

that the facts on which we rely to show that the agreement is ended will be in some necessary parts facts which will have to be admitted by the other side. On the face of the contract it is for a term of ten years, and there can be no pretence for saying that the contract has been performed by the company. There has also been a breach of the contract by the company; and, this being so, we have given notice that the contract is rescinded. That, of course, we shall have to prove.

Sir B. BURNSIDE: You do not therefore contend that a breach of a contract terminates the contract? Can one party to a contract rescind it?

Sir R. Stout: If the other party has been guilty of a breach entirely violating the terms of the contract, we say the other side can rescind it.

Sir B. BURNSIDE: That is your contention—that therefore one side can rescind it.

Sir R. Stout: Yes; because in this case the railway had to be completed within ten years. The ten years have elapsed, and not one-third of the railway has been completed. Now, suppose we had in this case the English form of pleading: I apprehend that they would have averred, in reference to the time having elapsed, the old form of pleading. They may possibly set up that we excused the breach, so to speak. They may say, "You have prevented us from performing our contract, and consequently you are responsible for the breach." But if they set up that contention, then I apprehend that the question which will have to come before the arbitrators will be this: Has our conduct in carrying out the contract been the cause of their failure to perform? And if the arbitrators were to come to the conclusion that our conduct was not the cause of their failure to perform, then it would be no excuse for their breach. This question will have to come up in this controversy, and I shall refer to it later on.

Sir C. LILLEY: These facts may all be controverted, of course?

Sir R. Stout: There is a reason given in Mr. Gully's affidavit as to our notice to rescind that cannot be controverted. Suppose they set up the point I have mentioned—namely, that "Though we have broken the contract, and failed to perform our part and construct the line, it was your conduct which led to our non-performance."

Sir C. LILLEY: That will be in the nature of a confession at once.

Sir B. BURNSIDE: Must not the question of jurisdiction necessarily rest on the state of the facts? How can you have a demurrer with no facts?

Sir R. Stout: I admit that; but at any time, if the case shows that the jurisdiction ceases, the arbitration must cease.

Sir C. LILLEY: We shall decide that.

Sir R. Stout: Yes; and I am raising the point now.

Sir B. BURNSIDE: Is not that taking double time? You do not raise your right to raise the question of jurisdiction so soon. When the facts are before the Court they will justify the course to be taken.

Sir R. Stout: All the facts required to show want of jurisdiction, as far as we are concerned, are contained in this: There is the contract before the arbitrators, which fixes the time within which the line has to be opened. It is for the other side to show the facts of excuse for non-performance. If they want to excuse themselves for non-performance, it is for them to bring the facts before the arbitrators. They must confess and avoid. It does not rest upon us.

Sir B. BURNSIDE: I understood that the facts do rest upon them. I think they must show that they are entitled to our jurisdiction before we can exercise that jurisdiction.

Sir C. LILLEY: *Prima facie*, I understood you to say that this railway was to be completed by the 17th January, 1895. There is no contention that it has been completed.

Sir R. Stout: There is a total failure.

Sir C. LILLEY: Then it is for them to show—

Sir R. Stout: Why they have not performed their part of the contract; and I am going to show the nature of the evidence we have to refute that.

Sir B. BURNSIDE: Do they controvert that primary fact, that the time of the contract has expired? They are making a claim for compensation for breach of contract on your part?

Sir R. Stout: They cannot controvert that, because, the contract being in, it bears the fact on its face.

Sir B. BURNSIDE: I am asking it.

Sir R. Stout: I do not know. They may say, "It is true we may have failed to perform our part of the contract, but that has been caused by your conduct."

Sir B. BURNSIDE: Suppose they set that up, does that touch the question of jurisdiction?

Sir R. Stout: It will later on.

Sir B. BURNSIDE: Is it necessary to go on with it now?

Sir R. Stout: I am going to state why there is no jurisdiction.

Sir C. LILLEY: The whole case, as I understand, is subject to this question of jurisdiction. If they go into the facts, it is on this question.

Sir R. Stout: From our point of view it will show that they have no jurisdiction.

Sir B. BURNSIDE: But can such a suggestion be made before the facts are brought forward with it?

Sir R. Stout: Yes; because the facts will have to come from them. Assuming that they do not raise the point, and are not prepared to take up that evidence, then the arbitrators will have no jurisdiction.

Sir B. BURNSIDE: I apprehend that if they do not set up that plea that we will do it for them.

Sir C. LILLEY: You say that at the present you are in this position: that the jurisdiction must be shown by the company?

Sir R. Stout: Yes. My second point is that the contract is at an end because the company have abandoned it, and expressly declared that they abandon the performance of a large portion of the contract—namely, the construction of the railway from Belgrove to Reefton—and there never has been any pretence by the company, for years past, that they ever intended to construct that