

portion of the line. It is at the Nelson end of the line. Belgrove is a small station some distance out of Nelson. They have constructed a part by way of the Nelson end. I might here mention, before I deal with the three points, what the Victorian Court said on this question—the judgment of the late Mr. Justice Higginbotham and Justice Holroyd, as delivered by Mr. Justice Higginbotham. At page 153, near the bottom, he says, “The conditions providing for arbitration ceased, in our opinion, to have force or to be capable of being put in operation at the same time that the contract was determined; neither party had power to appoint arbitrators, and arbitrators, if appointed, had no jurisdiction to act.” Another point is (see page 154), “except under and subject to the contract, and while the contract is proceeding.” Page 155: “has been legally determined, and it has come to a final end”; and the same principle of law is laid down in Pollock’s Law of Contracts, same effect (page 319, 5th edition). At the top of the page he says, “And when a question is whether an agreement containing an arbitration clause is, or is not, determined, that question is not one for arbitration, since the arbitration clause itself must stand or fall with the whole agreement.” Now, we say, therefore, that, on the first and second points I have mentioned, the arbitrators have no jurisdiction to act. The arbitrators are aware that since the first appointment of the arbitrators the other side have raised another point, as to the seizure of the lines. As to that I have to say—

Sir B. BURNSIDE: I understand distinctly from all parties that we were proceeding on the matters of the reference first referred to now. They were not binding?

Mr. Hutchison: No, not yet, your Honour.

Sir R. Stout: The point I wish to show is that the arbitrators may have to consider whether our seizure of the line does not really suspend the contract if it did exist.

Sir C. LILLEY: Yes, for twelve months.

Sir B. BURNSIDE: I understand the seizure of the line took place after the reference to this particular tribunal: in fact, we do not know anything about it.

Sir R. Stout: We contend that it suspended all rights under the contract, and if they intend to do anything about the seizure of the line the statute points out what they have to do. The point in reference to this seizure is this: If, as the other side say, they have not referred it to arbitration at present, but will do so later on, then there are, no doubt, considerations to be dealt with, but at present I need not deal with them; but I use it for another purpose. I say, if the Governor has seized the line, practically the contract is suspended, at all events, and that practically suspends the arbitration. The only remedy is the one pointed out by the statute under the powers of the Railways Construction and Land Act of 1881, section 33, where was given the power to the Governor to seize “in the event of any unreasonable delay.”

Sir C. LILLEY: That is a general statute, not limited to the company.

Sir R. Stout: Yes, but it controls the contract except wherein the contract by special legislation overrules this Act; and then it provides (section 124), that, “if the Governor shall exercise the powers vested in him by the last-preceding section, any company interested or affected by the action of the Governor may apply to the Supreme Court as hereinafter provided.” It goes on to say what is to be done: the Supreme Court Judge is to settle in a summary way.

Sir B. BURNSIDE: You construe the word “may” as “must”?

Sir R. Stout: I say that is the only remedy: there is no power to refer to arbitration. I might point out, in dealing with this matter, that that statute has pointed out the only way in which the Governor’s seizure can be got rid of. I submit that, as to this power of arbitration, there is nothing in the contract showing it could be suitably dealt with by arbitration, or that there is any clause in the contract or in the special Act passed since then; the powers are in no way limited, and therefore the general statute must have application to the contract.

Sir C. LILLEY: That power seems to be an inchoate power of forfeiture.

Sir R. Stout: After twelve months.

Sir C. LILLEY: Yes; and there is no compensation given at all?

Sir R. Stout: No.

Sir B. BURNSIDE: It seems to contemplate that after the seizure by the Government—I am speaking of the point of the second arbitration—the seizure will have to be an absolutely conclusive one. Arrangements subsequent to that to be made, and, if none made, then the title of the Crown becomes absolute.

Sir C. LILLEY: Forfeiture.

Sir R. Stout: If the seizure has taken place the contract is suspended.

Sir B. BURNSIDE: That is their contention?

Sir R. Stout: Yes; and consequently the arbitration is suspended; and, if the seizure is an improper one, I submit it is not for the arbitrators to decide: that question must be decided by the Supreme Court.

Sir C. LILLEY: The arbitration would be at least suspended?

Sir R. Stout: I would put it like that. I am not saying it is put an end to by the seizure, but if the position is wrongful, then there is the statutory way of getting rid of it.

Sir C. LILLEY: The seizure was made in May. I am not speaking of it as actual proof, but from the documents. That would amount to this: that we should have to return in May next, or that we might have to do so.

Sir R. Stout: I have not anything further to say in reference to that point at present. I shall mention it simply to the arbitrators. There are only one or two words in reply to what might be urged by the other side if they set it up that their breach was brought about by our conduct. Up to the present I have dealt with only one or two points; the other points will come on later, because we have no proper details or particulars. I am not going to speak on that point just now; but I shall assume that for the purpose of argument and as an illustration that they intend to say that they were unable to select land. Then the arbitrators will have to consider if they were prevented from selecting land. Did that prevention lead to the non-performance of the contract? Was it the cause? Can they set that up as an excuse? We will say, in answer to that, if necessary, that