The contractor is to make and execute, in the like manner as aforesaid, and with the like materials as aforesaid, any additions, deviations, or alterations to, from, or in the works, which the Engineer may from time to time, previously to the commencement or during the progress of the works, by an order in writing, require, at and for such prices or rates as shall be agreed upon in writing between the contractor and the Minister for Public Works. In case of non-agreement as to price, the work shall be done by the contractor as required by the Engineer, and the price thereof shall be settled by arbitration as hereinafter provided, and shall when so ascertained be added to and henceforth deemed to be part of the contract price for the works to be executed under this contract; but no additions, deviations, or alterations whatever, which shall be claimed by the contractor, will be admitted or recognized under any circumstances, or will be allowed or paid for, which shall be done or executed without, or contrary to any previous order from the Engineer in writing as aforesaid.

Then clause 25 provides that payments are to be made monthly, at a rate not exceeding 90 per cent. on the value of the work actually done. Clause 26 says,—

In case the Engineer shall neglect or refuse to certify the amount due to the contractor in respect of the work, or plant or materials, in manner and within the times mentioned in the foregoing condition, and shall continue such neglect or refusal for a period of fourteen days succeeding the fourteenth day after the end of the month in which the work was done, or the plant or material supplied, as the case may be, the Contractor shall be entitled to measure and value the same, having due regard in his estimate to the actual value thereof, and the measure and value so estimated by the contractor shall be temporarily accepted by the Governor so far as regards the progress payment to be made to the contractor in respect thereof under the foregoing condition, and the payment provided by that condition shall be made accordingly, with interest thereon, at the rate of ten pounds per centum per annum, during the period of delay occasioned by the neglect or refusal of the Engineer: Provided always that, in all cases in which a certificate shall, within the period or further period hereinbefore provided, as the case may be, have actually been delivered to the contractor, such certificate shall, for the purpose of the progress payment to be made thereunder, be conclusive; and in case of any dispute between the contractor and the Engineer as to the estimate therein made of value of work done, or plant or materials provided, as the case may be, of which dispute notice shall have been given by the contractor to the Minister for Public Works within fourteen days after the delivery of the certificate to the contractor, such dispute shall be referred to arbitration as hereinafter mentioned.

This section only applies to progress certificates and not to final ones, and therefore the power to appeal against a final certificate is unlimited except for the Act. The progress certificate is given merely for the purpose of enabling the contractor to get paid what is due to him under clause 25, and is only final for the purposes of the progress payment. It now suits my learned friend who appears for the Crown to say that final certificates have been given; but is that the case? There are letters to show that the final certificates have been refused by the Engineers under the contracts; for, on Messrs. Brogden applying to them for such final certificates, each one of them replied that he was instructed by the Government not to give the certificate asked for, on the ground that the Government asserted that the only person who could properly give it was the Engineer-in-Chief.

Hon. Dr. Pollen: Has any reference ever been made to an arbitrator as between the Government and a contractor?

Mr. Cave: Not between the Government and Messrs. Brogden.

Hon. Dr. Pollen: Could not the progress certificates be regarded as final?

Mr. Cave: I think not.

Hon. Dr. Pollen: But you have never challenged any of these progress certificates.

Mr. Cave: No, because they were accepted for the purpose of the progress payments. I come now to the Act itself. Notwithstanding the reiterated denial of Messrs. Brogden and Mr. Travers that they were not aware of the limitation clause of the Act, it has been contended that it was impossible for the Act to have been passed without their having had full knowledge of the whole of its contents. Yesterday I put in two letters which were written by Messrs. Brogden in London, and which I think go very far to substantiate the position which I took up at the commencement of the case, namely, that Mr. James Brogden and all the members of the firm, and even Mr. Henderson himself, were ignorant of the existence of the limitation clause until 1877. But then my learned friend says that it was not until after Mr. Reid wrote his memorandum in 1878 that the attack on the Act was confined to clause 31; but I may say that the whole sting of the Act is in clause 31. If it were not for that section the Act would be comparatively harmless to Messrs. Brogden. Section 28, if it stood alone, would merely deprive them of their right to sue in a Court of law, and they would still have the right to submit the matter in dispute to arbitration. But section 28 takes away their right to sue, and section 31 deprives them of the right to appeal to the arbitrators unless they do so within six months after the dispute has arisen. It is true that clause 4 was attacked in the correspondence, but why was it so attacked? It provides that, before the reference to the arbitrator, there shall be a reference to the Minister; and then, in case the decision of the Minister is adverse to the contractor, the latter can go to the Judge. The only reason why clause 4 was objected to was that it involved the necessity of incurring a double expense by requiring an appeal to both the Minister and the arbitrator.

Mr. Bell: That was not the objection raised in Mr. Barton's letter.

Mr. Cave: I am not referring to Mr. Barton's letter, and I have disclaimed all intention of indorsing anything that is said in that letter. I am referring to the letter written by Messrs. Brogden to the Secretary for the Colonies, in England, dated the 15th January, 1878. The reference to clause 4 in that letter reads thus:—

Clause 4 constitutes the Minister for Public Works a Court of first instance to hear and determine claims, an appeal lying from him to the Judge of the Supreme Court for the district in which the works are situated. Thus the contractors are put to the expense of a hearing at Wellington, and, in the event of the Minister, who is one of the parties to the suit, deciding in his own favour, of a second hearing in another part of the colony.

There is no doubt that if the Act had been passed as originally drawn Messrs. Brogden would not have had any ground of complaint. My friend admitted that he could not contend that the limitation of six months was a reasonable one, and it is quite clear, from the debates which took place in the House, that no particular attention was paid to clause 31. If Mr. Brogden's attention had been called to that section it is unreasonable to believe that either he or Mr. Travers would have remained quiescent, and taken no steps to have the clause expunged. It is further contended by my learned friend that it is clear, on the face of the correspondence, that the Government never intended to rely on the limitation clause or to take advantage of it. On that point I would ask the Committee to consider the memorandum of the Solicitor-General of the 20th January, 1877, immediately after the notices requiring the Government to consent to an arbitration under the terms of the contract had been delivered. Mr. Reid, in this memorandum, says,—