

they selected all areas of land that they were entitled to up to the very last; and I do not know yet what special reservations we have made that they complain of; but regarding all the reservations we have made, so far as being agricultural land is concerned, we submit it is absurd to say they are of any agricultural value whatever: they are lands for gold-mining purposes, and could not possibly have been of any value to the company.

Sir C. LILLEY: Is your law like ours—the gold is still the property of the Crown?

Sir R. Stout: Yes, it has always been so held by the Justices in our Courts—it was so held in all the old cases in Plowden's Reports.

Sir C. LILLEY: The express reservation in our case reserves the right to the miner, except to Her Majesty: the gold is the gold of the Crown.

Sir R. Stout: We submit that the financial inability—it will be proved in evidence—arose prior to these reservations being made, according to their admission—in fact, prior to the breaches they allege on our part of the contract. Then, I say that if the arbitrators come to the conclusion that our acts formed no excuse for their non-performance of the contract, then the arbitrators' jurisdiction to make any award is gone.

Sir B. BURNSIDE: That is, in fact, you contend that, if you break the contract and they afterwards break it, they would have no remedy against you for your breach?

Sir R. Stout: No; what I say is this: it is not a breach that might excuse their non-performance. They have to plead affirmatively; they have to plead a breach, and have to give evidence to excuse their non-performance. If we have made a breach that will excuse their non-performance. If the arbitrators come to the conclusion that anything we have done which could not have any possible effect on their non-performance, then I submit the arbitrators' jurisdiction is gone.

Sir B. BURNSIDE: Will you put that again? I understood you to say that, if we could find that your act formed no excuse for the non-performance by them, that then the contract was at an end.

Sir R. Stout: No; I said that the jurisdiction of the arbitrators would be at an end because it would depend on two conditions: first their statement, and our rescission. They say, "We admit the contract time is up; we admit we have not performed it; we admit you have given notice of rescission." They may say, "You cannot come in, because our non-performance was caused by you." I may say that, in the remarks I have made on this question of jurisdiction, I have not hinted at what our statement of the case will be. That will come in later on. I may say we think it will be abundantly proved that whatever we have done could not have given to the company any excuse for non-performance, nor have affected it. That is all I wish to say on that point, because I think it is right I should raise it on this question. There are other points I shall raise further on.

Sir B. BURNSIDE: I do not understand your question as to information dealing with the question.

Sir R. Stout: I am not going into that.

Sir C. LILLEY: There may be some; I will not suggest any.

Mr. Hutchison: I understand my learned friend wishes to save his objection—his right to object—to the jurisdiction at some future stage of the proceedings. All I desire to say at present is that we want it made clear that we do not assent to the right my friend has claimed to come here and say, "I protest, but am still going on." The cases he has referred to are somewhat peculiar, not absolute decisions on the right he has claimed as one would have gathered from his remarks. The case of *Davis v. Price*, reported in 34 Law Journal, Queen's Bench, at page 8, was peculiar in this respect: that the party who afterwards moved the Court pleaded that his appointment of an arbitrator, in effect, was not to determine all the matters alleged to be in difference, but was confirmed to a limited authority to decide on the construction of the lease which contained a clause for reference to arbitration. The following passage occurs in the report: "On the reference the defendant objected to the arbitrators going into any question of the amount of damages, or anything beyond the construction of the lease; but he did, under protest, attend meetings of the arbitrators, when the question of damages was gone into, and cross-examined some of the witnesses." The judgment of the Court is that of Pollock, Chief Baron, and is as follows: "We are of opinion that the plea is proved, and that the judgment of the Court ought to be affirmed";—the plea being that the appointment of the arbitrator by the party moving the Court was not to all the questions in dispute but merely as to the construction of the lease. The case of *Ringland v. Lowndes* follows immediately the decision in *Davis v. Price*—that having been decided some little time before the decision in *Ringland v. Lowndes*. However, these cases need not, I think, be further commented upon at present. Then, we have the Victorian case of *Higgins and the Railway Commissioners*. Mr. Justice Higginbotham, in his judgment, at page 149, when referring to the fact that the Commissioners appeared before the arbitrators and cross-examined witnesses, says: "This course was taken with the assent of the arbitrators and one of the contractors. It was conceded in the argument that the Commissioners had not, by appearing before the arbitrators, waived any right of objection." On this point I desire to make it clear that we do not accede to the position indicated by my learned friend.

Sir C. LILLEY: That he cannot have his rights reserved by the Court?

Mr. Hutchison: At any rate, we do not concede anything. We do not waive the objection to the learned counsel at once protesting and appearing.

Sir B. BURNSIDE: Have you any authority whatever for excluding the right of the other side, or for accepting absolute appearance as binding the parties?

Sir C. LILLEY: The defendant, when he appears, will reserve his right to reserve jurisdiction. I could put in an appearance, and do so, subject to the question of jurisdiction. It is a courtesy which I would show to the Court; but at the same time I say, "You have no right to try this question against me."

Sir B. BURNSIDE: You cannot plead until you appear.