

*Mr. Bell's Address.*

*Mr. Bell:* I may state at the outset that I have no desire or intention to ask the Committee to listen to any matters connected with the details of the claims. I propose to treat them upon the lines followed by my friend Mr. Cave, with one exception. I think the Committee will see that the question for their decision may present these two aspects—first, if the Messrs. Brogden could say that sums which had been certified as correct by the Government Engineers, and which had become payable to them, were wrongfully retained by the Government from them. I should admit at once that it would not only be the proper functions of the Committee to report to the House that the Messrs. Brogden were entitled to claim these moneys in any court of law, but I should say that in my humble opinion no Government would ever resist the right of persons to have such claims fully investigated. But if the question be whether the Messrs. Brogden shall now be allowed to appeal in the manner provided by the Act of 1872 from the decisions of the Engineers, they having received all that the Engineers have certified to, then the Committee ought carefully to consider whether that appeal should be allowed, notwithstanding the lapse of time. I think the Committee will now see why I lay stress upon that particular question. If it be a question of appeal, then that question is before the Committee to decide. But if it can at all be said that this enquiry is not whether there should be an appeal from the decisions of the Engineers, but whether the Government are retaining in their own possession money to which the Messrs. Brogden became entitled on the certificates of the Engineers, then the question is an entirely different one. I desire to prove, and I think I shall conclusively prove, that the Messrs. Brogden have been treated in this matter with exceptional consideration and liberality by the Government of the colony. And my first reason for saying so is, that there was an arbitration clause put in the contracts, and also in the Act of 1872, which gave them a position of advantage which no other contractors in the world I believe, and certainly none in this colony ever had. And I say as a matter upon which there is no doubt—it is a matter of law—that no contractor can recover in a court of law any moneys under an ordinary contract except such as have been certified to by the Engineer, who by the terms of the contract in ordinary cases is not only the arbitrator, but the final arbitrator. The members of the Committee must be conversant with cases of the kind where attempts have been made to settle in courts of law disputed claims under contracts, and unless it has been possible to show that there has been collusion between the contractor and the Engineer or architect, there is no right of recovery. The Messrs. Brogden say that but for the Act of 1872 they would have been able at any time within twenty years to bring actions on their contracts in courts of law, but this is not correct, unless there are moneys which have been certified to, but not paid. If what the Engineers have certified to has been paid in full, then the Brogdens, but for the arbitration clause in the Act and in the contracts could not, nor could any contractor in a similar position have sued the Government in any court of law. That has been settled by decisions in England, followed by the Court of Appeal here in the cases of *Brogden v. the Queen*, and *Smythe v. the Queen*. I am not going to trouble the Committee with more upon that point, but I hope the Committee will allow me to read a short passage upon it, which is framed in language more forcible than my own. I am reading from a decision by Lord Justice James, in the Court of Appeal in England, in the case of *Sharpe v. San Paulo Railway Company, L.R., 8 Ch., 597*.

The Engineer has made his certificate, finding an ultimate balance upon all the accounts, which certificate is not, according to my view of the pleadings, impeached on any of the grounds which the Court can take cognizance of. It is not pretended that the Engineer did not come to a conclusion to the best of his belief, and according to the best of his judgment. He was to determine the sums to be paid, and was not like an arbitrator dealing with evidence, or like a Judge dealing with a law suit. The very object of leaving these things to be settled by an Engineer is, that you are to have the practical knowledge of the Engineer applied to it, and that he, as an independent man, is to say what is the proper sum to be paid under the circumstances. That is the ordinary course between such companies and such contractors, and practically it is found to be the only course that is convenient for all parties, and just to all parties.

And Lord Justice Mellish in the same case says :—

There is no doubt that a mere agreement, that matters shall be referred to arbitration, does not by itself take away jurisdiction from courts of justice. Nevertheless, a contract may be so framed as under ordinary circumstances to take away the jurisdiction of courts of law and courts of equity to determine what is the amount payable under the contract. Wherever, according to the true construction of the contract, the party only agrees to pay what is certified by an Engineer, or what is found to be due by an arbitrator, and there is no agreement to pay otherwise, that is to say, in every case where the certificate of the Engineer is made a condition precedent to the right to recover, there the Court has no right to dispense with that which the parties have made a condition precedent, unless, of course, there has been some conduct on the part of the Engineer or company which may make it inequitable that the condition precedent should be relied on. If nothing of that sort has happened, then the parties are bound by that which they have made a condition precedent.

I read that to show that I am only stating the law, as it has been decided by the highest authority, that a contractor has ordinarily no right of appeal to Courts of Law from the decisions of the engineer, unless he can show that the decision was fraudulent. Now this leads us to enquire how the conditions of the contracts with Messrs. Brogden were arranged? I ask the Committee to remember that these contracts were not entered into by public tender. It was a matter of compromise. A resolution of the House was passed, and in consequence of that resolution Messrs. Brogden obtained the contracts. I ask the Committee to remember that if the tendering had been public the conditions of the contracts would have been arranged by the Government and in the ordinary form, and the Engineer would have been the final arbitrator, and no right to appeal to a Court of Law could ever have existed. The Messrs. Brogden, however, were in this position, that they were able to insist upon an alteration in the terms of the contract, because they were not tendering upon conditions framed with other tenderers. They themselves were parties to the settlement of the terms, and they insisted; and the Government (not without hesitation, and after refusing for a long time because it was a matter of the first importance) conceded that the contracts should provide for an appeal from the Engineer. This was granted in the terms of the contracts, and it is a concession which no other contractors in the world, I believe, and certainly no others in this colony ever obtained. Messrs. Brogden got that concession at last, and a provision was inserted in the contracts allowing an appeal from the Engineer to a Judge of the Supreme Court of New Zealand. The Judges were consulted, of