for 6,600*l.*

No objection was taken to the summing up. The learned Judge who tried the case, as appears from the observations of one of the learned Judges in the Court of Appeal, stated that probably he would have found the other way, but that he did not disagree with the verdict.

A rule Nisi for a new trial was granted on the grounds (1) that the verdict was against evidence or the weight of evidence, and (2) that the amount awarded was excessive.

The rule was argued before Darley, C. J., and Innes and Stephen, J.J., on the 2nd and 3rd of November 1887. Judgment was reserved. On the 4th of June 1888 the Court, Innes, J., dissenting, ordered that the verdict be set aside, and a new trial had between the parties, and that the costs of the first trial should abide the event of the new trial, and that the costs of and incidental to the motion for the new trial should be paid by the present Appellant.

Innes, J., was of opinion that there were ample materials to warrant the verdict, though there was a strong body of evidence the other way.

Darley, C. J., with whom Stephen, J., agreed, was of opinion that the verdict was "demonstrably wrong, and such as reasonable men discharging judicial functions ought not to have found." In estimating the value of Dr. Robertson's evidence, he laid stress on the fact that Dr. Robertson "entirely disregarded, and never even went down" the Furnace pit. As this circumstance was also pressed to the disadvantage of Dr. Robertson by the learned Counsel for the Respondent, their Lordships think it right to observe that, in their opinion, no significance ought to be attached to it. In the arbitration Dr. Robertson

heard the evidence and made an inspection with the arbitrators. That was proved. It was also proved that both the arbitrators went down the Furnace pit. There was no doubt or dispute as to what was to be seen in that pit, and if the arbitrators were agreed upon that point there does not seem to have been any reason why the umpire should have gone down himself. However, upon this and other grounds which are not very apparent, the learned Chief Justice came to the conclusion that the evidence of the experts on behalf of the Appellants was "purely conjectural," while the Respondent's case was "not founded upon mere opinion but upon "ascertained facts." Among these facts, however, it is to be observed that the learned Chief Justice seems to reckon the Respondent's contentions that the New Lambton old workings were abandoned because the coal was bad, and that in the new workings the seam diminished in thickness in the direction of the railway,—two matters which were in contest at the trial, and which were apparently determined by the jury adversely to the Respondent. The learned Chief Justice lays much stress on the two trial shafts sunk by the Respondent, which, no doubt, were very important pieces of evidence for the jury to consider. Dr. Robertson, indeed, stated that they were not sunk to "a sufficient depth to test the existence of coal," and upon this he was not cross-examined, though the Respondent was aware that the core from the bore at the trial shaft was taken to Sydney and shown to him. But, assuming, as seems to have been the case, that the trial shafts were sunk to the Borehole seam or to a section of that seam, which appears to have been split there by the roll, it is to be observed that, although these trial shafts afford cogent evidence to prove that the roll or fault extends from the Furnace pit along the line of railway, they do not necessarily prove that

workable coal may not be underlying the greater part of the lands in question.

The learned Chief Justice then expresses himself as follows:—"In my opinion the evi- "dence furnished by these trial shafts, taken "in connection with the other evidence for "the Defendant, renders it incumbent on the "Plaintiffs to show, not as a matter of con- "jecture resting on the opinion of experts, but "as a matter of fact, that coal does exist either "under the railway or under the 21 acres, and "this can easily be ascertained by the Plaintiffs "sinking a trial shaft upon some part of the "21 acres. It is impossible to suppose that the "Plaintiffs did not know that the Defendant "was sinking trial shafts, and it is to my mind "significant that, knowing this, they did not "sink a trial shaft on their own account. "Looking, however, at all the circumstances of "the case, I am of opinion that it is incumbent "for the Plaintiffs, before they can recover this "large amount of compensation from the De- "fendant, to prove that coal, payable coal in "fact, exists underneath this land." Their Lordships are unable to agree in this view. If a Plaintiff fails to make good his claim to the satisfaction of the tribunal which has cognizance of it, he must of course bear the consequences. But, in their Lordships' opinion, it would be wrong to lay down such a rule as the learned Chief Justice seems to enunciate, and to impose upon a person whose land has been taken from him against his will the burden of proving by costly experiments the mineral contents of his land as a condition precedent to obtaining compensation, merely because the opinion of experts may be in conflict on the subject, or because, in the opinion of a Court of Appeal, the weight of the scientific evidence is adverse to the claim.

The learned Chief Justice then deals with the Yard seam, and assuming, possibly correctly, that the jury had followed Dr. Robertson in

allowing compensation for it to the amount of 1,988*l.* 15*s.* 9*d.*, less 6 per cent., expresses his opinion that, according to the evidence, that seam was not workable at a profit. This point was also urged very strongly by the learned Counsel for the Respondent. It may be observed that there is no actual proof that the jury took the Yard seam into consideration. The sum awarded might be arrived at either by taking the Yard seam into account at Dr. Robertson's valuation, or by disregarding the Yard seam altogether, and giving compensation for the Borehole seam at the larger royalty of 1*s.* 6*d.* per ton, to which some of the witnesses thought the Appellants, as owners working their own mines, were clearly entitled. However that may be, there was certainly evidence to go to the jury as to the value of the Yard seam. Generally throughout the district it is not worked because it is too thin, but Dr. Robertson's measurement of 3 feet 6 inches in the New Lambton new workings was not questioned, and that seems to be a workable thickness. Further it must be borne in mind that it does not follow, because a seam is not presently workable at a profit, that no compensation is to be given for it if it is likely to prove profitable in the future.

On the whole their Lordships are of opinion that the question in issue at the trial was a matter for the jury to determine, and that it is impossible to say that the verdict was one which a jury, viewing the whole of the evidence reasonably, could not properly find. The jury may have thought, not without reason, that in the conflict of scientific evidence it was safer to rely on the evidence of Dr. Robertson and those who agreed with him than on the evidence of the witnesses for the Respondent. Expert witnesses are apt to make themselves partisans, and thus diminish the weight of their testimony. In Dr. Robertson the jury had before them a gentleman of eminence and skill, who had

been selected as umpire between the parties, and who does not appear, in anything that he said at the trial, to have departed from the position of impartiality which he occupied in the arbitration.

On the other hand, without disparaging the eminence or skill of the experts who were called on behalf of the Government, one cannot help seeing that the leading witness on that side, the gentleman who seems to have managed the case for the Government throughout, must have failed to carry the weight to which he was, perhaps, otherwise entitled in consequence of his propounding and insisting upon a theory which he illustrated by a coloured map, but which was proved, and indeed admitted, not to be altogether accurate. Again, although Mr. Mackenzie, the Examiner of Coalfields, and Mr. Dixon, the Inspector of Mines, spoke with the authority due to their position, it came out in the course of the evidence that the Government had consulted other gentlemen who were not examined at the trial, and whose reports, though called for, were not produced. The jury may have thought, and perhaps not without reason, that in a case of this sort, where private property is taken by the Government for public purposes, the Government are bound to give the jury all the assistance in their power, and are not at liberty to keep back any information in their possession, whether it makes for or against them.

In the result, therefore, their Lordships will humbly advise Her Majesty that the appeal ought to be allowed, and that the order of the 4th of June 1888 ought to be discharged, and that the Respondent ought to pay the costs of the trial and of the rule nisi and of the rule absolute.

The Respondent will pay the costs of this appeal.