

Sir C. LILLEY : An incline would be an open cutting, if a cutting were necessary. Then, to build a tunnel must be an expensive part of the line.

*Mr. Hutchison* : Possibly less time would be required to construct an incline than a tunnel ; but, in arranging for the substitution of the one for the other, an unreasonable time was taken up in arriving at a conclusion, by which reason some works were suspended and the financial plans of the company affected if only by uncertainty meanwhile. The two transactions—the one with reference to the deviation and the other with reference to the substitution—were both assented to by the Crown, and each involved delays, which went to the question as to the right of the company to have an extension of time granted for the completion of the whole railway: As to the substitution of the incline for the tunnel, if the engineer's report was favourable to the substitution, it should be granted; clause 4 being in terms "that the company may construct the incline line instead of the tunnel line if the Governor, after having obtained the opinion of two eminent engineers to be nominated by him, is satisfied."

*Sir R. Stout* : If he is satisfied.

*Mr. Hutchison* : If he is satisfied. He having been satisfied, the company had the right.

*Sir R. Stout* : Once he gives his consent.

Sir C. LILLEY : As an official act, undoubtedly. He is to have discretion : "and in his opinion," if he is satisfied it can be "worked at a satisfactory cost," and so on.

Sir B. BURNSIDE : I apprehend that is a reasonable discretion.

*Mr. Hutchison* : If he had said in his discretion, "I will not allow you to substitute an incline for the tunnel," then we should not have had a right to complain. But he gave way and exercised his discretion in the direction the company desired.

Sir C. LILLEY : You surely could not question any relation or act of State by the Governor.

*Mr. Hutchison* : The time he took was very unreasonable indeed.

Sir C. LILLEY : Can you urge that?

*Mr. Hutchison* : With all respect to the Governor, Yes. It was his Advisors, of course, who were responsible.

Sir B. BURNSIDE : Does that observation of the contract apply to the Queen? It is the colony.

*Mr. Hutchison* : The Executive. Paragraph 7 of the particulars is : "That the Queen, by further withholding for an unreasonable time consideration of the application of the company for an extension of time under clause 42 of the contract, prevented the company from raising the capital necessary to complete the railway and to perform the other obligations, and to realise the benefits and rights conferred on it by the contract." The company says it had a right to an extension of time, and it says further that such extension—

Sir C. LILLEY : A right?

*Mr. Hutchison* : Certainly,—a right to an extension of time.

Sir C. LILLEY : On what do you found it?

*Mr. Hutchison* : On the principle that where there are extras ordered or alterations made during the course of a contract any stipulation as to time in connection with that contract is thereby rescinded, and that reasonable time to perform must be allowed. The cases on this point are *Russell v. Sa Da Bandiera* (32 Law Journal, Common Pleas, page 68), and *Roberts v. the Bury Commissioners* (39 Law Journal, Common Pleas, page 129).

*Sir R. Stout* : Might you say what extras were ordered? Our consent to the deviation asked destroys our limit?

*Mr. Hutchison* : That is our contention.

Sir C. LILLEY : I express no opinion myself.

*Mr. Hutchison* : It may be said in this connection, assuming the principle I have suggested as applicable, that these changes, being in the nature of alterations assented to by both parties to the contract, displaced the period first limited for performance; then, on the principle that the company had instead a reasonable time to complete, we should have been enabled by a definite enlargement—of course, reasonable enlargement—to have gone on with the work under the contract. Here, again, the financial character of the undertaking comes in, and it will not be suggested that it was reasonable or proper to go on the London market to raise further capital by the floating of debentures when it was uncertain whether the company would have a definite enlargement of time or not. We had a right to an extension of time, and to have that put beyond doubt for the purpose of financing.

Sir B. BURNSIDE : What time do you think that extends to?

*Mr. Hutchison* : A reasonable time for the completion of works then incomplete. Whether that would be three, four, or any other number of years may be a question possibly for this Court in making its award to consider, whether the award take the shape of a definite pecuniary award or one in the alternative, reducing the damages in part upon the company going on with the railway—a work which the company is prepared to proceed with on a reasonable assurance that they will not be interfered with in the future as in the past.

Sir C. LILLEY : We can make no conditions.

*Mr. Hutchison* : I do not say that such a condition would be enforceable.

Sir C. LILLEY : That might be vitiating the award.

*Mr. Hutchison* : At any rate, the company is prepared to finish the works under reasonable guarantees. The eighth paragraph of the particulars is : "That the Queen, in derogation of the contract, by and through the Executive of the colony, and particularly by the false and defamatory statements of the Minister for Public Works in October, 1892, before a Select Committee of the House of Representatives (which statements became a part of the public records of the colony), made it impossible for the company to raise the capital necessary to complete the railway and to perform its other obligations, and to realise the benefits and rights conferred on it by the contract."