

1886.
NEW ZEALAND.

OTAGO HARBOUR BOARD ACCOUNTS

(REPORT BY THE CONTROLLER AND AUDITOR-GENERAL ON).

Presented to both Houses of the General Assembly by Command of His Excellency.

No. 1.

J. MACANDREW, Esq., M.H.R., to His Excellency the GOVERNOR.

SIR,—

Wellington, 18th September, 1885.

Herewith I have the honour to transmit to your Excellency a petition from the members of a committee, appointed at a public meeting in Port Chalmers, on the subject of alleged breach of trust on the part of the Otago Harbour Board.

The petition fully explains the position of the matter, and I would venture most respectfully to express a hope that your Excellency may be pleased, in the exercise of the function conferred on you by "The Harbours Act, 1878," to cause a special audit to be made with a view of substantiating the facts of the case, and thereafter of taking such action as may be necessary to restrain the Harbour Board from further abusing its trust.

I may add that the petitioners, in addressing your Excellency, are acting upon the opinion of counsel of high legal standing in Dunedin, who advise that this is the proper course to adopt.

His Excellency the Governor of New Zealand.

I have, &c.,

J. MACANDREW.

Enclosure in No. 1.

PETITION.

To His Excellency Sir William Francis Drummond Jervois, Lieutenant-General in Her Majesty's Army, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Companion of the Most Honourable Order of the Bath, Governor and Commander-in-Chief in and over Her Majesty's Colony of New Zealand and its Dependencies, and Vice-Admiral of the same, in Council.

THE PETITION OF THE UNDERSIGNED RESIDENTS OF PORT CHALMERS.

HUMBLY SHOWETH,—

THAT, at a public meeting held on the eighth day of September last, His Worship the Mayor presiding, we were appointed a committee to inquire into the action of the Otago Harbour Board's expenditure of the loan borrowed under authority of "The Otago Harbour Board Further Empowering Act, 1882," and the result of our investigation is as under, that is to say,—

That, by "The Otago Harbour Board Further Empowering Act, 1882," the Otago Harbour Board was authorized to raise and borrow a sum not exceeding two hundred thousand pounds, and it was provided that out of the sum so raised not less than one-half should be expended on harbour works undertaken for the improvement of the bar at Otago Heads, and for the general improvement of the Lower Harbour.

That the net sum realized by the floating of the loan thus authorized was one hundred and eighty-eight thousand nine hundred and eighty-three pounds three shillings and ninepence (£188,983 3s. 9d.).

That of this sum not less than ninety-four thousand four hundred and ninety-one pounds eleven shillings and tenpence (£94,491 11s. 10d.) at the least should have been expended on improving the bar and the Lower Harbour, whilst in fact only thirty-eight thousand seven hundred and thirty pounds and fourpence (£38,730 0s. 4d.) has been so expended, and the Board have now in hand of the amount so raised ten thousand pounds (£10,000) only.

That, in addition to the thirty-eight thousand seven hundred and thirty pounds and fourpence (£38,730 0s. 4d.) alleged to have been actually expended in the Lower Harbour, the Board, through its acting-chairman, claims to be entitled to debit against the proportion of the loan to be expended in the Lower Harbour various items amounting in the whole to forty-six thousand two hundred and forty-five pounds ten shillings (£46,245 10s.).

That this latter amount comprises, among other items, the following :—

Value of plant removed to heads	...	...	...	£2,777	10	0
Half-cost of dredge	...	...	...	23,850	0	0
Half-cost of tugs	...	...	...	6,750	0	0
				£33,377 10 0		

That your petitioners are advised that for various reasons none of these items can properly be charged against the proportion of the loan to be expended in the Lower Harbour.

That the members of the Board appointed by and representing the citizens of Port Chalmers on the Board have, ever since taking their seats at the Board table, endeavoured to have that portion of the loan allocated for the improvement of the bar and Lower Harbour set apart for that purpose, but that the other members of the Board have persistently refused to do so.

Your petitioners therefore pray that you cause a special audit to be made, in terms of the one hundred and eighty-sixth section of "The Harbours Act, 1878," and that, should the result of such audit show (as your petitioners allege it will) that a breach of trust has been committed by the Board, you cause such proceedings to be taken in the interests of the public as shall enforce compliance by the Board with the terms of the statute.

And your petitioners will ever pray.

E. M. G. ALLEN, Mayor.
JOHN DRYSDALE, M.D., J.P.
D. A. DEMANS.
WILLIAM REID, J.P.
WILLIAM MURRAY.
DAVID LAW.
ALEXANDER MCKENZIE.

No. 2.

The SECRETARY to the TREASURY to the CONTROLLER and AUDITOR-GENERAL.

SIR,—

Wellington, 12th October, 1885.

I have the honour to inform you that, pursuant to section 33 of "The Public Revenues Act, 1878," and section 186 of "The Harbours Act, 1878," His Excellency the Governor has been pleased to direct that a special audit of the accounts of the Otago Harbour Board be made by you, with a view to determining the accuracy or otherwise of the allegations contained in a petition from the residents of Port Chalmers to His Excellency (copy enclosed).

I have, &c.,
J. C. GAVIN.

J. E. FitzGerald, Esq., C.M.G., Controller and
Auditor-General, Wellington.

No. 3.

The CONTROLLER and AUDITOR-GENERAL to His Excellency the GOVERNOR.

SIR,—

Dunedin, 26th October, 1885.

In obedience to your Excellency's directions, conveyed in the letter of the Secretary to the Treasury of the 12th instant, I have made full inquiry into the complaints made in a memorial relating to the accounts of the Otago Harbour Board, forwarded to your Excellency in a letter from Mr. Macandrew of the 18th September, 1885.

The accounts of the Harbour Board having been duly audited year by year by Mr. Livingston, the Provincial District Auditor, and the accuracy of the figures having been thus ascertained, it was unnecessary for me to do more than inquire into the mode in which the expenditure has been charged to the several accounts of which the memorialists complain.

Prior to the passing of "The Otago Harbour Board Further Empowering Act, 1882," the only authority for the expenditure of money by the Board was conveyed in the 172nd section of "The Harbour Boards Act, 1878," which enacted that the harbour fund should "be expended and laid out in the construction, maintenance, and repair of harbour works within the port, or for the payment of interest and sinking fund (if any) upon moneys borrowed for the purposes of such works, and generally in the payment of expenses incurred by the Board in carrying out this Act." The powers thus conveyed sanction the execution of all works which, in the opinion of the Board, might be necessary for the improvement of the harbour, including the purchase of dredges, punts, tugs, and plant of all kinds required to aid in effecting such improvements. And it must be noted that the

Harbour Fund was thus made applicable, under the terms of the Act, not only to permanent works and improvements, but also to current expenditure in the harbour service, and, singularly enough, to the payment of interest on loans. As Parliament could not have intended that interest should be paid out of capital, it may be inferred that it was not contemplated in the 172nd section of "The Harbours Act, 1878," that the Harbour Fund should include borrowed money, although such is the effect of the section.

The Acts under which moneys were from time to time, prior to 1882, borrowed by the Board, contain no specific provisions for their expenditure; all moneys were, therefore, correctly carried, and all expenditure charged, to the General Harbour Fund. But in "The Otago Harbour Board Further Empowering Act, 1882," by which the Board was authorized to raise a further loan of £200,000, a special provision was inserted as follows: "Out of the sum or sums of money raised under the authority of this Act, not less than one-half of such sum or sums shall be expended on harbour works undertaken for the improvement of the bar at the Otago Heads, so that vessels drawing twenty-three feet of water can safely enter the harbour, and for the general improvement of the Lower Harbour."

This provision is a statutory appropriation of half the loan to a special purpose, and in effect creates a separate trust fund in favour of the bar and Lower Harbour.

A separate account of this trust fund ought at once to have been opened in the books of the Board, credited with half the sums received from the new loan, and debited with the expenditure on the Lower Harbour works. This has not been done: all expenditure has been carried to the general account, and statements have occasionally been made up to show how the account of the Lower Harbour stood, instead of a complete current account having been kept showing the unexpended balance from time to time. Hence, in eliminating from the general account the items chargeable against the Lower Harbour, a question has arisen whether any, and, if any, how much, of the sums expended on the Lower Harbour, prior to the passing of the Act of 1882, ought to be charged against the fund created by that Act. An account has been submitted to me (Appendix A) showing the mode in which the Harbour Board propose to charge the Lower Harbour Account; and the result would thus be that, of the £100,000 appropriated by the Act of 1882, the whole, except a balance of £11,280 18s. 10d., had been, up to the 31st August last, expended as provided by the Act.

This account is constructed upon the assumption that certain expenditure on the Lower Harbour, made prior to the passing of the Act of 1882, may be legitimately charged on the Lower Harbour Account; and the principal charge thus made is a sum of £23,850, being half the cost of a hopper dredge, which, it is stated, was ordered expressly for the bar and Lower Harbour works.

It is alleged, on the other side, that this dredge was bought and paid for before the passing of the Act of 1882, and was therefore paid for out of the previous loan of 1880; but it is stated, in reply, that, that loan being already exhausted, the dredge was really paid for out of an overdraft allowed by the bank in anticipation of the new loan, and on the express stipulation that, if the new loan was not procured, the dredge was to be sold in order to meet the overdraft.

If the argument relied on by the Board is admissible, I cannot perceive why the whole cost of the dredge may not be charged to the Lower Harbour Account, as well as the half, as it is admitted that this dredge was ordered and is mainly used for dredging the bar and Lower Harbour, other and more suitable dredges being in use in the Upper Harbour.

Again, if it can be maintained that the half-cost of the hopper dredge, tugs, punts, &c., can be charged against the Lower Harbour Account consistently with the Act, the same principle might be applied to a greater extent than is even proposed at present. The value of the plant belonging to the Board has increased year by year from £34,500, at which it was estimated in 1876, to £155,815, the value taken credit for in 1884. Part of the plant purchased in former years is probably still in use in the Lower Harbour works, and its half value might, on the principle asserted, be charged against the loan of 1882 equally with that now proposed to be so charged.

Some other charges in the account (Appendix A) seem to me less defensible than those of the dredge: such, for example, as the half cost of the tugs, which are mainly used for towing vessels over the bar and up and down the harbour. The Act does not authorize the expenditure of the Lower Harbour Fund on any general services which are common to the Upper and Lower Harbour equally, but confines it to works for the *improvement* of the bar and Lower Harbour.

The accounts of the Lower Harbour must, I think, be constructed strictly with a view to the wording and intention of the Act of 1882, which says that the £100,000 "shall be expended on harbour works undertaken for the improvement of the bar," &c.; and the intention may be, to a certain extent, inferred from the circumstances preceding the passing of the Act. The very fact that for the first time Parliament thought it necessary to allocate the expenditure of the new loan to different parts of the harbour, indicates that it recognized that differences of opinion, and perhaps that conflicting interests, were involved in the previous expenditure of the harbour funds. No other reason can be assigned why Parliament should have interfered with the discretion, which had hitherto been left to the Board, to allocate its funds to different parts of the harbour works at its pleasure; and the debates on the passing of the Act of 1882 prove that the claims of what are supposed to be rival interests were fully before the House at the time the limitation on the discretion of the Harbour Board was imposed. I cannot therefore think that by the words "*shall be expended*" Parliament intended that expenditure *which had already taken place*, and which was the subject of the complaints for which it was attempted to apply a remedy, should be included in the special appropriation it then made. It is true that Acts of Parliament must be read according to their actual meaning, not according to any presumed intention; but where, as in the present case, the grammatical meaning of the language accords with the intention suggesting it, the latter affords an additional reason why the strict reading should be adhered to, and no wider latitude of interpretation be admitted than that which the words themselves imply.

I also call attention to the fact that, where the intention has been to charge past expenditure to a new appropriation, such intention has been distinctly expressed. Thus, in the Schedule to "The Immigration and Public Works Loan Act, 1870," to the vote for the construction of roads the words are added "including repayments of advances from the Consolidated Fund already made for the same purpose;" and in the Defence Loan Act of the same year, section 14, the words used are "all such sums as shall have been applied," &c.

I am therefore led to the conclusion that the Act of 1882 provides that one-half of the loan to be raised under it was to be expended on works undertaken, or engagements entered into, subsequently to the day on which the Act came into force, namely, the 13th September, 1882; and, therefore, that the Lower Harbour Fund cannot legitimately be charged with any expenditure on plant or otherwise which had been made prior to that date.

I have caused a balance-sheet to be prepared (Appendix B) showing the position of the Lower Harbour Fund on the 30th September last, as I conceive the provisions of the Act of 1882 require the amount to be kept. This account has been carefully prepared by Mr. King, the Audit Inspector, from the original vouchers, and comprises all expenditure on the Lower Harbour which can by a fair and liberal interpretation be brought within the meaning of the word "*improvements*," excluding charges for general harbour service. It is possible that opinions might differ as to the inclusion or exclusion of particular small items in or from this account, but to the general principle of its construction I think no exception can be taken. It appears from this account that the balance belonging to the Lower Harbour Fund exceeds the moneys at present at the disposal of the Board. There seems but one way in which this deficiency can be made good. By "The Otago Harbour Board Loans Consolidation Act, 1884," the Board is empowered to borrow £150,000 for fresh works (in addition to the amounts for paying off the outstanding loans); and, of this, section 10 enacts that "out of the sum or sums of money raised under the authority of this Act, not less than sixty-five thousand pounds sterling shall be expended on harbour works undertaken for the improvement of the bar at the Otago Heads and the general improvement of the Lower Harbour." If I have been correct in the reading of the Act of 1882, the same interpretation must be applied to the same words in the Act of 1884; that is to say, the £65,000 must be applied only to expenses incurred subsequently to the date on which the latter Act came into force, *i.e.*, 6th November, 1884, and cannot be used to recoup the deficiency in the Lower Harbour Fund at that date. But there will remain the balance, £85,000, which is applicable to all works which it is competent to the Board to undertake; and of this, I am of opinion, it is the duty of the Board to transfer to the Lower Harbour Account such an amount as will repay the deficiency.

I am not aware that it is desired by any one that the members of the Board should be made personally liable for a misappropriation of trust funds. It is admitted on all hands that the funds of the Board have been honestly applied to the works they were appointed to administer. No question can be raised as to whether they have exercised a wise discretion or not, the law having vested that discretion solely in the Board; the only dispute being as to the construction of the Acts of Parliament, which the Board has interpreted under a misapprehension, and the error being capable of being rectified by a fresh construction of the account consistent with the provisions of the Act. Such, it is submitted, is the proper course to be adopted.

I would also suggest that, by consent of all parties, and by an inexpensive process, a question might be submitted for the judgment of the Supreme Court to obtain a judicial interpretation of the Acts as regards the point at issue.

I would also respectfully submit that "The Harbours Act, 1878," requires to be amended so as to provide that all loans should be carried to a separate account, and expended solely on permanent works, and not on current services, still less on the payment of interest, which should be charges solely on the annual income of the Board. Such provisions will be found in the Municipal Corporations Acts and in the Counties Acts, and should apply with equal force to all local bodies empowered to borrow money.

The question also arises whether the Board should keep separate banking accounts for its general and trust fund? It is not incumbent on them to do so; but, as a matter of convenience, and as a protection against applying one fund to supplement deficiencies on another, it is a very desirable course to adopt. In the Public Accounts only one banking account is kept for moneys of the Consolidated Fund and of the Public Works Fund; but under the established system of control there is ample provision by which it is impossible that the moneys of one fund can be used for the other. But in accounts where no such special provisions exist, a separate banking account is a great protection against an inadvertent misuse of trust funds. Thus, for example, in the Bankruptcy Act the Official Assignee is compelled to keep a separate banking account in each estate, notwithstanding the additional trouble and inconvenience of such a system, in order to prevent the moneys belonging to one estate being used for another. I should therefore respectfully suggest that the Board should adopt a similar course in regard to funds subject to special parliamentary appropriation.

In stating the above view as to the manner in which the accounts should be kept in order to satisfy the requirements of the Act, I desire to say that I have excluded all considerations of the relative importance of the works which are in the course of construction, which must naturally involve differences of opinion, and possibly conflicting interests. All these works equally appear to be of great ultimate importance, and the question is not which should be omitted in favour of the other, but rather which should be done first out of the means from time to time placed at the disposal of the Board. This latter question has, however, been determined by Parliament by the Act of 1882, and again by the Act of 1884, by allocating to each account a fixed share of the moneys to be borrowed.

Nor can I allow any consideration of what may be thought by some to be a fair or equitable mode of charging the Lower Harbour Account to influence the decision to be arrived at. It may

be quite true that the hopper dredge was bought mainly, if not solely, for the improvement of the bar, and its purchase was undoubtedly a legitimate and necessary expenditure under section 172 of "The Harbours Act, 1878." Had it been bought after the creation of the Lower Harbour Fund it might, in my opinion, have legitimately been made a charge on that fund; but it was bought out of the General Harbour Fund, before the division of that fund into two.

It is claimed, I understand, that this difficulty might be overcome by the nominal sale of the dredge to an outside party, and its repurchase by the Board on behalf of the Lower Harbour Fund. I am under the impression that such a transaction would not be permitted by the Courts. Courts of equity are very jealous of transactions whose intent is to evade the provisions of the law, even though there be no improper motive or object.

In conclusion, I have to acknowledge the courtesy and frankness, on the part of the Chairman, members, and officers of the Board, with which all the affairs of the Board have been submitted to me, and the full information which has been given me by the gentlemen who take opposite views on the matter which is the subject of this report.

I have, &c.,

JAMES EDWARD FITZGERALD,
Controller and Auditor-General.

His Excellency the Governor.

APPENDIX A.

MEMORANDUM prepared by the Secretary and Treasurer to the Otago Harbour Board, showing the State of the Lower Harbour Board Account on the 12th August, 1885.

	£	s.	d.
Net tenders for £190,000 of debentures	182,868	3	6
Less rebate on tenders paid in advance	60	6	6
Debentures handed over for purchase of tug	10,000	0	0
	192,807	17	0
Less cost of advertising, commission, and floating	3,824	13	3
	188,983	3	9
Credit, Lower Harbour, one-half above	94,491	11	11

Expenditure on Lower Harbour.

Works to 31st December, 1884	£27,727	6	3
Ditto to 11th June, 1885	8,522	6	0
Ditto to 12th August, 1885	2,480	8	1
	38,730	0	4
Proportion of interest on overdraft prior to floating loan	855	0	0
Ditto engineer's salary to 31st December, 1884	788	0	0
Ditto (6 months) to June, 1885	275	0	0
Percentage of plant, other than "222" dredge, such as "Vulcan"			
tugs, to 31st December, 1884	800	0	0
Ditto to 30th June, 1885	100	0	0
Value of plant removed to the heads	2,777	10	0
Four half-years' interest on coupons	10,000	0	0
Bank commission, payment of same	50	0	0
Half cost of Dredge 222	23,850	0	0
Half cost of tugs	6,750	0	0
	84,975	10	4
Credit, one-half profit on tug service	9,516	1	7
	1,764	17	3
	£11,280	18	10

JOHN L. GILLIES,
Secretary and Treasurer.

APPENDIX B.

STATEMENT of the RECEIPTS and EXPENDITURE of the LOWER HARBOUR FUND to the
 Dr. 30th September, 1885. Cr.

	£	s.	d.	
Gross amount of Lower Harbour share of loan	100,000	0	0	
Half-share of the expenses of raising loan :—				
Discount	£3,596	1	6	
Commission, &c. ..	1,918	18	4	
				5,514 19 10
Half-interest on loan and exchange	£10,093	13	6	
Less interest on paid deposits	2,417	5	7	
				7,676 7 11
Half-interest on bank overdraft prior to raising loan				1,476 8 6
Interest at 6 per cent. on plant used in Lower Harbour	£6,339	3	6	
Depreciation at 5 per cent. on plant used in Lower Harbour	5,282	12	9	
				11,621 16 3
Purchase of fresh plant for Lower Harbour				2,997 10 0
Repairs to plant employed in Lower Harbour				5,108 15 6
Sir John Coode's survey of Lower Harbour				821 1 8
Works at the North Heads				16,339 16 10
Wages, coal, &c., for dredging				13,110 1 8
Tide-gauges				98 19 4
Boring at Port Chalmers				392 2 10
Pilot-station repairs				498 11 10
Signal-buoys and beacons				175 7 2
Lights and lightships				1,462 7 10
Half-share of office staff and expenses ..				1,880 0 5
engineering staff & expenses				1,938 11 3
Half-cost of new offices				1,337 4 10
Total expenditure				72,450 3 8
Balance				27,549 16 4
	£100,000	0	0	£100,000 0 0

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