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ADDRESSES OF COUNSEL.

Laid on the Table by the Hon. R. J. Seddon, with the Leave of the House.

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OPENING OF PROCEEDINGS—ADDRESSES OF COUNSEL.

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FRIDAY, 22ND NOVEMBER, 1895.

The Court sat at 10.45 a.m., in the Legislative Council Chamber, Parliamentary Buildings.

Hon. EDWARD BLAKE, Q.C., M.P., Umpire.
Sir BRUCE BURNSIDE, Hon. Sir CHARLES LILLEY, K.C.M.G., } Arbitrators.
Mr. GEORGE HUTCHISON, Mr. THEO. COOPER, Mr. W. H. JONES, } Counsel for the Midland Railway Company.
Mr. J. W. BURCHELL, Mr. GEORGE HARRIS, } Solicitors for the Midland Railway Company.
Hon. Sir ROBERT STOUT, K.C.M.G., Mr. HUGH GULLY, Mr. T. W. STRINGER, Dr. FINDLAY, } Counsel for the Crown.

Sir B. BURNSIDE: As arbitrator appointed by the New Zealand Midland Railway Company (Limited) in this arbitration, I beg to hand in my appointments.

Sir C. LILLEY: As arbitrator on behalf of the Crown I hand in my appointments.

Sir B. BURNSIDE: Before proceeding to any portion of our duties as arbitrators, we have, in fulfilment of the authority in us vested, appointed the Hon. Edward Blake, Queen's Counsel, Member of Parliament, to be umpire in the matter submitted to us, and this is his formal act of appointment which I also hand in. I apprehend that both parties to this reference are before us, either personally or through their legal representative, and I wish to state now that, as Mr. Blake has been appointed umpire, the arbitrators suggest that the parties themselves should, by agreement, consent to his sitting with us, as we propose that he should do, so that he might hear the whole of the evidence and be cognisant of the matters submitted to the arbitrators, and also in order that, in the event of a disagreement between the arbitrators and the matter having to proceed to him as umpire under the reference, no question whatever should arise as to his ability to deal with the matter without his being compelled to go again through the whole of the evidence submitted. Sir Charles Lilley will also express himself on that point.

Sir C. LILLEY: I agree with my colleague Sir Bruce Burnside that that would be the most convenient and desirable mode of procedure, and I suppose that there will be no difference of opinion between the parties as to the wisdom of adopting that course. It would save expense and time. I suppose counsel on either side will be able to say whether full assent is given to that.

Mr. Hutchison: I appear with Mr. Cooper and Mr. Jones on behalf of the company, and the course proposed appears to us to be both desirable and convenient.

Mr. Gully: I appear with Mr. Stringer and Dr. Findlay for the Crown. We are led by Sir Robert Stout, who is unable to be present to-day. We have considered the matter, and we have come to the conclusion that that would be the best course. We therefore consent to it.

Sir B. BURNSIDE: That is, both parties consent?

Mr. Gully: Yes.

Sir B. BURNSIDE: You will send in a joint written consent to that effect subsequently?

Mr. Hutchison: Yes.

Sir C. LILLEY: Are there any reporters present?

Mr. Gully: I believe so.

Sir C. LILLEY: They will have to be sworn. [Messrs Russell and Gore, reporters, were here sworn.]

Sir B. BURNSIDE: We have appointed Mr. S. V. Blake, who is now sitting here, as the secretary to this arbitration and custodian of all documents which may be submitted to us in the course of the proceedings. Next, we fix this as the place of our meetings. We suggest that for the present

the sittings should commence at the hour of 10 in the morning, with an interval of an hour during the day for some refreshment, and that we should then proceed on to some reasonable hour in the afternoon, say 5 o'clock. We suppose that arrangement will suggest itself as being convenient to the members of the Board who may be present, and to the parties themselves. We now enter upon an act of the arbitration—that is, we ask you to give us the particulars of the matters in dispute submitted to us.

Mr. Hutchison: Speaking for the company—which is the complainant in this matter,—I hope the arbitrators do not expect that to be done this morning. We only received an informal intimation of the sitting to-day; but we shall be prepared at the next sitting to hand in our particulars.

Mr. Gully: Might I venture at this stage to say that there are two points which will arise during the course of the proceedings which appear to us to go to the question of jurisdiction. Therefore, in order to save our rights, it will be probably convenient to indicate the points on Monday. They bear on the question of jurisdiction; and I desire to make this statement before the particulars are handed in, so that our action shall not be deemed to be a waiver of any proceedings we may afterwards decide to take. May I take it that I have leave to refer to the two points I desire to suggest in order to save our rights on Monday morning?

Sir C. LILLEY: Is there any objection to sit to-morrow?

Mr. Gully: Does not that depend upon what the particulars of claim are? We might require no time at all to consider them. On the other hand, it is quite possible that it might be reasonable we should have time.

Mr. Hutchison: They might give ground for objection.

Sir C. LILLEY: You could also reserve the points until you make your appearance in Court.

Mr. Gully: That is probably the course I shall suggest. I am only raising these points at all to save our rights with regard to the particulars; at the present time we have none, or practically none; and would it not be convenient that a statement by the claimant on the one side, and a statement by the defence on the other side, should be placed before the Court?

Sir B. BURNSIDE: I think we must leave that matter to the parties themselves. It is for them to decide whether it is the right course or not.

Mr. Gully: I am really making a suggestion to the other side, that the Court would probably be better satisfied if they had the particulars of the claim by the claimants, and the particulars of the defence by the respondents. That is the course we are prepared to adopt if the Court thinks it reasonable and proper. We cannot, of course, deliver ours until we get theirs.

Sir C. LILLEY: You would require reasonable time?

Mr. Gully: If we had the particulars of claim by the morning, we would undertake to deliver our particulars of defence, and would be prepared to go on, on Monday morning. It will not give us much time to consider the way in which we shall frame our defence, but long enough.

Sir B. BURNSIDE: What I understand is that the parties will deliver to us a statement of the matters in dispute.

Mr. Gully: We are unable to submit anything.

Sir C. LILLEY: We are not speaking as advisers. What I want to know is, what disputes and differences are to be decided by us as between the two parties, and what we are to consider. We do not wish to take them out from the addresses of counsel.

Sir B. BURNSIDE: I understand counsel will open the matter to us in an address.

Mr. Hutchison: I presume the ordinary procedure of our law-courts will be followed—that is, to file particulars and deliver copies; then to have any preliminary objections disposed of on these particulars, and afterwards to open the case.

Sir B. BURNSIDE: It is almost impossible to lay down a course of procedure further than that it shall be the general procedure applied to such cases.

Mr. Gully: I should like to ask one more question: May I be permitted, in order to indicate the points which I am going to suggest on Monday on the question of jurisdiction, to file an affidavit?

Sir B. BURNSIDE intimated that there was no objection.

Mr. Hutchison: What we should prefer is this: to file our particulars in the Court and serve copies on the other side, in accordance with the practice in the law-courts of the colony.

Sir B. BURNSIDE: My impression is that you will prepare a statement of the matters in dispute to be submitted to us for convenience, and that you will give the other side a copy of that statement, so that they may be prepared to deal with it on Monday.

Mr. Hutchison: I understand that.

Sir B. BURNSIDE: Will you give us the names of counsel?

Mr. Hutchison: With me are acting Mr. Theo. Cooper and Mr. W. H. Jones.

Mr. Gully: With me are Mr. Stringer and Dr. Findlay on behalf of respondent. We are led y Sir Robert Stout, who is at present in Dunedin, but will, I hope, appear on Monday.

At 11.10 a.m. the Court adjourned to 10 a.m. on Monday, 25th November.

MONDAY, 25TH NOVEMBER, 1895.

The Court sat at 10 a.m.

[Messrs. E. J. LeGrove and J. H. Macalister were sworn in as reporters.]

Sir R. Stout: I understand that there has been an affidavit filed by my friend, Mr. Gully, in reference to the point of jurisdiction. I understand three copies have been filed setting out certain facts. I do not propose to read the affidavit.

Sir C. LILLEY: You think it may be taken as read?

Sir R. Stout: Yes. I understand that it was stated by my friend, Mr. Gully, that this point of jurisdiction would be raised this morning.

Sir B. BURNSIDE: I have no objection to taking the affidavit as read, but it must not be understood that I admit it as evidence.

Sir R. Stout: It is really setting out a document. The facts are stated in the affidavit, and if the affidavit is not accepted we shall have to prove what we want otherwise.

Sir B. BURNSIDE: There is not an admission that it is evidence.

Sir C. LILLEY: It must be understood that any observation made by one of the arbitrators does not bind the two.

Sir R. Stout: The only point I wish to raise is as to the question of jurisdiction as set out in the affidavit. It has been decided by English cases that the mere fact of an award being given in an arbitration does not necessarily waive the right of jurisdiction. There are several cases which I may cite. There is the case of Davis and Price (34, Law Journal, Q.B., page 8, New Series). The head-note is, "If a party to a reference objects that the arbitrators are entering upon the consideration of a matter not referred to them, and protests against it, and the arbitrators nevertheless go into the question and receive evidence on it, and the party, still under protest, continues to attend before the arbitrators and cross-examine the witnesses on the point objected to, he does not thereby waive his objection, nor is he estopped from saying that the arbitrators have exceeded their authority on the matter." There is also a case to the same effect—Ringlands *v.* Lowndes (17, Common Bench, New Series, page 514).

Sir B. BURNSIDE: Did not that case apply to a case before the arbitrators? Was it subsequent or after the award?

Sir R. Stout: I only cite it to show that we have a right to raise this question of jurisdiction under protest. We do it to show hereafter that we have not waived that point. The same point was also tested before the Full Court in Victoria, and with the same effect: Higgins and Wright *v.* the Victorian Railway Commissioners (11, Vic. Law Reports, page 140): "We have, in appointing our arbitrators, stated that we do so under protest."

Sir B. BURNSIDE: Does the case of Davis and Price, cited by you, refer to proceedings taken to invalidate the award after the award has been given, and not to proceedings *in limine?*

Sir R. Stout: The reason I mention it now is this: Suppose we can show the arbitrators that we have no jurisdiction, will the arbitrators proceed? That is for them to consider, and I intend to mention circumstances that will affect the question.

Sir C. LILLEY: Would it be right to object that the Court had no jurisdiction? It would be the foundation in all Courts and all inquiries.

Sir R. Stout: No doubt. The point of view we take is that in this matter power to refer to arbitration is given in the contract itself. I presume copies of the contract have been served—the contract of 1888.

Sir B. BURNSIDE: I understand this to be an argument upon a question of law. They are not admitted facts, and I want to know how we are to apply the law to a set of facts when there are no facts before us?

Sir R. Stout: There is only the contract asked to be admitted. [Contract put in.]

Sir C. LILLEY (to Mr. Hutchison): You admit the Government Printer's copy of the contract?

Mr. Hutchison: Yes.

Sir C. LILLEY: Is this contract to be allowed to be put in for all purposes?

Sir R. Stout: Yes; for all purposes. It is only by virtue of the contract that the arbitration can be called into existence; it is not by virtue of any statute. Of course, the contract had to be approved by statute, to which I shall refer hereafter. We say the contract has come to an end, and if the contract has come to an end the power to arbitrate has also come to an end. That is the law. I would refer to the case of the Llanelly Dock Company against the London and North-Western Railway Company (Law Reports, 8 Chancery Appeals, page 948). The case begins at page 942: "When the case was before the Vice-Chancellor"—and this is the point—"his Honour disposed of it upon the ground that the proper tribunal was arbitration, as provided by 'The Railway Companies Arbitration Act, 1859,' there being a clause in the agreement to the effect that any differences arising under this agreement were to be settled by arbitration, as provided by that Act. Neither party has desired to support that view of the case, and both concur in desiring that the matter should be determined by this tribunal; and possibly it would be difficult to say that the real question between the parties could be determined by the arbitrator under that clause, because, if the plaintiffs are right in their contention, they have determined that part of the agreement as well as everything else." The point was that the agreement was determinable by notice, and when the notice was given the agreement was at an end; and the Chief Justice held that when the agreement was at an end the agreement to arbitrate was also at an end. That was also held in the case of Higgins and Wright against the Victorian Railway Commissioners. And the principle of the thing is apparent. If there is an agreement existing between two parties and it is part of that agreement that there shall be a reference to arbitration on points in dispute, if the agreement is put an end to there is no agreement to arbitrate, because that part of the agreement is put an end to as well as the other. Now, we say that the contract has come to an end on the following grounds. As to these, no doubt, there will have to be evidence, but it will be seen as the evidence proceeds

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: *Primâ 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

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

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.

Mr. Hutchison: That would be the legal position, but I apprehend there is a difference in arbitration proceedings.

Sir C. LILLEY: What makes the difference?

Sir B. BURNSIDE: What I wanted to put was this: that, though the party appears, he can always plead jurisdiction, and he will leave the other party to contend when the plea is put in. The mere fact of appearance without protest would not debar a man from pleading jurisdiction and taking objection to jurisdiction.

Sir C. LILLEY: As a matter of caution, one side can always reserve its right as to jurisdiction, and, possibly, if they did so without any reservation, it might be said that they had submitted to the jurisdiction.

Sir B. BURNSIDE: Do you know any such process in law as appearance under protest?

Mr. Hutchison: No, not at law.

Sir B. BURNSIDE: A man appears and puts in his plea: he subjects himself to jurisdiction. We have the right to decide as to jurisdiction or we have not; and, if we have that right, then clearly the matter must appear before us in some way.

Mr. Hutchison: On facts, no doubt. Here, however, the points contended for are advanced upon highly contentious grounds.

Sir C. LILLEY: My impression is that when a man appears he reserves his right of appeal to the jurisdiction of the Court.

Mr. Hutchison: I accept that as a legal proposition.

Sir B. BURNSIDE: The only process I know is that in the Admiralty Court, where special provision is made. A man may bar himself by some act from raising the question of jurisdiction.

Sir C. LILLEY: The danger is this: If a man appears after objecting to the jurisdiction, he generally is held to have submitted to the jurisdiction of the Court. If he appears, and comes into Court, he must object to the right of the Court to deal with him in any way at the first possible moment.

Sir B. BURNSIDE: Before he comes into Court?

Sir C. LILLEY: Until he appears at the Court he is not before the Court. His appearance is his coming into the Court.

Mr. Hutchison: I take this opportunity of saying that the grounds upon which my friend says he is going to move are not admitted in any sense but are controverted. For instance, under the first head it is said that the Crown contends that the contract has come to an end. Now, we do not admit that the contract has come to an end.

Sir C. LILLEY: That is a mixed question of law, I take it, as it has been presented to us by Sir Robert.

Mr. Hutchison: We say that the company has not abandoned the construction of the railway.

Sir B. BURNSIDE: That would be raised equally well, I presume, whether there had been a protest or not.

Mr. Hutchison: I presume so. The third point raised by the learned counsel is that the seizure of the line on the 25th May last suspends the contract: but that is a matter which I submit can only be dealt with later on. At present I desire to point out that the present arbitration is as to the facts prior to the 14th January last.

Sir C. LILLEY: I understand the other matter is deferred.

Mr. Hutchison: Yes.

Sir B. BURNSIDE: We have not really appointed an umpire, and that matter cannot come before us.

Sir R. Stout: I would say one word in reference to this last point. My learned friend apparently misapprehends my contention. It is as to whether the seizure does not take away the jurisdiction of the arbitrators——

Sir C. LILLEY: Suspends the agreement—suspends everything, in fact?

Sir R. Stout: Yes.

Sir B. BURNSIDE: In fact, that the suspension of the contract has the effect of depriving one party of the legal rights which accrued before the suspension of the contract?

Sir R. Stout: I do not object to putting it as strong as that. If there were legal rights, everything is suspended by the seizure. I do not intend to cite cases at length, but I might say that in the case Ringland *v.* Lowndes, the summing-up of the Judge of the Court of Executive, in 15 C.B., N.S., p. 528, was as follows: "We are of opinion such an appearance under protest does not give any authority, and that there is no waiver, no estoppel; and, consequently, that the award was unauthorised and void. We come to this conclusion upon the authority of the case alone referred to." The reason of that is obvious. No consent can give jurisdiction: it can only waive. That cannot confer jurisdiction. We protest in order that there may be no question of acquiescence raised, as in the Scotch case which was referred to in Queen's case. The question was raised whether there had been acquiescence. We protest now, so that that question cannot be raised against us, even in argument.

Sir C. LILLEY: The submission to a Court of Arbitration is only a personal act; but if it were one of absolute jurisdiction, as in the case of divorce, for instance, then, of course, no appearance will give the Court jurisdiction.

Sir R. Stout: Then, I suppose the arbitrators will not express any opinion on the matter?

Sir C. LILLEY: We are in this position: Suppose we differ upon this, then we must go to Mr. Blake.

Sir R. Stout: Then, the next point is as to particulars. The particulars have not been sent to us. I submit there are really no particulars nor details. As to some of them, I will go over them one by one. The first is that the undertaking of the company——

Sir B. BURNSIDE: May I ask, for the purpose of saving time, if what you are about to urge upon us now is with the ultimate intention of asking for further particulars?

Sir R. Stout: As to the first four, I submit that we must have further particulars; and, as to the other claims made here, I wish to show that the arbitrators ought at once to strike them out, as they are not subjects to be arbitrated upon at all, and cannot be contended to be subjects to be arbitrated upon. They are Nos. 5, 6, 7, 8, and lastly 9, which is a consequential one really. Down to 4 inclusive we ask for further details. The first is as follows: "That the undertaking of the company being work to be remunerated in part by land, as provided by clause 16 of the contract, the Queen, contrary to the provisions of the said contract, refused and prevented the exercise by the company of its rights of selection over large areas of land within the authorised area." Now, surely we have a right to know what areas they were refused selection over. We ask to get details of the reserves made, which may be classified under three heads, as will appear by-and-by. There are reserves made in what may be called the Grey district, and in what may be called the Hokitika district. I am only giving the names just to separate them. We want to know whether they complain about the reserves in all the districts; because, to put it in this way: Supposing it turned out, in the course of arbitration, we called fifty or sixty witnesses in connection with the Buller reserves, and it then turned out that the Buller reserves properly made were miles and miles away from this railway: we are entitled, at all events, to get our expenses in dealing with this if the arbitrators decide that the reserves were properly made. Under the contract we are entitled to reserve 750,000 acres, and we have not reserved 500,000 acres. We have surely the right to get the details of the lands they were prevented from selecting over. It has all been gazetted, and the least we can ask is to get the details of what they complain of. That is as to the first clause. Then, as to the second—"That, if any lands were properly reserved under subclause (*c*) of clause 16, then the company was hindered and prevented in the exercise of its rights under clause 18 by being refused the right to the timber on such lands"—we want to know where and how. We have surely the right to know when the refusal was made and how it was made. We have the right to get these details and particulars. Suppose this had been an action in a Court of law, particulars would have been at once ordered. This would not be held to be sufficient even in the lowest Court of the colony. Then, No. 3 is, "That the Queen has, in contravention of the contract, permitted and authorised the destruction and the removal of timber on lands available for selection, and thereby depreciated the value of such lands." Well, we want also to know where such lands were situated, and how permission or authority was given to destroy timber, and when it was given. Surely we have the right to get that. The arbitrators will see that we are groping in the dark. Clause 18, which they refer to here, says this: "Provided also such option shall not be exercisable over lands the timber on which shall, in the opinion of the Governor, be or be likely to be required for sawmilling industries in existence at the date"—and so on. Then, there is also the right of the miners to take timber for their own mining uses. We have the right to give them that timber. Do they complain of the gold-miners having used timber so as to destroy or injure their line? Until we know exactly what it is they complain of it is impossible for us to cross-examine their witnesses properly. We have no details, and I do not know what we have to meet. Then, the fourth claim is, "That the Queen, in contravention of the contract, refused to give effect to the requests of the company under clause 33 to sell or let lands within the authorised area in the Nelson and Westland Land Districts on the western side of the main range of mountains." Does that western side of the range of mountains include all Westland and Nelson? If it does it includes two or three hundred miles. We have surely the right to know something about it. This "west of the mountains" is of no value to us at all.

Sir B. BURNSIDE: You want the boundaries specified.

Sir R. Stout: If they could tell us the blocks or sections, or specify the reserves or surveys in some way, we might manage. I have pointed out that the reserves may be divided into three classes. There are what may be termed those near the Grey Valley, and the southern reserves due south of the Arahura. Section 33 provides this: "So far as respects any lands within the authorised area in the Nelson and Westland Land Districts, on the western side of the main range of mountains, and being available for selection by the company under clause 16 hereof, the Queen shall, from time to time, on the request of the company, sell any such lands for cash, or on deferred payments in such manner as may be agreed upon between the Queen and the company, or may let the same on lease," &c. That is the section 33 referred to in clause 4.

Sir B. BURNSIDE: They make no reference to it themselves?

Sir R. Stout: They do not say where the lands are situated except that they are on the western side of the mountain-range; but that is not the locality at all, for, as I have said, it is two or three hundred miles long. We want to know the date of the requests, and what the requests are, and where the land is situated, because we cannot meet the claim otherwise. Then, as to clause 5 of the claim, this we submit should be struck out, as it is ridiculous to take up the time of the arbitration considering this at all. Clause 5 says, "That the remuneration of the company being to the extent of £1,250,000 'B 1 value' in land (as the work of construction should proceed), the Queen, by and through the Parliament of the colony, by greatly increased and graduated taxation on land, imposed subsequent to the date of the contract, and without any exception in favour of the lands over which the company had the right of selection, materially reduced the consideration of the contract and destroyed confidence in the undertaking of the company as a commercial enterprise." Well, there might be something in it if Parliament had put on a special tax in dealing with this company; but surely it cannot be suggested for one moment that the Government or Parliament made a contract with the company that was to limit them in varying, for example, their Customs duties or methods of taxation. It is not suggested that they put any exceptional taxation on this company. It would be a most extraordinary thing to say, for example, that the Customs duties should not be varied because of this contract. It amounts to exactly the same thing. I do not suppose there is any country in the world that has not entered into contracts for the construction of railways; and would it be suggested that the making of such a contract would prevent Parliament from putting on any taxation it pleased? It is not like putting special taxation on this company, as

it has been placed in exactly the same position as other bodies or individuals, and I submit that it is mere nonsense to take up the arbitration to suggest such a cause of complaint.

Sir C. LILLEY: There is nothing in the contract binding the Crown?

Sir R. Stout: Nor could the Crown bind itself by contract. Suppose Parliament passed an Act—suppose it has been put in the statute of 1887, which authorised the execution of this contract—and suppose Parliament decided that they would limit future Parliaments in the case of future taxation——

Sir C. LILLEY: And suppose the present Parliament said, "We propose to repeal that decision."

Sir R. Stout: No objection could be made to it. I submit, then, that it is only wasting the time of the arbitrators to suggest such a ground as that to them. The sixth claim is as follows: "That the Queen, by withholding for an unreasonable time consent to the deviation of the railway-line from the western to the eastern side of Lake Brunner, and to the substitution of the incline for the tunnel line at Arthur's Pass, delayed and prevented the company from proceeding with the works under the contract." Here, again, what is the contract to us? It was only a question of permit; and I do not know that there are any English authorities to show that it can be suggested that any damages can be claimed for not giving permission. In the well-known case Julius *v* Bishop of Oxford, quoted in the Law Reports, the question turned upon how the word "may" should be interpreted. It cannot be contended surely—it is not even suggested—that the Queen was bound to give consent to anything the company asked. Suppose the Queen refused to give consent to the incline line, and refused to give consent to the change from the eastern to the western side of Lake Brunner—the complaint is here that the Queen gave consent only after delay. I submit that we were not bound to give consent at all. The seventh ground of claim 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 its other obligations, and to realise the benefits and rights conferred on it by the contract." This is not in the nature of a demurrer that I am raising, but I say that in the face of these particulars and details there can be no right whatever to put in a pleading.

Sir B. BURNSIDE: You cannot raise an objection to particulars by demurrer.

Sir R. Stout: No, but I could raise it by plea. Suppose there had been a breach of contract with so-and-so, they could come and plead to it.

Sir C. LILLEY: Only to the extent of stating their case.

Sir R. Stout: Section 42 of the contract says, "If the company shall not be able to construct and finish the said railway within the period hereinbefore limited in that behalf, or if it shall not before the said thirty-first day of December, one thousand eight hundred and eighty-eight, have expended one hundred and fifty thousand pounds, as hereinbefore provided, the Governor in Council may, by writing indorsed on these presents, if satisfied that the delay has not been caused by the wilful default or neglect of the company, extend the said periods," and so on. How can you claim damages for the Governor in Council not extending the time? He has only got to plead that the delay was caused by the wilful neglect of the company, and he is the sole judge of it.

Sir B. BURNSIDE: Is it urged that consent was given afterwards?

Sir R. Stout: No. It is not suggested that the time was exceptional. That is certainly a most extraordinary thing, that a statement made by a Minister for Public Works before a Select Committee of the House is to give a company a right to sue for damages.

Sir C. LILLEY: Is there any authority?

Sir R. Stout: I am not aware of any. It would be a most damaging thing for the colony if the Crown were to be responsible for the statements made either by the leaders of the Government or the leaders of the Opposition. I am afraid that to this colony it would mean a very large Appropriation Bill. By our law, statements made before a Select Committee are privileged, and I submit that the company could not sue; and, that being so, how can it be suggested that though the company might sue the person who made the statement—that the company might sue the Queen—or that the Queen and the Government of the colony are responsible for those statements? I submit that paragraph 8 is akin to paragraphs 5, 6, 7, and ought to be struck out.

Sir B. BURNSIDE: Your observations with regard to that contract I have been listening to with very great care, but you will observe that it is stated here "a false and defamatory statement." Supposing a party to a contract made a false and defamatory public statement with regard to the terms of that contract to the prejudice of the other party, would not that be a subject for damages?

Sir R. Stout: I submit not. Of course, I do not admit the analogy, because the false and defamatory statement is not made by a party to the contract, but by the Minister for Public Works, who is not any party to the contract. The contract is between the Queen and the company, and I submit that the Queen cannot be responsible for the utterances of her Ministers. Supposing a person slanders another, an action might lie, but that would not be a breach of contract.

Sir B. BURNSIDE: I do not ask whether it would be a breach of contract, but whether it would be a question for the jury to consider in assessing damages upon a breach of that contract?

Sir R. Stout: I submit not. That would be a suit for defamation without bringing in the question of the contract at all. The point I put is this: that it is not a party to the contract who has made this statement. That is my first distinction.

Sir B. BURNSIDE: Who is really a party to the contract?

Sir R. Stout: The Queen.

Mr. Hutchison: The Government of the colony.

Sir B. BURNSIDE: Is the Queen herself in any way subject to the jurisdiction of this Court?

Sir R. Stout: Yes; because the right to arbitrate on the claim has been granted by the Legislature by the Act of 1887, and this is the arbitration, I presume.

Sir B. BURNSIDE: Has the other side a remedy as against the Queen?

Sir R. Stout: We have in this colony a remedy against the Queen, or, at least, what is equivalent, against her representative.

Sir B. BURNSIDE: You have the remedy against the property of the colony. Is that a remedy against the Queen in the same way as it would be called a remedy against a private individual?

Sir R. Stout: It is true it is not in the same sense the same, as the Queen cannot be seized.

Sir B. BURNSIDE: Is it not really a fiction?

Sir R. Stout: It is a necessary fiction in order to enable the government of a colony to be carried on.

Sir B. BURNSIDE: Just in the same way as in the other colonies it would be against the Attorney-General?

Sir R. Stout: Sometimes they put it in that form. It was the same under the old system in dealing with public companies under the Joint Stock Companies Act, where they had a Government officer who was responsible.

Sir B. BURNSIDE: In some of the Line colonies actions are brought against the Attorney-General.

Sir R. Stout: In Victoria they are brought against the Queen, and the Act there is similar in some respects to our Act—the Crown Suits Act—which allows an action to be brought against Her Majesty. But I submit that it is not a party to the contract who has made this defamatory statement. Assuming a party to the contract has made this statement, such party may be sued for defamation—if he has made the statement as against another. I have mentioned that by our law a statement made before a Select Committee is privileged. The other claim is, "That the company, being formed for the purpose of constructing a railway on the system of land-grants, as provided by 'The East and West Coast (Middle Island) and Nelson Railway and Railways-Construction Act, 1884,' and as expressed in the contract between the parties, and being thus known to the Queen as a company which would have to raise money from time to time by share or debenture capital, or both, to enable it to carry out the contract, was, by reason of the premises, prejudiced and prevented from raising the capital necessary." That is No. 9, and it refers to the whole of the other particulars, Nos. 1 to 8. These particulars are merely summarising the mode in which the damage arises. Instead of putting it in the way mentioned in No. 9, it might have been put in the old form, "wherefore plaintiff claims so much damages." The question is, however, of little value, excepting as to form.

Sir C. LILLEY: Has the company summarised in any way its alleged claim?

Sir R. Stout: No; we have received nothing excepting this statement, and it is the most detailed thing we have. I submit this is no detail at all.

Sir C. LILLEY: You have no idea of the company's money-claim?

Sir R. Stout: No; we do not know how it is made up in any way at all. I submit we are entitled as of right to fuller details of the first four; and, as to 5, 6, 7, 8, the arbitrators should now say, after consideration of course, that they ought to be struck out. We ought not to have our time spent in dealing with them. I would also point out that when details are given we ought also to have the same right as we would have in an action here—namely, that in regard to this sum of £1,584,000 it ought to be shown how the damages are made up, so much for each breach. For example, giving an illustration, the whole of the timber that might have been taken off the area might only have amounted to £50 in value. The timber on the west coast of New Zealand is so plentiful that really very little is made out of it. I do not suppose that the people there make 3d. per 100ft. for royalty, although sometimes it might go up to 1s. On account of the labour in getting it and the cost of exportation there is very little profit. We wish for details of that item, and I submit that we are entitled to them.

Mr. Hutchison: Of course, the arbitrators have at present little or no knowledge of the particulars of the company's claim; but it would be a mistake to suppose that the Crown is not very familiar indeed with the grievances of the company.

Sir C. LILLEY: We are not.

Mr. Hutchison: The information is sought presumably for the other side. The counsel for the Crown complains that the Crown is not informed as to this, that, and the other matter. Well, I might be challenged, but I think I am right in saying that the Crown is very familiar indeed with the particulars under the various heads indicated.

Sir R. Stout: No.

Mr. Hutchison: The first four paragraphs of the particulars are in the nature of general statements, I admit at once. I would say with reference to these, as well as to the other paragraphs of the particulars, that if the other side will wait and hear the opening address of counsel in this case they will have the fullest particulars under every head. To ask us to say, for instance, what the items of damage are in the first paragraph—namely, "That the undertaking of the company being work to be remunerated in part by land, as provided by clause 16 of the contract, the Queen, contrary to the provisions of the said contract, refused and prevented the exercise by the company of its rights of selection over large areas of land within the authorised area"—would be to raise a mixed question of law and fact, because although, as my learned friend indicated, large reservations are purported to have been made, we challenge the right of the Crown to have made any one of those reservations.

Sir R. Stout: In all the districts?

Mr. Hutchison: In all the districts. My friend is aware that the crucial point in this clause 16 is that with reference to the mining reserves. We say at once that the Crown has not taken the proper steps to reserve a single acre of land for mining reserves on the West Coast. If we are to be asked, then, to give particulars, it would be to say that the whole of the reservations that are purported to have been made have not been properly made.

Sir R. Stout: If they are not made you can select.

Mr. Hutchison: That is the point. We had the right to select, but we were prevented from selecting. That is what we allege. We were prevented—that is to say, the Crown, contrary to the provisions of this contract, refused and prevented the exercise by the company of its rights of selection.

Sir R. Stout: I would ask, if that is so, that you should put in the applications you made.

Mr. Hutchison: We will do that in the course of the proceedings.

Sir R. Stout: You cannot tell what applications were made.

Mr. Hutchison: We were prevented from selecting any land in the most available areas for selection on the West Coast, because these were intimated as intended to be reserved for mining purposes, or were proclaimed as mining reserves. As I have said, there is an element of law in that. We may be wrong in contending that none of these reserves were properly made. In that event we will be entitled, I apprehend, to go into evidence to show that too much land was reserved. That, again, is a question of law and fact which will be dealt with somewhat exhaustively in the address with which the company will open its case. The second paragraph is in the nature of an alternative: "That if any lands were properly reserved under subclause (*c*) of clause 16, then the company was hindered and prevented in the exercise of its rights under clause 18 by being refused the right to the timber on such lands." Clause 18 is subject to clause 16, subclause (*c*). Subclause (*d*) of clause 16 may be left out of the question altogether, as there were no reservations under it. But under clause 18, if no reservations were properly made under subclause (*c*) of clause 16, then the company was entitled, subject to certain exceptions indicated in the latter part of the clause, to the timber on those lands. As to the particulars of claim under this head, we will give the fullest information in our opening. The third paragraph of the particulars of claim reads as follows: "That the Queen has, in contravention of the contract, permitted and authorised the destruction and removal of timber on lands available for selection, and thereby depreciated the value of such lands." This is a general claim in respect of lands which were not reserved. The fourth paragraph says, "That the Queen, in contravention of the contract, refused to give effect to the requests of the company under clause 33 to sell or let lands within the authorised area in the Nelson and Westland Land Districts on the western side of the main range of mountains." My learned friend was inclined to be facetious as to the phrase used here—"the western side of the main range."

Sir R. Stout: The same phrase is in the contract.

Mr. Hutchison: It is the same phrase as used in the contract, and we are simply pursuing the words of the clause in setting them out here. There was no reason why my learned friend should have afflicted himself with the idea that we would call evidence as to applications under clause 33 on the eastern side of the main range. We were restricted to the western side. As to this paragraph of the particulars, no doubt, we can be more particular—that is, with reference to clause 33 of the contract—because the uncertainty as to the gold-mining reserves does not apply to the same extent with reference to the operations under clause 33 as to clause 18. We can be more precise as to transactions in respect of clause 33, and we shall be prepared to give further particulars as to these. But I would suggest that there is no need now to delay the proceedings for the purpose of further particulars, as the company will have to open at some length, and it will have to quote the outline of its evidence, which will take up considerable time, I am afraid, and during that time the Crown will have plenty of opportunity to go into the particulars we will furnish in the opening address. These transactions complained of will then be pretty fully gone into. So much for the paragraphs of the claim which my learned friend says he ought to have further particulars of; and as to the last, he may reasonably expect details, and he shall have them.

Sir C. LILLEY: As to paragraph 4?

Mr. Hutchison: Yes; the one I last dealt with. My learned friend then referred to No. 5 of the particulars of claim. In the notice served by the Crown on the 23rd November no objection is taken as to this paragraph. But possibly it is not well to seek to restrict the Crown to the notice already given.

Sir R. Stout: What notice?

Mr. Hutchison: To the notice served on Saturday, and which does not refer to this paragraph.

Sir B. BURNSIDE: Which one are you referring to?

Mr. Hutchison: No. 5. That is not objected to. But we see that paragraph 6 is objected to; and then from 6 down to the end, both inclusive. I would first deal with paragraph 5, which has been objected to this morning for the first time. It reads: "The remuneration of the company being to the extent of £1,250,000 'B 1 value' in land (as the work of construction should proceed) the Queen (by and through the Parliament of the colony) by greatly increased and graduated taxation on land imposed subsequent to the date of the contract, and without any exception in favour of the lands over which the company had the right of selection, materially reduced the consideration of the contract and destroyed confidence in the undertaking of the company as a commercial enterprise." I have to ask the Court to consider that this contract stands in a peculiar position. It is not a contract between two private parties. It is a contract between a company formed and administered in England, and only required to give an address in the colony, on the one part, and the representative of the Queen, represented by the Governor, in the colony, on the other part; and it is an essential element of that contract that the company should have the right to select 50 per cent. of the estimated value of the cost of the railway in the shape of land, and should have the right to finance throughout the contract for the purpose of raising the money for carrying on the work. That is an essential matter. In the contract there is reference to certain statutes. The most important is, perhaps, the statute of 1884, called "The East and West Coast (Middle Island) and Nelson Railway Construction Act." It is the second of three Acts referred to in the preamble of the contract. The first is more general; it is the Act of 1881, which was called "the principal Act." The Act of 1884 is referred to as "the said Act." This Act deals with the grant of land. At that time the process contemplated was the selection of land in alternate blocks, afterwards altered by the contract into a right of selection generally.

Sir C. LILLEY: That is a kind of land-grant railway Act.

Mr. Hutchison: That, probably, sums it up—a land-grant railway Act. However, the change in the mode of selection is immaterial at present. Section 9 of the Act of 1884, under the head of "Borrowing Powers," provided that "The company may from time to time, under the authority of this Act, borrow and take up such sums of money as may be necessary for completing the construction of the railway, and for such purpose may issue debentures under this Act." Section 12 gives power to the company to borrow. The form of the debentures is that indicated in the schedule, but the Company might vary the form. This is the basis of contract, and the right and necessity are recognised from the first on the part of the company to borrow money for the purposes of the undertaking. That is also recognised in clause 9 of the contract itself. Clause 9 says, "The company shall not at any time assign, charge, or dispose of this contract, or any benefit or advantage thereof or thereunder, either in law or in equity, without the written consent of the Governor on behalf of the Queen first had and obtained; but this clause shall not be deemed to affect or interfere with or in anywise abridge the powers of borrowing given by the said Act." If that be kept in mind, it will be seen that this provision especially has a most important bearing on the whole undertaking. Now, as to the particular terms of paragraph 5 of the particulars of claim, referring, as they do, to taxation, we do not suggest that the Legislature of the colony had not the power to alter the fiscal laws of the colony, but we contend that, as between this company formed in England on the one side, and the Executive of this colony on the other side of the world, it was not competent for the colony to make such change as we see has been done in this instance without incurring a claim for compensation. That the change was a material one, and affected the company most detrimentally, I think will be proved beyond any doubt. My learned friend says that the colony had the power not only to alter the taxation of land but to alter the tariff. Assuredly; but that reminds me that when the colony, after the date of this contract, did alter the Customs tariff of the colony, it was careful at that time to make an exception in favour of the company's machinery and materials; indicating that in 1888, at any rate, the Legislature had a sense of the propriety of recognising the responsibility the colony was under in dealing with taxation affecting the company. As to the latter part of the paragraph of the claim, referring to the destruction of confidence in the undertaking of the company as a commercial enterprise, we will show very clearly that throughout it was recognised, in the first instance by the Agent-General of the colony in London, acting in concert with the chairman and directors of the company, and afterwards by the Executive in 1887, that it was considered to be an essential element of the enterprise that debenture capital would have to be raised from time to time, and that a change in taxation like this, affecting the land-grant that the company would earn under the contract, was one which went to the root of the stability of the company, and, being a change directly attributable to the Parliament of the country, directly affected the company, and rendered the Queen, as a party to the contract, liable at the instance of the company to damages. Now I come to paragraph 6, which is as follows: "That the Queen, by withholding for an unreasonable time consent to the deviation of the railway-line from the western to the eastern side of Lake Brunner, and to the substitution of the incline for the tunnel line at Arthur's Pass, delayed and prevented the company from proceeding with the works under the contract." With reference to the Lake Brunner deviation, there is no doubt that change in the plans was at the option of those representing the Queen in the colony. They need not have sanctioned any deviation, but they chose to do so; but in doing so said, "We must have legislation for the purpose; we are advised that the powers under the contract do not allow us to assent to a deviation without going to Parliament." These powers were given in the shape of a public Act. In that way the Queen assented to a definite change in the contract, and necessarily affected the time of completion, for there was a considerable time taken up in connection with the deviation after the legislation that the Government considered necessary had been obtained. There was so much time taken in connection with it—in complying with the conditions imposed by the Act—that of 1891—as to enlarge the period for completion under the contract. As to the substitution of the incline line for the tunnel line over Arthur's Pass, that was a matter for which the company under the contract had some right to expect special consideration.

Sir C. LILLEY: But not to payment?

Mr. Hutchison: The provision is contained in clause 4 of the contract, which says: "The company shall not, without the consent of the Governor first had and obtained, deviate from the line of railway as surveyed, or alter any gradients upon the said railway as the same are shown upon the plans of that portion of the said railway from Springfield to Brunnerton"—that is, the east and west line—"deposited in the office of the Minister for Public Works, marked P.W.D. 11554, 11555, 12007, and 12009, copies whereof have been handed to the company before the execution of these presents: Provided that so much of the sheets 54A, 46A, 47A, and 48A of the said plan 11555 as apply to the 'incline line' at Arthur's Pass shall not be deemed to be part of the said plan: Provided also 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 that the incline line when made will be suitable for mineral and other heavy traffic, and in his opinion worked at a satisfactory cost." Here, then, there was a provisional right of change.

Sir C. LILLEY: Possibly.

Mr. Hutchison: And, as both parties assented to that change, they thereby also assented impliedly to an extension of time.

Sir C. LILLEY: What was the effect of changing from the tunnel; would that affect the time?

Mr. Hutchison: Not, I think, in construction.

Sir R. Stout: Yes, it would.

Mr. Hutchison: I am not advised as to that.

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."

My learned friend has suggested that the statements referred to might be privileged. Well, that is a plea which he may raise; if he does, we will meet it at the proper time. I would only anticipate here that, if primarily such a plea were proper, we might contend that there was separate and repeated publications of these statements under circumstances which destroyed the privilege. That is our allegation. In the meantime I need only say here that we will be prepared, if necessary, to meet his plea at the proper time. As the element of finance outside the shareholders of the company is embodied in and runs through the whole contract, defamation by one of the parties, incapacitating the other in the performance of the contract is, I submit, an element in the assessment of damages. My learned friend suggests that in a contract between two private parties a defamatory statement by one against the other would be cause for a separate action at law for damages. That ordinarily would be the remedy of the aggrieved party; but the forum which the parties to this contract have set up is one that is seized of all differences and questions in dispute, and is able to settle all questions arising under the contract, or "in any way whatsoever relating thereto," if I remember the phraseology aright. The ninth paragraph of the particulars reads: "That the company, being formed for the purpose of constructing a railway on the system of land-grants, as provided by 'The East and West Coast (Middle Island) and Nelson Railway and Railways Construction Act, 1884,' and as expressed in the contract between the parties, and being thus known to the Queen as a company which would have to raise money from time to time by share or debenture capital, or both, to enable it to carry out the contract, was by reason of the premises prejudiced and prevented from raising the capital necessary to complete the railway and to perform its other obligations, and from realising the benefits and rights conferred on it by the contract." This is in effect what I have been urging as underlying all the previous paragraphs of our statement of claim, and without reiterating too often the point, which is, however, of the utmost importance, I would leave it on that footing—namely, that financing for the purpose of providing funds for completing the railway was an essential element in the contemplation of the parties from the very beginning, and that therefore these various paragraphs, from 5 to 9, both inclusive, are pertinent and relevant to the present proceedings. As to the others—1 to 4—as I have indicated, they will be developed in the course of the opening, and this course of giving information to the other side will, I think, be more convenient than any attempt to give at the present stage a more detailed statement of particulars specifying blocks, subdivisions, and so on. As to paragraph 2, that is impossible without first of all dealing with the question of law. As to paragraph 3, that, no doubt, is very general, but will not, I think, be so when the opening address is finished. And as to paragraph 4, well, we can give a number of figures now, but that, I think, also would be better left until after the address. And even if my learned friend has anything further to say in the meantime as to further particulars, I would ask the Court to allow us to proceed. Will the Court also hear my learned friend, Mr. Cooper?

Sir B. BURNSIDE: At present we think it necessary only to hear one counsel; during the proceedings we may think it necessary to hear all.

Sir R. Stout: It appears clearly from Mr. Gully's affidavit that we have been asking for particulars from the very first. We have been continually asking them to give us details of their claim, and up to the present we have received none; and this little paper giving details cannot surely be any real explanation of what we have to meet. How are we to meet claims made against us upon such flimsy particulars as these? I submit that they would not be deemed sufficient for an action of £10 in the Magistrate's Court; and we have a claim made against us of over a million and a half of money with no further particulars than these. My friend says that all the reserves were improperly made, and that the mode of making them was wrong. If so, how has he been prevented from selection over them? Did he ever make a selection over reserves said to have been improperly made, or claim them?

Mr. Hutchison: The evidence will show that.

Sir R. Stout: The evidence will show nothing of the kind. We want it put down in black and white. Then, we want the dates on which the applications were made to select over these lands and refused; we want the details. I never knew that they wanted to select over these lands; and they would have been no use to them if they had. The lands were utterly useless for any purpose under the sun; they would not even grow rabbits. Then, as to section 2 of the statement of claim—that if the lands were properly reserved the company was hindered and prevented in the exercise of its rights by being refused the right to the timber on such lands—surely we have a right to know when the application was made. As to the argument of Mr. Hutchison that this turns upon the right of finance, supposing it had been stated at the Select Committee that the company was years ago at the end of its finance and insolvent, and the reserves were made years after, how could that affect them? The important thing is to get the data. I want to know how it was, if all the reserves were improperly made, they said on a former occasion they had no fault to find with the policy of reserving. If they say they were improperly made, I say, give us the dates and the particulars. Then, as to the second claim—the timber—surely we have a right to ask when they were refused permission to exercise their right to the timber. It must be within their knowledge. Then, as to the third paragraph, that the Queen has permitted the removal of timber. We know nothing of that. We want to know to whom the licenses were given and where given. It may be raised that we have given the licenses to cut timber, but we must have the names and dates given. We cannot meet a general statement like this without evidence.

Sir C. LILLEY: Would you be responsible for a breach of the law by a miner if he exceeded his right?

Sir R. Stout: I do not know that we are. Suppose a miner cut the timber and sold it unknown to us, we cannot be responsible for that. Under clause 18 of the contract we have the right to keep timber for existing saw-mills—"required for saw-milling industries in existence at the date when the Queen shall consent to the exercise of such option by the company"—so that the date is

a general claim: we ought to have a specific one. Our Court procedure is that you must specify the amount of damages you claim. I submit that on the breach of contract we should have at least particulars and details and dates; and also what damages they claim for each breach in their details.

Mr. Hutchison: Might I suggest that the opening address on behalf of the company be heard, which will give many of the particulars and details wanted?

Sir R. Stout: We want them now.

Sir C. LILLEY: We will consider the matter for a time.

[The Arbitrators here left the Court for the purpose of considering this question, and on returning,]

Sir B. BURNSIDE said, We have carefully considered the points that have been submitted to us by Sir R. Stout and Mr. Hutchison, and have determined for the present to reserve the decision on these points until we have heard the opening address of counsel on both sides.

Sir C. LILLEY: Perhaps it would be convenient to hear the opening address from each side—the statement, in fact, of their case, first by Mr. Hutchison and then by Sir Robert Stout. Then the notes would be led in on both sides. That is the practice with us, and it is a very convenient one.

Mr. Hutchison: Yes, your Honours.

Sir R. Stout: I do not object. I wish to consult with Mr. Gully, and speak of it at 2 o'clock.

Mr. Hutchison: May it please the Court, I now propose to review the events culminating in the contract of 1888 and bearing on various heads of particulars to be dealt with more in detail afterwards, and I propose to deal generally with the events leading up to the present arbitration. This branch of the subject depends on public records chiefly, and the evidence of the chairman of the company as to the transactions which took place in England. The first event which may be mentioned, but only mentioned, is that in 1875—just twenty years ago—there commenced an agitation to connect the east and west coast of the Middle Island. Petitions in that year were presented to Parliament from inhabitants on either coast, and there were reports laid before Parliament by the Engineer-in-Chief and by various surveyors as to the various routes suggested for the desired connecting railway. In 1878 the Railway Construction Act was passed, which contemplated the Government entering into contracts for the construction of a number of railways in the North Island and in the Middle Island. Amongst the latter was one from Amberley to Brunnerton, on the main trunk Government line through Canterbury and Otago. In 1881 the Railways Construction and Land Act was passed. That is the Act which in the contract is called "the principal Act," but is not of immediate consequence in the present connection. In 1883 a Royal Commission was set up to report upon the scheme of connecting the East and West Coasts, and a connecting line northwards to Nelson. The report of the Commission is in the parliamentary papers of that year—D.–2A. I may say, in passing, that that report was not favourable to the proposed construction of a railway between the east and west coasts, and between the west and north. In 1884, however, as though the project were considered of more importance than the Royal Commissioners thought it to be in the previous year, we find on the statute-book the East and West Coast (Middle Island) and Nelson Railway and Railways Construction Act. This Act I have had occasion already to refer to to-day. It is called in the contract "the said Act." It was under this Act that the contract with Messrs. Chrystall and nine others was entered into in the following year, 1885. That contract was afterwards set out as the First Schedule to the Act of 1886. In the same year—1885—there were proposals for the construction of such a railway proposed by Messrs. Meiggs and Company, but these were not acceded to by the Government. In connection with that proposal there were opinions expressed by Ministers which I conceive to be of considerable importance, as showing the value of the concession which was afterwards granted to the present company. I would, with the forbearance of the Court, refer to some of the speeches of Ministers at that time. In the year 1885, the Minister for Public Works, as reported in *Hansard*, Volume 52, at page 251, says this——

Sir R. Stout: I do not like to interrupt my learned friend, but we do not consider speeches of Ministers in the course of parliamentary debate in any way relevant.

Sir C. LILLEY: It is hardly worth while travelling over that ground unless you can get evidence.

Mr. Hutchison: The evidence would be that of the Minister himself. He will, if necessary, be asked to come here and say whether these were the opinions expressed by him as leading up to and inducing the present contract. They are the public expressions of one in the best position to give an opinion as to the value of the railway proposed to be constructed, and to give an estimate of the probable earnings of the railway when constructed.

Sir C. LILLEY: All this is speculation, I think.

Mr. Hutchison: Not entirely, because the opinions expressed the facts, as well as they could be ascertained, at the time.

Sir R. Stout: You do not rely on representation.

Mr. Hutchison: We do not propose to suggest misrepresentation, as inducing the contract; but, in estimating the value of the railway which the Midland Railway Company has been prevented from constructing, it is right to show the value of such railway as estimated by people in official positions and therefore likely to know.

Sir R. Stout: If it is admissible to show what one Minister said, I presume it will be admissible to quote those who said that the land was not worth anything; and when is it all to end?

Sir B. BURNSIDE: I think when the question of acceptance comes in we will be able to judge of it *quantum valeat.*

Mr. Hutchison: I hope so. This, I submit, has relevancy to the case. I am sorry I shall have to read a good many extracts from documents and letters, but I shall endeavour to make them as

of immense importance to us. So as to the fourth clause of the statement of claim, there is no date given us as to when we refused to give effect to the requests of the company to let or sell lands in the authorised area. I am not aware that the company has asked, or that the Government has refused. Surely we have a right to get the details of it if they have. Therefore I submit that it is unusual to pick out these things and not give the dates or the particulars. Then, as to paragraphs 6, 7, and 8, I would say first, as to the taxation, I cannot understand the contention. I can conceive of this ground being raised if the Parliament of the colony had put special taxation on this company which it had not put on other subjects of the Queen and the colony. That would be a ground for saying that the Queen had acted improperly. But that is not suggested, and it is not suggested that this company held any land particularly. When the Land Act of 1891 was passed, it is true that the tax was varied. But it is not here suggested that this company was specially taxed. The question really turns on this: Will the colony be liable for damages because it altered the incidence of taxation applicable to this company and the rest of the colony? And the arbitrators have to consider this question in dealing with the contract for this railway: Under what section of the contract can this be raised? How can it be suggested that this can be raised under the contract? How can it be suggested or contended? I submit that it cannot be suggested or contended. It cannot be suggested for a moment that it was ever contemplated under the provisions of the contract by either of the parties that there was a question of arbitration as to the power of the New Zealand Government to pass laws, and that that was to be left to arbitration. I submit that to suggest such a thing would be an absurdity. Then, as to reasonable time for the deviation at Lake Brunner, that was done by Parliament by the Act of 1890. Clause 3 of "The Midland Railway Contract Act, 1890," says, "The deviation in the line of railway sanctioned by this Act, when authorised as hereinbefore provided, shall be deemed to form part of the said contract in the same manner as if such contract had originally contained provisions in that behalf, and shall be binding on the parties thereto accordingly." How can it be suggested that an unreasonable time elapsed for giving a concession? Surely that reminds us of the old proverb of looking a gift horse in the mouth. We were not bound to give this concession. We have given it, and we have given it by statute. How can they claim damages because we have not given it before?

Sir C. LILLEY: Have they taken advantage of the Act?

Sir R. Stout: They have taken advantage of the Act, and constructed the line on the deviation. It was a concession to them, and it is enough to stamp their case altogether when they make such a claim as this. Then we come to the next—clause 9. This seems extraordinary. My friend cites two authorities to support his contention. If you have a contract you are entitled to exact from the contractor a penalty of so much per day for non-performance, and, if you ask the man to perform some work in the nature of an extra, then the time is enlarged. That is ordinary law. But that is not claimed here. He founds the extras on two concessions—namely, on the change from the tunnel to the Abt system at Arthur's Pass, and the deviation from the eastern to the western side of Lake Brunner. They call them extras. It is a concession given to them, and they say, "Because you gave us one concession, therefore you must give us another concession as to time." There is no suggestion that this was an extra in any sense of the term, and I repeat that this is simply in the discretion of the Queen to grant this extension of time. It is not a thing bound to be given, and therefore we have not given it. How can they claim damages because it has not been given to them? They claim damages because other concessions were not given to them before, and they say they can get damages because other concessions were given. I again repeat that this decision comes within a class of cases for suing for penalties.

Mr. Hutchison: Which recognise that a reasonable time should be allowed.

Sir R. Stout: You know you are referring to the case of the architect. That case was this: An architect had it in his discretion to say whether an extension of time would be granted for the extras or not, and the Court were divided, two one way and four the other. They held that it was not the province of an architect to bind the plaintiff, and that therefore the plea was not good. That was what they held: the term was not provided for in the contract binding on both parties there would have been an end of it. Now, here, how can it be said that you are to claim damages if you do not give an extension? It is for the Government to say if it is to be given. I can understand this class of cases to be suitable for this purpose. I can understand my friend to say we have not broken the contract for non-completion; but that is not the purpose he seeks to utilise this class of cases for at all. He says that because we do not give this extension of time therefore the company is entitled to damages. That statement cannot be maintained. Then, as to the statements made by the Minister for Public Works. How possibly can that be said to relate to the contract when the arbitration case was agreed to be settled by arbitration? I am not called upon to say whether the company has or has not a good cause of action against the colony for defamation. Suppose it has. My point is this: that this is not a thing to be settled by the arbitrators at all. A statement is sufficient to show that there is no relation to the contract, but that they founded a claim for damages to be submitted to arbitration; that the arbitrators should have the right to lie by for a time, and then prove as to whether an injury was done outside to the company by defamation. I submit it could not be dealt with under section 8. Then, as to section 9, I need not refer to that again, because it is simply a summing-up of the other. We need not object to that.

Sir C. LILLEY: If we strike 7, 8, and 9 out we shall have to strike out others.

Sir R. Stout: I am not caring about that. I submit that the Arbitrators should say as to the taxation question, as to the witholding of consent, and as to sections 7 and 8; also that these are things not put before the arbitration at all. It is only wasting time to deal with them. I submit that the Arbitrators should say that we are entitled to the dates and details and particulars. We ask for them, and if they can be granted—and I am told they can be got from the speeches of counsel—they should be given; and also how they make up their damages. This amount, £1,584,900, is

few as possible. I am by no means going to read all the correspondence or all the records bearing on the subject.

Sir B. BURNSIDE: What is the object of reading them?

Mr. Hutchison: To show the value of the railway which we have been prevented from completing.

Sir B. BURNSIDE: Would a speech show the value?

Mr. Hutchison: This one would.

Sir C. LILLEY: All that may have turned out to be wrong. I suppose the result was legislation?

Mr. Hutchison: Negotiations first.

Sir C. LILLEY: And legislation afterwards?

Mr. Hutchison: Yes. There were many negotiations with the Agent-General. The contract with Messrs. Chrystall and others was with a syndicate who had no intention themselves of constructing the railway; they entered into a preliminary contract with the Government for the purpose of arranging with a company expected to be formed in England for the purpose of constructing the railway; and, before the present contract was formally completed, long negotiations between the Agent-General of the colony and the future chairman of the Midland Railway Company took place on the subject of the assignment of the original contract, subject to modifications to be ratified by Act of Parliament.

Sir C. LILLEY: I confess I cannot myself see the relevancy of any of it, unless in claiming damages you put in this gentleman to swear that the actual value at that time was so-and-so. But what about the value when the contract was broken?

Mr. Hutchison: We say it was the same. This is from the Minister for Public Works of the day, in Parliament.

Sir R. Stout: What date do you rely on?

Mr. Hutchison: 1885, after the contract with Chrystall and others.

Sir R. Stout: I know that some Ministers said that they were not worth anything.

Sir C. LILLEY: We must limit this inquiry to something. This only appears to be a representation, not as to what the parties did in pursuance of the contract on one side or the other.

Mr. Hutchison: I am quoting this as a representation, not as a misrepresentation.

Sir C. LILLEY: Then, why trouble about it?

Mr. Hutchison: In this connection. For instance, a portion of the East and West Coast——

Sir C. LILLEY: I wish to compress this inquiry as much as possible.

Mr. Hutchison: So should we all.

Sir C. LILLEY: I take it that this much may be conceded by both sides: that both parties to the contract believed they were making a good bargain.

Mr. Hutchison: But we will be told that it was worthless and that consequently no damages are recoverable.

Sir C. LILLEY: I think the question will be what the damages were at the time there was a breach. When you were deprived, as you say, of your right to the railway it might be worth fifty millions. That was in 1885. In 1895 it might not be worth fifty farthings.

Mr. Hutchison: Quite so.

Sir C. LILLEY: Then, fifty farthings would be your damages.

Mr. Hutchison: Exactly.

Sir C. LILLEY: This is after all a practical business inquiry.

Mr. Hutchison: But you want to know the circumstances of the contract under which damages are claimed.

Sir C. LILLEY: I do not know that we want to know anything about the contract. I take it that each party conceived they were doing well.

Mr. Hutchison: There is a good deal, I apprehend, so to be proved.

Sir C. LILLEY: You have legislation, of course, which is public record.

Mr. Hutchison: We have negotiations also.

Sir C. LILLEY: The negotiations would not affect the contract.

Mr. Hutchison: Yes, in this connection: that it was recognised as a material element of the contract that the company should have power to finance.

Sir C. LILLEY: Does the contract bind the Government in that respect?

Mr. Hutchison: It binds the Government not to interfere injuriously with the right of the company to finance.

Sir C. LILLEY: I cannot see what it has to do with this inquiry.

Mr. Hutchison: It affects the question of damages.

Sir R. Stout: Of course, it is not usual for counsel to open with evidence that may even be doubtful. It is usual to hold over such evidence so as not to allow it to interfere with the speech. This is a statement made by a Minister who was not a Minister at the time the contract was signed, and how can such a speech by a Minister be relevant to this inquiry? We might have the whole of *Hansard* brought in if this was allowed.

Mr. Hutchison: This is a statement of circumstances. I might, for instance, leaving out all reference to a Minister, state, as matter of fact, what in effect I find here stated, that the population to be affected by the railway was so-and-so——

Sir B. BURNSIDE: You might say you received an assurance of that kind.

Sir C. LILLEY: We do not know how much of *Hansard* is coming upon our heads.

Mr. Hutchison: The contemporaneous declaration of a Minister gives certain facts.

Sir B. BURNSIDE: While you might assert it as a positive existing fact at the time, I question whether a statement by a Minister at that time would indicate what happened.

Mr. Hutchison: He would probably be prepared to repeat the same now.

Sir R. Stout: He does not want *Hansard* to prove what he is going to say.

Mr. Hutchison: We may call the Hon. Mr. Richardson, who was Minister for Public Works, to state what the facts were as he here is reported to have stated them. He goes into detail to make comparisons and estimates of the traffic on the proposed railway.

Sir C. LILLEY: Is that to be traversed by evidence on the other side? Where are we going to stop? It is of no use stating any matter which cannot be received as evidence.

Sir B. BURNSIDE: I think if you are going to read a statement of a particular individual you must show that that was a statement made by a member of the Government, upon which statement the company contracted.

Mr. Hutchison: We do not proceed on that line at all. But, without mentioning who stated them or where they are to be found, it may be convenient for me to state the facts as I find them, and am instructed they can be proved to be.

Sir R. Stout: I understand there are eight different breaches alleged, and yet my learned friend has not handed them in at all. I understand he charges us with having broken the contract, and with having dealt with reserves and timber, and all the rest of it—well, what does it matter if there were millions of people on the West Coast, and what has that to do with the timber or the reserves——

Mr. Hutchison: It has to do with the value of the contract which we say has been broken.

Sir R. Stout: The question is, What have we done to you? If necessary, I can cite a case as to how damages are to be ascertained. There was a case in 1892—Queen *v.* . It is a case of damages for breach of contract. But surely it cannot be said that this sort of evidence as to the probable value of the line in the opinion of a Minister cannot be admitted.

Sir B. BURNSIDE: I presume Mr. Hutchison will read from the paper in his hand to show that So-and-so said so-and-so; but, when it comes to the question of making it evidence, we shall decide that fast enough.

Mr. Hutchison: I prefer not to pursue that question at present, as it probably may be dealt with more appropriately later on. To resume the subject-matter of my address, I would say that the proposals as to the railway were first introduced in 1885 to the notice of Mr. Thomas Salt, the chairman of the New Zealand Midland Railway Company, Limited, by Mr. H. Alan Scott, who was the delegate from the syndicate which entered into the contract of the 17th January of that year.

Sir C. LILLEY: We had better call that the Chrystall syndicate.

Mr. Hutchison: Mr. Salt will inform the Court that, after careful consideration, he was induced to believe the scheme a sound one. Sir F. Dillon Bell, the Agent-General of the colony, gave his assurance——

Sir R. Stout: I object to statements of the Agent-General being introduced unless he was authorised to make representations.

Mr. Hutchison: Sir F. Dillon Bell will be in the colony soon, and he will no doubt be prepared to give evidence as to that.

Sir R. Stout: You are not basing your claim on representations made.

Mr. Hutchison: I claim the right to recite facts or events which led up to the making of this contract, and the circumstances under which it was made; and surely interviews between the chairman of the company which was afterwards formed and the representative of the Executive of New Zealand in England, and in that respect the representative of the Queen, who is named as one of the parties to the contract, are material and relevant to this inquiry. I should certainly ask the Court to hear me on this point, and to hear the evidence. The result of these negotiations is referred to, in the shape of correspondence, in one of the Acts of Parliament bearing on the contract, and I think what I am now opening is matter which should properly be referred to.

Sir R. Stout: The arbitrators will see that this is opening entirely new ground when we are asked to deal with the negotiation or the talk that took place years before this contract was entered into. The negotiations with the Agent-General took place in the early part of 1886. All the negotiations that came to anything were embodied in an Act. That Act was not accepted by the company; and then, I presume, there were further negotiations, and a further Act, and so on; and can it be said for one moment that the negotiations between the Agent-General and the company, and what Mr. Salt believed and what he was told, are relevant to this inquiry? The contract speaks for itself. I cannot see what possible bearing this has on what is alleged against us.

Mr. Hutchison: I am leading up to the making of the contract.

Sir R. Stout: We deny that the Agent-General was authorised to make any agreement whatever, and the statute shows that "Sir Dillon Bell told Mr. Salt something." How can that be relevant to this inquiry?

Sir B. BURNSIDE: To such extent, then, it is not evidence—if it is not attempted to be put in to make up evidence.

Sir R. Stout: If it is evidence, surely we have a right to object to it. The proper thing for my learned friend to do is for him not to open the evidence.

Sir C. LILLEY: That is for Mr. Hutchison to decide.

Sir R. Stout: I submit that the ordinary course is for counsel, if he proposes to open to the Court something about which there is no doubt, not to do so, but to hear the case upon the evidence, and then for the admissibility to be argued.

Mr. Hutchison: I take it upon myself to say that, to the best of my opinion and that of the colleagues with me, this evidence will be found to be relevant, and we will submit it as relevant.

Sir R. Stout: That does not make it relevant.

Mr. Hutchison: There is no jury here, and there is no one likely to be prejudiced by a reference to what may afterwards be ruled out or considered as inadmissible.

Sir C. LILLEY: My object is—I speak for myself—to save time. I am sure, Mr. Hutchison, that you do not wish to waste time.

Mr. Hutchison: Not by any means.

Sir C. LILLEY: You may make statements without reading this letter. You might state generally that it is an important district, and that the population is large.

Mr. Hutchison: I had proceeded beyond that point. I am now dealing with the history of the contract, and that, I submit, is relevant.

Sir C. LILLEY: I confess I do not see it. We have the contract here.

Mr. Hutchison: The contract is not one originating in itself. There are several Acts of Parliament incorporated with it, and a previous contract referred to in it.

Sir C. LILLEY: I am not of the opinion of my colleague, because he may wish to hear this, or he may think it does not matter at present.

Sir B. BURNSIDE: My opinion is that it does not matter two straws, excepting for the purpose of enabling us more fairly to grasp the facts when they come before us. We hear you as diligently as we hear Sir Robert Stout, Mr. Hutchison, and in anything you put before us we shall decide whether you are right or wrong.

Sir R. Stout: I suppose that the admissibility of evidence is not to be gauged simply by what counsel chooses to say in his opening?

Sir B. BURNSIDE: Of course not.

Sir R. Stout: Then, on the main question of putting this in now, he is to be allowed to say anything he pleases, whether evidence or not. It is giving counsel a very——

Sir B. BURNSIDE: Is it possible to say that a particular thing is relevant?

Sir R. Stout: Suppose in the opening of a case counsel proposes to lead certain evidence, and the other counsel says it is not evidence and that it is not relevant. If there is reasonable ground for opposition to it, the Court generally says, "We will agree before you open that you can tender the evidence, and we will deal with its admissibility afterwards."

Sir B. BURNSIDE: That is the course you have adopted?

Sir R. Stout: Yes.

Sir B. BURNSIDE: Where counsel address the Court and bring before it matter which should not have been brought before it, they assume an enormous amount of responsibility.

Mr. Hutchison: With a due sense of responsibility, I shall ask the Court to hear what I am about to say in reference to the transactions in London in 1886.

Sir B. BURNSIDE: It being understood most distinctly by both sides that, if the admission of evidence of any kind tends to raise or embarrass any clear and distinct matter which arises out of the contract, you will find my colleague and myself will very soon be prepared to stop it.

Mr. Hutchison: A material fact in connection with this business was the preparation of the prospectus of the company. That prospectus was submitted to the Agent-General, who, we say, represented in London, in this matter, the Executive of the Colony of New Zealand. I propose at the proper time to put in a copy of that prospectus.

Sir R. Stout: What date was this?

Mr. Hutchison: The 30th April, 1886. I repeat, it was a prospectus submitted to the Agent-General and approved of by him after he had consulted the legal advisers of the colony in London.

Sir B. BURNSIDE: For what purpose was that prospectus issued?

Mr. Hutchison: As showing that there was notice from the first to the Queen, through her representatives, that it was an essential part of the operations of the company that they should be able to finance beyond the subscribed share capital of the company.

Sir R. Stout: That prospectus was issued two years and a half before the contract was made.

Mr. Hutchison: Just so; the connection will appear presently, when I come to show the reason for an extension of time. All these delays, of course, prevented the company from beginning the work of construction.

Sir C. LILLEY: Am I right in assuming that you wish to implicate the respondent, the Queen, in the financial transactions of the company?

Mr. Hutchison: I am not attempting to implicate the Queen in anything, but to show that it was an essential element that her subsequent actions, through her representatives, militated against and interfered with the company.

Sir C. LILLEY: That she was responsible?

Mr. Hutchison: Yes; by preventing the company from deriving the contemplated benefits of the contract.

Sir C. LILLEY: That it caused the ill-success of the company?

Mr. Hutchison: Yes.

Sir C. LILLEY: Where do you find this contract?

Mr. Hutchison: The recitals of the contract contain references to the Acts of 1881 and 1884. The power to borrow on debentures, with a special charge against the landed estate of the company, is conferred by those Acts.

Sir C. LILLEY: That is all right. It was the estate of the company that was charged, and not the estate of the Queen.

Mr. Hutchison: It was a right of selection the company had.

Sir C. LILLEY: Then it was security for the debentures?

Mr. Hutchison: Yes; the property of the company is the security of the debenture-holders.

Sir C. LILLEY: How do you implicate the Queen in that?

Mr. Hutchison: Because she—speaking of Her Majesty, as represented in the matter of this contract, by the Government of the colony—knew it was part of the contract that the company should be able to finance in this way. This paragraph occurs in the prospectus, which was approved, as I have already said, by the Agent-General, who represented in London the Government of the colony: "Recognising the importance of the line to the colony, the New Zealand Government

have agreed to make a free grant to the company of lands to the nominal value of £1,250,000. The directors are fully persuaded of the substantial character of this grant, as the value is to be arrived at by arbitrators to be nominated by either party, and they are only to take into consideration the estimated market value of the lands immediately prior to the making of the original contract, without reference to any prospective value that will be given to such lands by the railway. It is a matter of common knowledge that in New Zealand, as in other new countries, the making of a railway rapidly increases the value of the lands served by it. It appears, therefore, to be a moderate estimate to assume that lands which have been thus valued at, say, 10s. per acre will, on the making of the line, realise at least 20s. per acre, thus making the company's estate worth at least £2,500,000 for the purposes of realisation." Further on it says, "In the country traversed by the line are large and valuable deposits of gold, coal, iron, and other minerals, with abundance of timber, and hard and soft building-stone of excellent quality. From these sources alone a valuable traffic should come upon the railway. The export of gold from the western districts during the year 1884 (as shown in the Government returns) was of the value of £454,519, which may be taken to be about the average. The coal, from its excellent bituminous properties, is valuable not only for local consumption, but for export, and from this source alone considerable traffic may be expected. The demand for timber is already great, not only on the treeless plains of Canterbury, but also in most parts of New Zealand and Australia. The railways in the South Island, as shown by the official returns, earned on an average 4 per cent. per annum during the five years ending in 1885, on the capital invested in them, by traffic alone." That was in the prospectus which was issued by the company, after being approved by the Agent-General. The share capital is stated in the prospectus as £500,000, of which £250,000 was offered for subscription, and was taken up. The company proceeded, even before the present contract was entered into, with certain works for the purpose of employing the capital which had been raised, although at that time it had not the formal contract which was considered essential for the purpose of the undertaking, and which afterwards, on the 3rd August, 1888, entered into. The contract with Chrystall and others had been, on the 14th May, 1886, transferred to the company by indorsement on the original deed, and £5,000 deposited in terms of that contract with the Agent-General.

Sir R. Stout: When do you say the prospectus was issued?

Mr. Hutchison: On the 30th April, 1886; and in the next month, on the 14th May, the Chrystall contract was transferred to the company; so that we have from that date, at any rate, the company in the position of a party contracting with the Queen, or rather in the position of the assignee of certain concessions which were recognised by both sides as standing in need of modification. Afterwards another contract was substituted, as expressing the modifications considered necessary, but not until after long negotiation. On the 30th July in the same year—1886—was passed the East and West Coast (Middle Island) and Nelson Railway and Railways Construction Act Amendment Act; and I think this Statute will justify the introduction of some evidence which might otherwise be open to challenge. There are recitals in this Act which are important. The first recital is that of the Chrystall contract. Then there is the recital of the assignment I have just referred to, and a recital of the deposit of the £5,000 which I have also referred to. Then comes this recital: "And whereas it has been proposed by the company [meaning the Midland Railway Company] that certain modifications in the original contract shall be made, the nature and terms whereof are generally indicated in the correspondence set out in the Second Schedule hereto, and it is expedient that the authority of the General Assembly should be given for making a further contract embodying such modifications as hereinafter provided." Section 2 provides that "the company shall undertake to carry out and be bound by all the provisions of the original contract, with such modifications thereof as are mentioned in the correspondence set out in the Second Schedule." Further on it says that such contract "shall, immediately upon the execution thereof, and without any further or other proceeding, be operative and have full force and effect, notwithstanding that the terms thereof may be repugnant to or inconsistent with the provisions of the said Acts or either of them." As a matter of fact, there was no modified contract entered into under this statute. The negotiations were difficult and protracted, and some other circumstances intervened to make it for a time impracticable to arrive at a consensus of opinion as to what the precise terms should be. In December of the same year an effort seems to have been made by Mr. Brodie Hoare, who was one of the directors of the company then in the colony, and the Government, to arrive at a contract under this Act of 1886, and a draft was prepared and sent to London for the approval of the directors of the company. That draft contract will be found indicated by a certain arrangement of type in D.–2, 1887. The directors, however, did not see proper to accept the proposed contract, and further negotiations took place. I would at this point seek to refer to certain events which I submit have a material bearing upon the subject of the present inquiry. In January, 1887, there appeared, what will be often referred to throughout these proceedings, a Proclamation by which the whole tract of Crown lands in the Grey Valley were declared to be a reserve under the Mining Act at that time in force.

Sir R. Stout: Was it not dated December?

Mr. Hutchison: I said, in January, 1887.

Sir R. Stout: Was it not dated December?

Mr. Hutchison: The 11th January is the date. It was gazetted on the 20th. I will have occasion to refer again to this Proclamation when I come to deal with the subject of the mining reserves. In this connection, however, I may state that when news of that Proclamation reached London it had a most detrimental effect upon the operations of the company. That the whole of a territory, aggregating between 700,000 and 800,000 acres, along the course of the railway north and south should be in one block reserved for mining purposes, and so withdrawn from the right of selection by the company, was nothing short of a blow that a company formed on the basis of the right to select land likely to be benefited by the construction of the railway could scarcely

hope to recover from. At the same time there also reached London a statement by the Premier of the colony——

Sir C. LILLEY: This was in 1887?

Mr. Hutchison: Yes, after the assignment of the Chrystall contract to the company, and pending an arrangement for a modified contract.

Sir C. LILLEY: After that you entered into this contract with your eyes open?

Mr. Hutchison: After getting certain modifications of the existing contract and making sure of other points.

Sir C. LILLEY: The new contract was after this Proclamation?

Sir B. BURNSIDE: Was the contract made subject to that Proclamation?

Mr. Hutchison: Oh, no. That Proclamation was afterwards withdrawn *in toto.* Six months after a *Gazette* notice appeared withdrawing it. I was about to refer to certain statements made by the Premier of the colony soon after the Proclamation appeared. If my learned friend really objects——

Sir R. Stout: I do not object. If you are going to put in one statement put them all in.

Mr. Hutchison: Just so. I am going to put in a statement of my learned friend himself, who was then Premier of the colony.

Sir R. Stout: I held the opinion I hold now—that the land was valueless.

Mr. Hutchison: My learned friend, who was then Premier of the colony (and consequently his utterances had a very great weight), declared in a speech at Waipawa on the 26th March, 1887, that the 250,000 acres given to the Wellington-Manawatu Railway Company—another of the railways mentioned in "The Railways Construction Act, 1887"—was ten times more valuable than the 2,000,000 acres purported to be given to the East and West Coast Company. That is to say, one-eighth of the area was ten times more valuable; or, taking the Manawatu concession at an average of £1 an acre, that the landed endowment proposed to be given to the company as half the estimated cost of the railway concession was not worth more than 3d. an acre. There was not sufficient land on such a valuation within fifteen miles of the proposed line which could be selected under the terms of the Chrystall contract, which was all that then existed beyond negotiations, which could represent anything like the one and a quarter millions' worth of land which the company had a right to expect would be available for selection. In the circumstances, it was out of the question that financing could go on. I understand that my learned friend, while also holding the same position of Premier, referred in a speech he delivered at Napier to the concession to the company as consisting of glaciers, snowy mountain-tops, that there was little or no timber, and that the land would not feed a goat to the acre. Of course, the company was not going to be put off with scenery, however sublime.

Sir C. LILLEY: Did it make a new contract afterwards?

Mr. Hutchison: It stipulated for a guarantee of land to the value of one and a quarter millions, requiring that the area of selection should be enlarged so as to insure that they should get the one and a quarter millions' worth of land.

Sir C. LILLEY: Is that in this contract?

Mr. Hutchison: That will appear.

Sir C. LILLEY: It is in the schedule?

Mr. Hutchison: The maps illustrate it. The schedules are on the maps, and form part of the contract.

Sir C. LILLEY: And made part of the contract?

Mr. Hutchison: Yes. The position then was that in consequence of these statements the company was paralysed.

Sir C. LILLEY: That is, whilst the Proclamation subsisted?

Mr. Hutchison: By the Proclamation and by the statements of persons in official positions depreciating the worth of the concessions. The year 1887 was indeed a disastrous one. It evolved also a change of Ministry, and that also meant delay in the completion of the arrangements. It will not, I hope, be considered irrelevant for me in this connection to read a Memorandum which the retiring Colonial Treasurer, Sir Julius Vogel, left behind him. It reads as follows:—

"TO MY SUCCESSOR:—The change of the arrangement with the Midland Railway Company has been in the hands of Mr. Richardson"—Mr. Richardson was Minister for Public Works—"and myself. After the Act was passed in 1886 a new contract was framed, with the approval of the local Board of the Midland Company, but subject to the ratification of the Home Board." That is the transaction I have referred to as Mr. Brodie Hoare's draft proposal. "The Home Board was not able to ratify it, because, as they represented, and the Agent-General confirmed, they could not, under its terms, obtain the necessary capital." Here, then, we find the foremost Minister in office at the time admitting that the Agent-General was representing, in connection with the negotiations then going on, the Executive of the colony. "The Board," Sir Julius goes on to say, "is composed of high-charactered influential men. The enterprise could not be in better hands; and there is no reason to doubt that they wish to proceed with the railway, and will be content with any equitable arrangement that will enable them to obtain the necessary capital. Negotiations have been continuously proceeding during many months. The Agent-General has acted for the Government on the basis of endeavouring to arrange within the four corners of the powers given by the Legislature. In May last the Board sent out the alterations they desired to see made in the contract. In July one of the contractors with the Midland Railway saw Mr. Richardson and me and suggested modifications less onerous than those proposed by the Board, which he thought might prove acceptable. Mr. Richardson and I so far approved of them as to say that, if the London Board were willing to adopt them, we would submit them to Cabinet, with the view of the Cabinet considering whether it would recommend them to Parliament. This matter has ceased to have importance, as the Home Board did not adopt Mr. Avigdor's suggestions. In August the Board amended and modified the alterations for which they had previously asked. They urged acceptance

by cable, but it was impossible, of course, to give such acceptance in the absence of the specific text of the alterations. The alterations proposed reached Wellington on the 19th September. It was impossible to submit them to the Government before the elections took place, and after the elections, obviously, the Government could not deal with them,"—that is so: the Government had been left in a minority at the polls—"and therefore Mr. Richardson and myself did not submit them for consideration. The matter, therefore, must be left to our successors. In referring to it, I wish to express the opinion (and Mr. Richardson concurs) that there should be no difficulty now in putting the last proposals of the company into a shape that will be satisfactory alike to the colony and to the company.—JULIUS VOGEL, 7th October, 1887."

The new Government came in shortly after that date, and in the ensuing session referred the subject to a Select Committee, which reported in November of that year, and attached to their report a draft new contract. An Act of Parliament followed on the 23rd December. It recites that, "Whereas a Select Committee of the House of Representatives of the General Assembly of New Zealand was appointed during the present session of such Assembly, to whom was referred the proposals for amending the contract for the construction of the Midland Railway, and which had been entered into under the provisions of 'The East and West Coast (Middle Island) and Nelson Railway and Railways Construction Act, 1884': And whereas such Committee has reported 'That, in the opinion of the Committee, a new contract should be prepared embodying the several provisions of the Acts of 1884 and 1886, the contract of 1885 legalised by the Act of 1886, and the further' (draft) 'contract amending the contract of 1885, and that an Act should be passed empowering the Governor to execute such new contract. Such new contract should, as far as practicable, contain provisions in the same words as are used in the said Acts and contracts, and, where any deviation is necessary in order to render the new contract consistent throughout, the alterations required should be to the same purport and effect as the draft contract hereunto annexed.'" And then follow, after some further recitals of an unimportant character, the operative parts of the Act, which provide for the substitution of a new contract. So ends 1887. The draft contract proposed by the Committee was somewhat altered by the Government, and formed the basis of further negotiations between the Agent-General and the company in London. A considerable correspondence followed, chiefly as to clause 38 which was considered most important in view of the financing of the company. It was on the 3rd August, 1888, that the contract with which we are more immediately concerned was executed, and Mr. Salt will tell the Court that the official intimation of the contract being signed—although every day was of importance then—was not communicated until the 23rd September—some six weeks after—and then by a private message from the Agent-General's office.

Sir C. LILLEY: When did he sign it on behalf of the company? Did he sign it?

Mr. Hutchison: Yes. Mr. Salt and Mr. Brodie Hoare signed it, but the date they actually appended their names on behalf of the company does not appear in their attestations.

Sir C. LILLEY: But the contract gives the 3rd August.

Mr. Hutchison: Yes; it was executed then, probably.

Sir C. LILLEY: Sir William Jervois, the Governor, puts the seal, but the date would be the 3rd August.

Mr. Hutchison: Yes. At this stage it may be as well to recall the lapse of time that had occurred since the date of the original contract. It will be observed that the same period for the construction of the railway is mentioned in the new contract as in the old—namely, ten years from the 17th January, 1885. Thus, the new contract was executed three and a half years after the original contract, and some two years and three months after the assignment of said original contract to the company. It may be asked why some modification was not made in the new contract to enlarge the time for the completion of the work; but I will refer to that point when I come to deal with the question of time. In April, 1889, the company proceeded to raise money on debentures, which was contemplated as the course to be pursued throughout all these Acts and the contract itself. Mr. Salt will describe the nature of the difficulties the company had to encounter at that time. I have here a copy of the debenture-capital prospectus. This prospectus was, like the prospectus of the company, submitted to the Agent-General and approved of by him. It was a term of this prospectus—a representation set out in the prospectus—that no further issue of debentures would be made until the line to Reefton was complete and in working order. It reads: "The present issue of debentures"—which was for £745,000—"is made—(1) to extend and equip the line to Reefton, about forty miles; (2) to make and equip about twelve miles of line into the timber district . . .; and (3) to construct, in accordance with the contract, at Springfield (Christchurch), and Belgrove (Nelson), the extension (about six miles at each place) of Government railways now in operation at these points, in all about sixty-four miles of railway. The line to Reefton passes through the best coal and gold districts of the colony, where during the last few years much land has been taken up for farming and mining, and the population is rapidly increasing, and the demand for land (which is under the contract withheld from sale by the Government) is far in excess of what the company is now able to supply. There is now a substantial traffic between the important and growing townships of this district and the harbour of Greymouth, which will be largely increased by the construction of the railway. It is estimated that the existing wagon and highway traffic alone should yield about 5 per cent. upon the capital required for this section. The gross receipts of the Greymouth Government line, of which this line is a direct extension, were £3,602 per mile for the financial year ending 31st March, 1888, and when the accounts for the year ending March, 1889, are published it is believed this figure will be maintained. It is estimated that an annual gross receipt of only £1,100 per mile on the Reefton Section would pay 8 per cent. upon the capital required for this work. No further issue of debentures will be made"—and this I consider somewhat material with reference to this inquiry—"until the line to Reefton is complete and in working order, or until the present issue is repaid in the terms of the trust deed." That leads me to deal with the subject-matter of the statement of particulars which have been filed,

and which I hope, as I proceed, to so amplify as to meet the objections of the other side. The line to be constructed between Brunnerton and Reefton with the proceeds of the debenture capital raised in 1889 was a portion specially chosen as most likely to bring in an immediate return. That was the locality over which the Proclamation had previously been made about two years before, and soon after withdrawn. It is at this point that the first serious grievance of the company arose. It was very soon after this section of the railway had been begun out of moneys thus raised that a series of Proclamations, at evasive intervals of time, were issued: practically they were a series with an almost obvious intention of doing again what had been done some two or three years ago but withdrawn. The wording of subclause (*c*) of clause 16 of the contract provides that the reservations shall be made "from time to time."

Sir C. LILLEY: "Evasive." That is rather like a charge of fraud.

Mr. Hutchison: The term has been used before in connection with this very matter, and I adopt it as expressing the character of what occurred. With scarcely any break in continuity, reserves were made which practically had the effect of again doing what the single Proclamation in 1887 had previously attempted to do. This leads me to consider——

Sir C. LILLEY: I would like you to give us your idea of "evasive intervals of time."

Mr. Hutchison: A week or two. My reference may be clearer when we come to criticize the wording of subclause (*c*) of clause 16. I only incidentally refer to the fact at this point. The new contract gave the company, instead of the right to land in alternate blocks under the contract of 1884, the right of selection over a very large area of land—more than five million acres in extent—out of which it was considered the company would be sure to obtain land to the value of the million and a quarter which it was part of the contract it should receive as half the estimated cost of the railway.

Sir C. LILLEY: Was there not some provision as to the frontage of the line?

Mr. Hutchison: Not any at all. It was a general right of selection over an immense area in the Middle Island, out of which the company were to select lands, as defined by what is called the B 1 map, up to the limit of £1,250,000, which was 50 per cent. of the estimated cost of the railway.

Sir B. BURNSIDE: That is in the real contract.

Mr. Hutchison: Yes.

Sir B. BURNSIDE: All the lands are scheduled in the new contract?

Mr. Hutchison: Yes. The alternate-block system was abolished, and instead there was a right of selection at values defined by schedules attached to the maps annexed to the contract. The second of these maps is the B 1 value map. The prices of the lands in the schedules range from 10s. up to £1 17s. 6d. an acre.

Sir B. BURNSIDE: The contract forbids you going outside the area.

Mr. Hutchison: Yes, we cannot go outside; but there is supposed to be plenty—abundantly so—for the purpose of clause 16, which gives the company the right of selection with certain exceptions. The only exception of importance to be noticed at present is the exception indicated by subclause (*c*), which reads, "All lands which from time to time, in the opinion of the Governor, are or may be required for *bonâ fide* mining purposes, and the several purposes connected therewith or incidental or conducive thereto, and which lands shall from time to time be set apart and defined by Proclamations to be issued in that behalf; but no more than ten thousand acres shall be so set apart or proclaimed in one block at any one time; and the lands so set apart and proclaimed from time to time shall not in the aggregate exceed seven hundred and fifty thousand acres." Now, I have to submit an interpretation of this subclause to the Court. I would, first of all, call the attention of the Court to the fact that the opinion here to be exercised is that of one of the parties to the contract. It cannot be said that the Governor is other than the representative of the Queen—the agent of the Queen—who is one of the contracting parties; and on that point I would submit that the opinion of the Governor may not be conclusive on a question of the kind. If an employer is to decide on any question, his decision is conclusive only if he acts *bonâ fide*, which is a question of fact. That is decided in the case Studhart *v.* Lee (32 Law Journal, Q.B., page 75). In a further case the decision is thus noted: "Where a contract required the work to be done to the satisfaction of the other party, his approval was held not to be a condition precedent." That is the case Dullman *v.* King (4 New Cases, page 106). Now, as to the phrase "from time to time," which occurs in the first line of this subclause, these words appear to have their correlatives in the next sentence, where the opinion of the Governor is to be exercised as to what "are" or "may be" required for a certain purpose. The opinion to be thus arrived at by the Governor from "time to time" would not, I submit, be properly exercised at what I have called evasive intervals of time—the expression of opinion must have relation to events arising and calling for the exercise of a sound judgment. There is a phrase in the 18th clause which may throw some light upon these words: "from time to time in the opinion of the Governor are or may be required." The phrase I would refer to is to be found in the second proviso of the 18th clause, which provides for the making of certain exceptions which in the opinion of the Governor may "be or be likely to be" required. There the Governor seems to have a larger power than under clause 16, under which it is contended that he cannot look into the future—that the words "may be" should be construed as to events actually occurring at the time. The word "required," which follows the words "are or may be," seems to have an important bearing on the context.

Sir B. BURNSIDE: You say there must be existing facts which call for an exercise of the power?

Mr. Hutchison: Yes, that is what I contend. There must be potential facts. "Likely to be" is the phrase in clause 18, which would justify a speculative opinion. In clause 16 the "may be" means, I submit, an opinion to be exercised at some future time, but only on existing facts supporting a then present opinion. Then follow these words: "for *bonâ fide* mining purposes." I submit that these do not mean "colour" (to use a mining phrase) or "colourable," but "real,"

existing facts. Then, we have the further words in the clause as to "the several purposes connected therewith or incidental or conducive thereto," regarding which there cannot be, I think, much contention. Now, the submission I have to make in connection with the whole of this subclause (*c*) of clause 16 is that it is to be read subject to the Mining Act in force at the time of this contract being entered into. I have not referred to the Proclamations as evidencing anything but the obstructive action of the Government—in fact, we challenge the Proclamations. They appear to have been made under the contract. I contend they should have been made under the law as at the time it existed.

Sir R. Stout: What law?

Mr. Hutchison: The mining law.

Sir R. Stout: The Westland Act might be used.

Mr. Hutchison: No; these Proclamations were not made under any Act. We say that they should have been made under the Mining Act.

Sir R. Stout: Do not they say, "anything and everything enabling them thereto"?

Mr. Hutchison: They do not purport to be made under the Mining Act.

Sir R. Stout: Where do you say it is under the Mining Act?

Mr. Hutchison: The law as to mining at the time in force was contained in the Acts of 1886 and 1887. These give an intelligent meaning to the clause which it would not otherwise have. If the Proclamations were made under the Mining Act, in relation to subclause (c) of clause 16 of the contract, they could only have been made in respect of areas where there were actual gold-workings, and where there were actual gold-workings the company would have been the last to object, inasmuch as nothing is more fruitful of traffic than a goldfield. Our objection comes to this: that these reserves were made where there was no gold-mining of any consequence, and that we were thus prevented from selecting lands along the route of a railway made for the purpose of producing revenue as against the debenture capital of 1889. The effect of these so-called mining reservations was that when the railway was opened for traffic, instead of serving a populous and prosperous district, it might almost as well have been made through a desert, except, of course, in respect of the lands previously settled in the Grey Valley, which, however, were of a very limited character. Now, the Mining Act of 1886 provides under Part I. for mining districts being proclaimed in any part of the colony. The lands on the West Coast that I am now referring to had been all proclaimed mining districts—that is, in the sense of bringing them under the operation of the Act. There were the Reefton, the Westland, the Nelson, and other mining districts proclaimed under the law I have referred to.

Sir R. Stout: They were proclaimed before, and this Act continued them.

Mr. Hutchison: The important section of the Act is the 25th, which says: "The Governor, in any Proclamation constituting a mining district, and also from time to time by Proclamation subsequently issued, either by general or particular description, may set apart for mining purposes exclusively any portion of Crown lands within a mining district, and in like manner may exempt from occupation for mining purposes, or for water-races, dams, or reservoirs, or for machine, business, or residence sites, any land within the boundaries of such mining district; and from time to time may revoke any such exemption, or may alter the limits and extent of such exempted land as he may think fit." The 26th section provides that "the Minister may from time to time, with the sanction of the Governor, set apart for mining purposes exclusively any of the Crown lands within a mining district or outside thereof; but in the neighbourhood of any place where mining operations are carried on, and upon such reserve being so made, the lands comprised therein shall cease to be Crown lands, and shall not be capable of alienation in any way, save for mining purposes, without the consent of the Minister, and then only by the Governor in Council." The provisions of the 26th section, which I have just read, conferring power on the Minister, seem to be restricted to reservations in the neighbourhood of places where mining operations were already in existence. The previous section, which seems to be more apposite to my present argument, is that the Governor may, by Proclamation subsequent to the proclamation of a mining district, set apart any land that he may think proper for mining purposes; and if that power had been exercised under the limitations of subclause (*c*) of clause 16 as to *bonâ fide* mining purposes, the company would, as I have said, have been the last to object, because it would have had the assurance of the realisation of actual mining settlement along the course of its railway. My contention on that point may be supported by a reference to clause 20 of the contract, which refers to the Mining Acts. The clause reads: "The selection by and grant to the company of any lands within any mining district constituted under 'The Mining Act, 1886,' which may abut on or include any river or watercourse, shall not be deemed to give the company, or any person claiming through or under the company, any right or title to the uninterrupted flow of the water therein, or to give any claim for damage by reason of the interruption of such flow or for the pollution of the water in such river or watercourse by mining operations, or by the deposit of tailings or mining *débris* therein, or to give any further or better title in respect of any such river or watercourse, or the water therein, than would be acquired by any person purchasing lands from the Crown that are or may be subject to the provisions of section 3 of 'The Mining Act Amendment Act (No. 2), 1887.'" I submit, therefore, that subclause (*c*) of 16 is to be read in connection with the Act of 1886. The first part of the subclause restricts the power under the Act to the authorised area of selection under the contract, and applies only to lands that could be shown to be required for *bonâ fide* mining purposes, which, by the latter part of the clause, could not be more in all than 750,000 acres. These are the contentions I submit as to the interpretation of subclause (*c*) of clause 16. It may, however, be said, and probably with truth, that this clause is ambiguous; that it contains a latent ambiguity, and, if so, the general rule would apply, that parol evidence of the declarations and acts of the parties is admissible for the purpose of explaining it.

Sir R. Stout: Which parties?

Mr. Hutchison: The parties to the contract.

Sir R. Stout: The Queen?

Mr. Hutchison: The Queen and the company. Of course, if my contention already submitted as to the interpretation of subclause (*c*) of clause 16 be accepted as the correct interpretation, I have nothing further to say on the subject; but if that interpretation be challenged, I assume the passage may be said to contain a latent ambiguity, and to allow of parol evidence being given as to the meaning attached to it by the parties themselves, with a view of throwing light on the clause, and showing that the interpretation that I have submitted was in fact the intention of the parties.

Sir R. Stout: Who do you say are the parties?

Mr. Hutchison: The Queen and the company.

Sir R. Stout: Do you propose to give evidence of what Ministers said?

Mr. Hutchison: Yes, and the acts they did, to elucidate the latent ambiguity of the words in the contract.

Sir R. Stout: What is the remedy under the arbitration clause of the contract, you ask?

Mr. Hutchison: The remedy is indicated.

Sir B. BURNSIDE: I know what the remedy is; the question is, what can be done?

Mr. Hutchison: Nothing is to be done in the way of proceeding on the award until the General Assembly has an opportunity of providing money.

Sir B. BURNSIDE: Look again.

Sir B. BURNSIDE: It only says that amount shall be taken. It was not to be taken until the Government shall have an opportunity.

Mr. Hutchison: Yes, as early as possible.

Sir B. BURNSIDE: What does that mean—the ordering of the payment of the money?

Mr. Hutchison: I should say it means that, if money is awarded to the company under these proceedings, the company shall take no step to enforce the award until the General Assembly has had an opportunity of appropriating the amount. If that opportunity is allowed to pass without provision being made, steps to levy the amount as upon a judgment would be necessary; but under the law of the comity of nations the Government would almost necessarily see that provision was made to satisfy an award made against it. It seems to me to be pretty clear that the Government is the representative of the Queen, inasmuch as the Government will do what the Governor is expected to do.

Sir C. LILLEY: The Governor has to send down his recommendation by message recommending an appropriation. Is the Queen in the position of an ordinary suitor here?

Mr. Hutchison: She has submitted herself to arbitration.

Sir B. BURNSIDE: Is the party to this suit resident in England?

Mr. Hutchison: No; she resides all over the Empire.

Sir B. BURNSIDE: She resides all over the Empire, but is at Balmoral at present.

Mr. Hutchison: How we shall enforce the award is a matter for future consideration; at any rate, the company has put itself in the position of being content with that prospect. I am now going to refer to and open the evidence which we would call of acts and declarations by the parties, showing what is the meaning attached to the words of subclause (*c*) of clause 16.

Sir R. Stout: How do you propose to make declarations—by whom?

Mr. Hutchison: By the Agent-General, by the Ministers in office at the time of the making of the contract, and by the evolution of the contract itself through its various stages from 1884.

Sir C. LILLEY: Clause 16, subsection (*c*): "All lands which from time to time in the opinion of the Governor are or may be required for *bonâ fide* mining purposes, and the several purposes connected therewith or incidental or conducive thereto, and which lands shall from time to time be set apart and defined by Proclamations to be issued in that behalf; but no more than ten thousand acres shall be so set apart or proclaimed in one block at any one time; and the lands so set apart and proclaimed from time to time shall not in the aggregate exceed seven hundred and fifty thousand acres."

Mr. Hutchison: I propose now to open evidence of the declarations and acts of the parties towards removing the latent ambiguity of this subclause (*c*) of clause 16, so as to show what was the meaning intended by them to be given to it. The authority for this course is, I submit, clear, assuming, of course, that there is a latent ambiguity. Storey, in his Commentaries, at page 805, says that "if there be a declaration by one party, assented to by the other, of the meaning intended to be given to certain terms and clauses when such term or clause is ambiguous, parol evidence of such fact may be given"; and in the same connection, further on, "in the case of a latent ambiguity the actions of the parties previous to and contemporaneous with the contract are admissible to explain it." That is the proposition which I claim to be allowed to support in connection with subclause (*c*) of clause 16, by referring to the acts and declarations of Ministers and officials of the Queen prior to and contemporaneous with the making of the contract.

Sir R. Stout: I may point out that the interpretation of this contract means an interpretation of the statute itself; it is the same thing. This contract is by virtue of a statute. We will suppose, for example, there is a latent ambiguity—I can see none—how can the interpretation of an Act by Ministers of the House be made when the Act is passed? Why, we are not allowed to look at the marginal notes. We could abolish all Acts if we could get in the speeches of those who were present. The Court cannot look at that or listen to it. So far as the Queen is concerned, she cannot make a contract except by a statute. There must be a statute to do it. Where is the statutory power that you are to take the interpretation put upon it by Ministers or Agents-General or anybody else? If it was put in writing by the Agent-General it would not be binding on the Queen. Something outside a statutory power, that would not be binding; and how can it be said that the talk prior to the contract or the statute being passed can be made a practical statutory statement? I submit that this is laying down not only a new principle of law, but an exceedingly peculian thing if that was to be admitted for a moment. The Act under which this contract is made is ar-

Act of 1887, and that says as follows: Clause 3. "As soon as conveniently may be after the passing of the Act, the Governor in Council, in the name and on behalf of the Queen, may enter into a contract with the company for the construction, under the said Acts and this Act, of the Midland Railway. Such contract shall, as far as practicable, contain provisions to the same effect as are set forth in or authorised by the said Acts or either of them, or in the original contract, with such additions thereto and modifications thereof as are contained in the draft contract annexed to the report of the Select Committee." Now, this clause is in an exact form that it came from the Committee. What power, then, is there to interpret that? It is really a statute, and cannot be said for a moment that the arbitrators are to take over the interpretation of a statute except for things of art; but you cannot take for the interpretation of a statute the declarations of a Minister at the time it was passed, or after it has been passed. I submit that too would be necessary.

Sir B. BURNSIDE: A very important matter is who represents the Queen in this matter, because we know, of course, that the Queen is only nominally in the contract. On the one side the company, and on the other nominally the Queen.

Sir R. Stout: The whole point in this: We have one peculiarity here which I believe is unique. We do not make our laws in the name of the Queen. Our statutes are all enacted by the General Assembly, consisting of the Governor and the two Houses of Parliament. In almost every other colony it is always enacted by the Queen, with the consent of the General Assembly. The point I want to make is this: Though the Queen is in England, this is the Queen's dominions; everything is in her name—lands, railways, everything is the Queen's as if we were in England. We have no distinction in that respect. She is as much here as in England; and, that being so, the only person the contract can be made with is the Queen, and they must in reality proceed against the Queen. What is sought to be introduced now is some talk of her Ministers, or those of her Ministers who are to modify a statute. How can that be? This contract is by virtue of a statute. The words are just the same as if you set them out in the schedule to the Act. If that is so—if there is any ambiguity—it cannot be helped except by the Legislature which made it. You cannot take the opinions of a Minister who took part in it. My friend's suggestion is to introduce some talk of a Minister or anybody else. If we go to *Hansard* to interpret the New Zealand statutes I do not know where it will end.

Sir B. BURNSIDE: Suppose it was between two parties, and one of them delegated his authority, or his interest, or whatever participation he had in the contract to another, would not the statement of that other bind the party to the contract on the principle *face per alium, face per se?*

Sir R. Stout: If he was a proper party; but in this power there is no power to delegate to the Queen the power of interpretation. If there is such power, then I ask my friend to show the statute where the power is given. There is no power to make this except by the Act of 1887.

Sir B. BURNSIDE: Would not the responsibility of the Minister of the Crown be tantamount to the responsibility of the Crown in England?

Sir R. Stout: If so, we have the expression in England that the Minister cannot bind the Crown in that way—the case of Churchward *v.* The Queen. There a contract was made. The whole contract turned upon the statutory power to make it. The Postmaster-General could not bind the Queen except by statutory power. So here you cannot bind the Queen except by statutory power. If so, how can this talk affect the interpretation of the contract? I submit that we cannot go outside to get evidence of what Ministers said, or what the Agent-General said.

Sir B. BURNSIDE: It requires most careful consideration that the declarations of a Minister of the Crown as to the responsibilities of the Crown have no relation at all upon the subjects of the Crown.

Sir R. Stout: They have no power to bind the Queen except they can produce a statutory power for the purpose. In any case where a Minister is empowered to act—as, for example, in the Mining Act, to do certain things—but except they produce a statutory authority they do not bind the Queen. I submit the case of Churchward *v.* The Queen applies. In the statute of 1887 the draft contract is not set out, but we have it here, and that contract, so far as this section is concerned, was not altered by the Assembly.

Sir B. BURNSIDE: Is there before the Court or on the table the Crown Suits Act? [Work handed to his Honour.]

Sir R. Stout: I submit that the Court cannot listen to any talk by Ministers or Agents-General or anybody else to aid them to interpret this contract whether it has a latent ambiguity or not. I cannot reason the point of ambiguity now. It is therefore not relevant or proper to open up any talk by Ministers or Agents-General.

Sir B. BURNSIDE: Then, if the Queen herself could speak, and said, "I did so-and-so," you say it could not be received?

Mr. Hutchison: Assuming, as my friend has done, that there is a latent ambiguity in the contract, then his contention would amount to this: that there is no means of removing it.

Sir C. LILLEY: You have to make the best of it.

Mr. Hutchison: I submit the contention leads to absurdity. My friend refers to the contract as if it were set out in the Act itself. The Act which authorises such a contract as this was passed on the 23rd of September, 1887, the contract itself was not signed till the following August. My friend speaks about "talk." I propose to do more than put in "talk." The acts as well as the declarations of the parties can be referred to for the purpose of solving a latent ambiguity. I would, on this point, refer to the matters which are stated in the preamble of the Act of 1887. The first is that a Select Committee has reported. The next is that the draft contract has been agreed to by the House of Representatives, on the 24th November, as printed in the Journals, and that the same has been transmitted by message to the Legislative Council, with a request for their concurrence; and when the Council had agreed to it, with certain amendments—which were in turn adopted by the House of Representatives,—"And whereas," the preamble goes on to say, "it is expedient that an Act should be passed by the General Assembly for the purpose of giving effect to

the report of the said Committee as finally adopted as aforesaid." Then, passing by the interpretation clause, we come to the third section of the Act, which is as follows: "As soon as conveniently may be after the passing of this Act, the Governor in Council, in the name and on behalf of the Queen, may enter into a contract with the company for the construction, under the said Acts and this Act, of the Midland Railway. Such contract shall, as far as practicable, contain provisions to the same effect as are set forth in or authorised by the said Acts or either of them, or in the original contract, with such additions thereto and modifications thereof as are contained in the draft contract annexed to the report of the Select Committee hereinbefore mentioned, as the same was finally adopted as aforesaid, or as may be necessary to give full effect thereto; and may also contain provisions for working sections of the said railway as near as conveniently may be in accordance with the resolutions relating thereto agreed on by the House of Representatives on the twenty-first day of December, and by the Legislative Council on the twenty-second day of December, one thousand eight hundred and eighty-seven." Here, then, we have merely an empowering Act, which would authorise the Governor, in the name of the Queen, to enter into a contract with another party upon certain lines "as far as practicable." It was still, therefore, a matter for negotiation. The main points only were indicated. Then, the fourth section is: "The contract authorised by this Act shall, when executed on behalf of Her Majesty and by the company, operate as a substitute for the original contract; but all acts and things lawfully done thereunder before the execution of the new contract shall and be deemed to have been valid, and shall be of the like force and effect as if they had been done under the contract authorised by this Act, and it shall not be necessary that any allocation of land under such new contract shall be approved by the General Assembly, as provided by the said Acts or either of them." The actual contract was some months afterwards entered into, but, although authorised by statute, it is not, I contend, a contract which may not be subjected to the ordinary rules of interpretation applicable to contracts. I say it must be so subject. There is nothing to exclude the ordinary law of evidence with relation to it, and I propose to open as to acts and things which occurred prior to the date of this contract. I cannot understand how it is possible to exclude the ordinary application of the laws of evidence and interpretation in the case of a contract which is not itself in the form of a statute, but made eight or nine months after the statute which empowers it to be made, and which validates all acts and things done since the previous contract for which it is substituted. I submit I should be allowed at the proper time also to adduce evidence on all matters arising out of the first contract in 1886, and leading up to this one of 1888.

Sir R. Stout: Part of the contract to which my friend referred was in the draft contract.

Mr. Hutchison: We do not know that as yet.

Sir R. Stout: It is known perfectly well, and, if there is any doubt about it, it may be easily settled by producing the draft. My friend has no right to put in anything which he does not know is a fact.

Mr. Hutchison: This is one of several facts.

Sir R. Stout: The point is this: By the Act of 1887 there was power given to make a contract. There was a certain draft that the Legislature said to the Queen, "You must follow as near as may be." In that draft is this clause. How, then, can this clause, which was given to the Queen to follow, be modified or altered or interpreted by any verbal statements made by the Minister? Here is a report which says, "All lands which from time to time, in the opinion of the Governor, are or may be required for *bona fide* mining for gold or silver, and the several purposes connected therewith or incidental or conducive thereto, and which lands shall from time to time be set apart and defined by Proclamations to be issued in that behalf; but no more than 10,000 acres shall be so set apart or proclaimed in one block at any one time, and the lands so set apart and proclaimed from time to time shall not in the aggregate exceed 750,000 acres." There is no modification except that the words "or silver" are struck out.

Mr. Hutchison: That itself is a modification.

Sir R. Stout: That point is this: Can the words of a statute, which these really are, be explained by contemporaneous statements made by a Minister? There is no power given by that Act. There was power given, no doubt, to the Queen to modify the terms of this contract; but there was no power given to say that the interpretation shall be modified by verbal statements of Ministers. Where, then, is the statutory right to do it? I submit that there can be no power to do that inherently in a Minister. It must be by virtue of some statutory right, and where is the statutory power?

Sir B. BURNSIDE: I would like to ask one question, upon which I think Sir Robert Stout could enlighten me. Is the Queen represented in this contract, or in carrying it out? Who is the party we have to look to as doing anything which affects the contract as far as the Queen is concerned since the contract was made?

Sir R. Stout: No doubt, in carrying out the contract under the terms here mentioned, the Governor has to do certain things. The contract so provides.

Sir B. BURNSIDE: I see that; but, say the Governor had made a distinct allegation or statement which either you or Mr. Hutchison wished to put in: how far does the Governor represent the Queen?

Sir R. Stout: He cannot represent the Queen as regards anything made prior to the contract. He cannot bind the Queen in any way unless he has statutory authority for so doing. If he has to carry out the terms of a contract and he does not carry them out, then the Queen would be bound by his not carrying them out.

Sir B. BURNSIDE: Are you prepared to say that the Governor in Council cannot enter into a contract and cannot bind the Queen in so far as he would bind the colony?

Sir R. Stout: Not without legislation. I go that full length, and I have authority for it.

Sir C. LILLEY: Surely the Queen would be bound by an administrative act of Ministers?

Sir R. Stout: Yes, in reference to the fulfilment of the contract. Suppose, for example, the Treasury did not pay money if there was money due under the contract, or suppose there was a certain thing to be done and it was not done, then, no doubt, it would be a breach of contract if it was not done by Her Majesty's Ministers.

Sir B. BURNSIDE: Who stands in the place of the Queen?

Sir R. Stout: No one. The Queen has her Ministers for carrying out her will.

Sir B. BURNSIDE: Then this contract, so far as the Queen is concerned, is one which is subject to Royal favour only?

Sir R. Stout: No; because there is the arbitration clause in it. Apart from the contract itself, the Queen can only speak in legislation through her Parliament with her subjects in this colony, and if there is no statutory authority of Parliament or law she cannot speak at all.

Sir B. BURNSIDE: Your proposition to a certain extent is perfectly correct, but it does not meet entirely the point I have submitted. If every act which was done by those persons who Ministerially represent the Sovereign in the country with regard to a contract bearing upon the interests of the colony have no effect upon the contract itself, that is a proposition I am not prepared to yield to.

Sir R. Stout: I put it like this: I do not deny that if the Queen, through a Minister, had broken this contract by issuing a Proclamation, for example, improperly, it would be a breach; but I am not raising that point. All I am saying is this: that for the interpretation of the contract the Court can only look at the statute. You cannot look at any contemporaneous statements of any Minister of the Crown, because that would mean that the Minister of the Crown could legislate, and could authorise the making of a contract which Parliament did not authorise.

Sir C. LILLEY: The difficulty which arises here is this: that the contract is not in the Act. There is authority to make the contract on certain conditions.

Sir R. Stout: The point is this: that the Queen has not modified this clause in the Act except by striking out the words "or silver," and therefore we cannot look to any contemporaneous statement to explain this clause.

Sir B. BURNSIDE: I think your point must be narrowed. I do not think you can say this is a statutory contract at all. I think what you say, and very forcibly say, is that this is an attempt to interpret a contract which is not an ambiguous one.

Sir R. Stout: I say that contemporaneous statements by Ministers cannot explain Acts of latent ambiguity.

Sir B. BURNSIDE: Of course, we must wait until we see that there is latent ambiguity in it. At present I do not see much latent ambiguity in it. That is only an indication of my opinion.

Mr. Hutchison: My argument is that the interpretation is tolerably clear; but, if that be a latent ambiguity, I claim to put in evidence to remove that ambiguity.

Sir B. BURNSIDE: You can do what you like in the conduct of your case.

Sir C. LILLEY: When you tender the evidence we will decide whether it can be admitted.

Mr. Hutchison: I would point out that this is no more a statutory contract than the lease in the case Davenport *v.* The Queen was a statutory lease.

Sir C. LILLEY: You might just as well leave that alone for the present.

Mr. Hutchison: I will adopt that suggestion, and rest my case at present as to subclause (*c*) of clause 16 of the contract, on what I submit is the only meaning of the words as they stand. I will now proceed to refer to what was done under that subclause (*c*). Without admitting the Proclamations as in any sense good, I may be permitted, perhaps, to refer to them as indicating the extent of obstruction the company was subjected to in its efforts to obtain the advantages of its land-grant. Here is one of the Proclamations, and I believe they are all similar. It is headed, "Land available for Selection by the Midland Railway Company set apart for Mining Purposes," and reads:—

"(L.S.) JAMES PRENDERGAST, Administrator of the Government.—A PROCLAMATION.

"WHEREAS in the contract bearing date the third day of August, one thousand eight hundred and eighty-eight, made between Her Majesty the Queen and the New Zealand Midland Railway Company (Limited), it is, among other things, provided that, subject to the conditions therein contained, all lands within the limits of the authorised area defined in the said contract shall be available for selection by the company with certain exceptions: And whereas among such exceptions are included all lands which from time to time, in the opinion of the Governor, are or may be required for *bonâ fide* mining purposes and the several purposes connected therewith or incidental or conducive thereto, and which lands shall from time to time be set apart and defined by Proclamation to be issued in that behalf; but no more than ten thousand acres shall be so set apart or proclaimed in one block at any one time, and the lands so set apart and proclaimed from time to time shall not, in the aggregate, exceed seven hundred and fifty thousand acres: And whereas, in the opinion of the Governor, the lands described in the Schedule hereto are required for *bonâ fide* mining purposes and the several purposes connected therewith, and the said lands are comprised in one block containing four thousand five hundred acres: And whereas it is expedient the said lands should be set apart and defined by this Proclamation: Now, therefore, I, James Prendergast, the Administrator of the Government of the Colony of New Zealand, in pursuance and exercise of all powers and authorities enabling me in this behalf under the hereinbefore-mentioned contract or otherwise, do hereby proclaim and declare that the block of land defined and described in the Schedule hereto is set apart under the provisions of the said contract for *bonâ fide* mining purposes and the several purposes connected therewith."

This Proclamation will be found in the *Gazette* of the 14th April, 1892. It is a sample of the rest, and we submit, in the first instance, as indicated in the argument already submitted to the Court, that all these Proclamations, not being made under the Mining Act, are void.

Sir C. LILLEY: How do you say that?

Mr. Hutchison: They recite the contract and do not mention the Act.

Sir C. LILLEY: If the law exists I presume a Proclamation may be issued under it. At present I think you assume that the Minister should act under the authority of the Mining Act.

Sir R. Stout: The Minister did so under all powers and authorities.

Mr. Hutchison: The general words near the end of the Proclamation are that the reservation is made "in pursuance and exercise of all powers and authorities enabling him in that behalf under the hereinbefore-mentioned contract or otherwise"; but these general terms must be controlled by the special reference in the beginning of the Proclamation to the contract itself. The Act is not once mentioned.

Sir B. BURNSIDE: Was it necessary to recite that; and, if he recited it, would it have any effect at all?

Mr. Hutchison: I shall wait with some curiosity to see whether the other side claim that these Proclamations were issued under the Mining Act. In the meantime I will assume they were not.

Sir B. BURNSIDE: The question is whether he had power to reserve, or whether he rightly reserved.

Mr. Hutchison: The Governor had power generally to reserve under the Mining Act, limited within "the authorised area" by the express terms of the contract as to *bonâ fide* mining. I will rest this matter, in the meantime, on the contention that the Governor did not make these proclamations under the Mining Act, and that therefore they are void. Then, I have to contend—and this raises an important question as to the order of producing evidence—that this power, being an exception to the right given by the controlling words of the clause in the beginning, makes it incumbent on the other side to justify these Proclamations; and, if that be so, it will be sufficient for the company to adduce *prima facie* evidence of their having been prevented from selecting the lands which are covered by these Proclamations. It would be upon the Crown to show that the lands referred to in these Proclamations were required for *bonâ fide* mining purposes.

Sir C. LILLEY: It would be for you to show the other way.

Mr. Hutchison: I submit that it would be for the other side to show that they acted within the exceptions.

Sir C. LILLEY: He will have to show that they are in the exceptions.

Mr. Hutchison: Yes. Now I come to the evidence which will be called on the subject of our being prevented from selecting land in consequence of these Proclamations.

Sir R. Stout: In clause 1 of our particulars?

Mr. Hutchison: Under clause 1 of our particulars. Although the contract was dated in August, 1888, the company had, in 1886, raised £250,000 of share capital, and they had employed that money on works in connection with railway-construction, depending, of course, on the formal contract to be completed as might be arranged, as the result of the negotiations then pending. The first intimation on the subject of mining reserves seems to have been by a letter on the 6th August, 1888, from the manager of the company (Mr. H. Alan Scott) to the Minister for Public Works; I have it not, but probably nothing turns upon the actual words, but the contents are sufficiently indicated by the reply, which is dated the 13th August, 1888:—

"SIR,—I have the honour to acknowledge the receipt of your letter of the 6th August, requesting that you may have an opportunity of conferring with me before any lands are set apart for mining reserves within the 'authorised area.' In reply I have to state that the company will be afforded an opportunity of seeing the proposals before being finally determined.—I have, &c., G. F. RICHARDSON, Minister of Lands."

Then, on the 27th August, 1889, the following letter was received by the manager from the Minister, also in answer to a letter from the manager, which I have not here, but again the contents are sufficiently indicated by the answer:—

"SIR,—I have the honour to acknowledge the receipt of your letter of the 20th instant, relative to meetings held for the purpose of having lands in the Grey Valley withdrawn from the railway area, &c., and to inform you that the promise given in my letter, No. 634/2, of the 13th August, 1888, that the Midland Railway Company will have an opportunity of seeing the proposal of the Government with reference to mining reserves before they are given effect to, has not been overlooked.—I have, &c., G. F. RICHARDSON, Minister of Lands."

Nothing further appears to have been done until Mr. Robert Wilson became general manager as well as engineer-in-chief and representative of the company in the colony. On the 6th October, 1890, he wrote to the Minister for Public Works as follows:—

"Re *Mining Reserves.*

"SIR,—I learn that the Government is taking steps to define some of these reserves, and that plans are already prepared, and I have to request that you will cause the company to be furnished with copies of such plans, so that there may be time for inquiring into the proposed reserves before they are finally decided upon, as already promised by the Minister of Lands in his letter dated 13th August, 1888, and on subsequent occasions."

Then, we have next a letter from the Assistant Secretary of Public Works to the general manager, dated 23rd October, 1890:—

"Re *Midland Railway.—Mining Reserves.*

"SIR,—I am directed by the Minister for Public Works to acknowledge the receipt of your letter of the 6th instant on the above-mentioned subject, and, in reply, to inform you that it is intended to furnish your company with copies of the plans of the reserves proposed to be made before the auriferous areas are definitely decided upon."

In July of 1891 there was an interview between Mr. Wilson, along with Mr. Scott, who still held office in the company, and the Minister.

Sir B. BURNSIDE: Was that previous to this last law?

Mr. Hutchison: Yes. I mentioned that the interview was after the dates of the letters I have just quoted on the subject of mining reserves. There was an interview, at which the company was again promised to be duly informed of the steps to be taken by the Minister.

Sir B. BURNSIDE: Who is Mr. Alan Scott?

Mr. Hutchison: The first representative of the company in the colony. He was succeeded by Mr. Wilson as general manager, but Mr. Scott continued to act as land agent. The first letter actually referring to a Proclamation is a letter of the 10th July, 1891, from the Minister of Public Works to the general manager of the Midland Railway Company, and is as follows:—

"SIR,—In accordance with the promise I made at the recent interview with you in Christchurch, I now forward description of two blocks of land which it is intended to immediately set apart and define by Proclamation, as provided by clause 16 of the Midland Railway contract, as required for *bonâ fide* mining and the several purposes connected therewith. It is proposed to first proclaim the block of 5,250 acres at Kumara Flat, to be followed by a further proclamation of the block of 9,900 acres at Piper's Flat, Kelly's Terrace, Stafford, and Waimea. Proclamations defining further blocks will follow from time to time in areas not exceeding 10,000 acres at any one time, as provided by the contract."

On the 20th July there was another interview between the Minister and the manager, when a letter containing certain proposals of the Kumara Miners' Association on the subject of the proclaiming of mining reserves was discussed, together with Mr. Wilson's reply to the association, which reply had concluded as follows: "Should the whole 750,000 acres be so required to be used for *bonâ fide* gold-mining it would mean such an increased population and corresponding traffic in the districts that the company need then feel but little anxiety as to the exact lands to be so reserved; but in the meantime it must take precautions against lands being reserved which are not really required for gold-mining, as such reserves would impede instead of increase the population in the district." This point I conceive to be important in view of the effect of those Proclamations, which was not to protect *bona fide* gold-mining, but to debar settlement, leaving the company's railway through the midst of these reserves comparatively useless.

Sir C. LILLEY: Do you suggest that these Proclamations were made in bad faith?

Mr. Hutchison: It must be so—the contention of the company must come to that. These Proclamations practically amounted to a repetition of the Larnach Proclamation made a couple of years before, but withdrawn after a month or two, and that these repeated Proclamations contravened the provisions of the contract——

Sir C. LILLEY: You think they were not *bonâ fide*, in fact?

Mr. Hutchison: They were not *bona fide*.

Sir B. BURNSIDE: They were made for the purpose of excluding the company from keeping the lands?

Mr. Hutchison: Yes. Then, we have a reply, on the 29th July, 1891, from the Minister to Mr. Wilson's last letter:—

"*Midland Railway Mining Reserves.*

"SIR,—I am directed by the Minister for Public Works to acknowledge the receipt of your letter of the 20th instant, in reference to the above-mentioned subject. In reply thereto, and particularly in reference to your statement that the meaning of the clause of the Midland Railway contract in reference to reservation of land for mining purposes is that 'only such lands as may be *bonâ fide* required for gold-mining purposes are to be reserved by the Government, and that in any case the total of such reserves shall not exceed 750,000 acres'; also that 'it is not intended by the contract that the amount of these reserves should necessarily reach that area, unless required for actual gold-mining purposes,' I am to state that the interpretation which the company places on the clause in question is not concurred in by the Government, and, indeed, is considered to be entirely contrary to the provisions of the contract and of the law bearing on the subject."

So we see that as early as July, 1891, a distinct variance had arisen between the parties as to the meaning of this particular clause of the contract. Mr. Wilson replied to the Minister on the 1st August, 1891; and, as defining the position of the company, this letter seems to be important:—

"*Mining Reserves.*

"SIR,—I have the honour to acknowledge the receipt of your letter of 29th ultimo, and am astonished at the views expressed therein, as the contract is so clear on the points in question that there seems to me no doubt whatever as to the meaning of the clause, as stated in my previous letter, and which you now say is not concurred in by the Government. Must still maintain the same views."

Not to deal with unnecessary correspondence, I come to a telegram from Mr. Wilson to the Minister, as follows:—

"(Telegram.) "24th September, 1891.

"COMPANY protests most strongly against the mining reserves which are being made, and the method of making them, those recently proposed being far in excess of lands *bonâ fide* required for gold-mining, and the time before notification to company (agreed to be given) of proposed reserve and gazetting being so short as to make any inquiry by company impossible. It will therefore be necessary for the company to formally object to each reserve, unless some time is given for examination. "ROBERT WILSON, Greymouth."

That is replied to by a telegram, the date of which is not given, but it must have been almost immediately after the one just read, and is from the Minister to the manager. It is as follows:—

"(Telegram.)

"*Re* protest against proclaiming mining reserves, the Government is acting strictly within terms of contract in proclaiming reserves. The reference to company of plan and particulars of land intended to be reserved is, as you are well aware, a matter of courtesy, not that Government by terms of contract are in any way bound to submit same to you. On receipt of any application for time to make inquiries as to any particular blocks of land proposed to be reserved, I shall always be prepared to give same fair consideration. "R. J. SEDDON, Wellington."

Then, there is a reply telegram from the manager to the Minister:—

"(Telegram.) "Westport, 29th September, 1891.

"AM aware you considered reference of reserves to company matter of courtesy, but think company clearly entitled to object either before or after proclamation, and more convenient for all if done before, therefore apply for month's notice of all not gazetted. Area of 250,000 acres is, I consider, far greater than required, and will seriously impede settlement and people's use of land.

"ROBERT WILSON, General Manager, New Zealand Midland Railway Company (Limited)."

It would seem that by this date some 250,000 acres of land had been proclaimed.

Sir R. Stout: No; proposed to be reclaimed.

Mr. Hutchison: At any rate, either proclaimed or proposed to be shut out from selection by the company.

Sir R. Stout: We had that amount down to 1892.

Mr. Hutchison: I dare say that Mr. Wilson will be able to give the exact figures. On the 29th October the manager writes to the Minister as follows:—

"*Mining Reserves.*

"SIR,—With reference to your letters of various dates indicating blocks of land which it is proposed to set apart as mining reserves under the contract, I have again to call your attention to the fact that all these blocks contain lands which cannot possibly be required for gold-mining purposes; and I would specially refer to your letter of the 27th instant, indicating the eleventh block which it is proposed to reserve, which includes Kelly's Ridge, and extends across the route of the railway down to the Teremakau River. This blocks covers much too large an area, and there is no probability of the land being required for gold-mining purposes except in the immediate vicinity of the reefs. I protest, on behalf of the company, against lands being wrongfully included in the reserves, and shall require to have the blocks reconsidered, and, if necessary, to have evidence produced before arbitrators as to whether or not they are requisite for *bonâ fide* gold-mining purposes."

So we find thus early that the difference was considered so serious as to point to arbitration. I have only two other letters that I would read in this connection. The correspondence was very voluminous, but I have selected only those letters that seem to be important as marking the steps in the quarrel. The first is from the Minister to the manager, on the 13th July, 1892, and refers specially to clause 33 of the contract, but, as it also bears on clause 16, I quote it in this place. It is as follows:—

"*Midland Railway.—Application for Assessment of Land under Clause 33 of the Contract.*

"SIR,—In reply to your letter of the 22nd April last, forwarding, for assessment under clause 33 of the Midland Railway Contract, an application by Messrs. Loughnan and Halley for a piece of land containing 50 acres, situated in Block II., Waitahu Survey District, I am now directed by the Minister for Public Works to inform you that the land in question is within one of the proposed mining reserves, and is therefore not available for selection under clause 16 of the said contract. The application cannot therefore be entertained."

Then, as indicating something different from the tenor of the previous communications—as indicating that much had been problematical as to these reserves being required—I would quote a letter from the Minister of Public Works to the manager, dated 23rd February, 1893, which purports to deal with some mining reservations being necessary for "actual" working:—

"Re *Mining Reserves.*

"SIR,—I have the honour to acknowledge your letter of the 13th ultimo, with regard to the reservation for mining purposes of 5,170 acres of land in the Waimea Survey District proclaimed in *Gazette* No. 101 of the 29th December last, and in reply to state that, as there are at the present time actual gold-workings upon the land, it was considered desirable to immediately reserve it as required for *bonâ fide* mining purposes and the several purposes connected therewith or incidental or conducive thereto."

That is all the correspondence I would quote in connection with the mining reserves. What I have read indicates clearly that these Proclamations were from the first protested against by the company through its representative, apart from any legal objection as to their validity, as having been made greatly in excess of actual requirements, which, I repeat, restricted the operation of subclause (*c*) of clause 16. I would like to mention, before leaving the subject of mining, that while the company had no right to gold or silver in any lands it had a right to the coal deposits which are known to be in some of the lands which were made the subject of these mining reserves. There is known to be coal there, which the company had a right to select and develop under the terms of the contract.

Sir C. LILLEY: You mean to say they had a right to the coal, although the same lands might have to be leased?

Mr. Hutchison: Yes; all the land within the authorised area was, subject to certain exceptions, open to the right of selection by the company.

Sir C. LILLEY: Kept out for the purpose of the contract?

Mr. Hutchison: Yes, and no reservations could affect the right of the company to the coal anywhere within the authorised area.

Sir C. LILLEY: When they had made a selection?

Mr. Hutchison: Yes. Meanwhile the company had the right to have the lands so kept that it could select—that the lands with their wealth (other than gold and silver) should be conserved. Possibly my learned friend would like to know, before the Court rises to-day, the damages claimed by the company in respect of these reservations. Under this head the company claims, as damages for loss of traffic on the railway through the Grey Valley, between Brunnerton and Reefton, such an amount as might reasonably have been expected to have been earned, being an average of £4,000 per annum, on twenty years' purchase, or £80,000. The company further claims, for loss of capital on the construction of the railway through between those points, after giving credit for £100,000 as the value of the railway, on the basis of average earnings at the rate of £5,000 per annum, at twenty years' purchase, or £400,000. Damages under this head will also be included in the general claim which will be dealt with later on. I only give at present these two amounts as the claim specially referable to this head—No. 1 of the particulars. But, as I was saying, damages under this head will also form part of the general claim coming at the end.

Sir C. LILLEY: One and a quarter millions. Is that the general claim?

Mr. Hutchison: The general claim includes this specific claim.

Hon. E. BLAKE: You mean to say there are some further damages?

Mr. Hutchison: Yes. The sum of £480,000 is the special claim under this head. Besides, the matters referred to under this head will affect the general damage, which I will deal with by-and-by.

Sir C. LILLEY: What is the general damage?

Mr. Hutchison: The combined result of a variety of grievances. The general and comprehensive claim will be referred to later on. The general amount is subject to all particular amounts. For instance, the general claim would be less by £480,000 under No. 1, and less by various amounts under No. 2, No. 3, and No. 4, which I will mention as I come to deal with them. I will also present the whole damage under a different arrangement, and endeavour to give as full details as possible. At present, what I have said will conclude my observations under paragraph No. 1 of the particulars of claim in the present arbitration.

Sir C. LILLEY: That concludes it?

Mr. Hutchison: Yes.

TUESDAY, 26TH NOVEMBER, 1895.

The Court sat at 10 a.m.

Mr. Hutchison: I propose now to deal with the second paragraph of the particulars.

Sir C. LILLEY: You have finished the first?

Mr. Hutchison: Yes.

Sir C. LILLEY: There is no claim, as I understand, in this matter for money or lands earned; it is all for damages?

Mr. Hutchison: Yes; that is all at present.

Sir B. BURNSIDE: You mean no claim for land specifically, or money?

Mr. Hutchison: That is for the arbitrators to say.

Sir B. BURNSIDE: Under the contract there is no provision?

Sir C. LILLEY: No; they are not to earn money, it is land.

Mr. Hutchison: The second and third paragraphs of the particulars refer to timber, as will be seen, and may conveniently be taken together. The one is on the assumption that lands were properly reserved under subsection (*c*) of clause 16, and the other has reference to the destruction and removal of timber on the lands available for selection.

Sir B. BURNSIDE: You are addressing us on sections 2 and 3?

Mr. Hutchison: Yes; but, as giving the Court an idea of the extent of the land which will be claimed to have been improperly reserved, I would hand in, for convenience of reference, a list which will be afterwards proved in evidence. It is a list of the Proclamations, giving the areas reserved.

Sir B. BURNSIDE: It is to be put in as part of the evidence by-and-by?

Mr. Hutchison: Yes; the Proclamations are fifty-eight in number, starting from the 20th August, 1891.

Sir B. BURNSIDE: Do you say they are properly made?

Mr. Hutchison: No; but they barred our right of selection. It will be seen that the Proclamations range from the 20th August, 1891, to the 7th February, 1895, the latter, it will be observed, being a date subsequent to the date for the completion of the works as mentioned in clause 42 of the contract.

Sir B. BURNSIDE: You say it has barred the right of selection being properly made?

Mr. Hutchison: The Proclamations improperly barred the company's right to selection.

Sir C. LILLEY: You were barred?

Mr. Hutchison: Yes; "prevented" is the word used. It will be seen, by reference to the dates of the Proclamations, how delusive the intervals of time were, as indicating any proper exercise of the right of reservation under the contract. The intervals are sometimes a week or so.

Sir C. LILLEY: You say it is bad faith?

Mr. Hutchison: Yes; having regard to the facts, and to the effect of these Proclamations along the route of the railway between Brunnerton and Reefton. It might be convenient if I were now to place a map illustrating the area covered by these Proclamations before the Court, as giving an idea of how the reservations affected the railway.

Sir B. BURNSIDE: It is handed in to us as part of the proof?

Mr. Hutchison: Yes; and the Court will see that the reservations lay along one side of the line of railway from Brunnerton to Reefton. There is a narrow strip of land uncoloured along the river, indicating the lands previously alienated by the Crown. Outside that narrow strip the Proclamations took effect. They could only be made in respect of land not alienated. The railway ran along the valley.

Sir B. BURNSIDE: And those coloured yellow, you say, are the properties infringed upon?

Mr. Hutchison: Yes.

Sir B. BURNSIDE: The white is the alienated land.

Mr. Hutchison: Yes. The Crown as to all land had the right of resumption for mining, reasonable compensation being paid. The Proclamations took effect on the lands immediately behind the freeholds.

Sir B. BURNSIDE: Do I understand the railway was constructed through the private lands?

Mr. Hutchison: Yes; the route follows the river, along which are the alienated lands. The mining reserves are on the foot-hills and in the gullies behind the private lands. It will be seen from clause 18 of the contract that the right of the company over the mining reserves to timber was subject to certain exceptions, quite a number of them. Assuming that the Crown was right in proclaiming these reserves, or some of them, then the company had the option of selling the timber on these lands in lieu of other land; but that right was not to interfere with *bonâ fide* mining: and the clause provides further that the option should not be exercisable over land which, in the opinion of the Governor, was used or likely to be required for sawmilling purposes. Supposing the company said, "We wish to select the timber on this land which has been reserved for mining purposes," it was competent for the Governor to say that, in his opinion, the timber was required for sawmilling industries in operation at the date that the option was desired to be exercised. Further, the option could not be exercised if the timber was, or was likely to be, required for holders of timber-licenses, or mining licenses, or for mining purposes. These are the exceptions; but it will be shown in evidence that, notwithstanding all these exceptions, the rights of the company were invaded by the Crown over lands the subject of Proclamations which resulted in great injury to the company. In mentioning the sum of £20,000 as damages in respect of timber rights, I desire to put it in the alternative, as covering the claim under this paragraph No. 2 and the next, which both relate to timber. Paragraph 3 relates to timber on lands not subject to reserves, and as to which the company complains that a large number of licenses to cut timber were issued by the Crown, so reducing the value of the land over which the company had the right of selection.

Sir B. BURNSIDE: Timber which was growing?

Mr. Hutchison: Yes; on land not proclaimed, and so reducing the value.

Sir C. LILLEY: It is not on the particulars.

Mr. Hutchison: The company also complains that the Crown not only issued such licenses as I have referred to, but has been negligent in its duty to the company, inasmuch as it has not taken the proper and necessary steps to conserve the timber within the authorised area over which the company had rights to the exclusion of the Crown. The position of this vast territory, over which the right of selection extended, was that of Crown lands subject to the jurisdiction of the Crown all the time.

Sir C. LILLEY: You could invoke the assistance of the Crown.

Mr. Hutchison: Yes; that is part of our case. The Crown had a duty to the company. We say the Crown was bound to conserve those lands, because the interests of the company were being endangered, and the Crown was asked to protect them. No one could interfere in the management of these Crown lands except the Crown.

Sir C. LILLEY: You say the company had rights?

Mr. Hutchison: They had rights. The whole area, as I was observing, was Crown land, locked up as it were with the key in the hands of the Minister of Lands, or of his officers having charge of the administration of the Crown lands of the colony; and we say that large quantities of timber have been cut and removed, not only under licenses and without licenses by individuals, but also for public purposes, such as railway-sleepers, for the Railway Commissioners, the railways of New Zealand being the property of the State.

Sir R. Stout: Do you say cut for the Crown?

Mr. Hutchison: Under tenders let.

Sir R. Stout: Cut by sawmillers and sold by the Crown.

Mr. Hutchison: The Railway Commissioners called for tenders, and the successful tenderers went and cut the timber off the Crown lands on the coast within "the authorised area," and delivered the sleepers to the Railway Department.

Sir C. LILLEY: They were cut by the contractors for party purposes?

Mr. Hutchison: I have here an advertisement as to tenders for sleepers:—

"*New Zealand Railways.—Supply and Delivery of Silver-pine Sleepers at Lyttelton.*

"Railway Manager's Office, Greymouth, 18th November, 1889.

"WRITTEN tenders will be received at this office up to noon on Saturday, the 30th November, for the supply and delivery of 10,000 silver-pine sleepers at Lyttelton. Specifications and forms of tender to be obtained at the Railway-station, Greymouth, Brunnerton, and Stillwater. Tenders to be addressed to the New Zealand Railway Commissioners, Greymouth, and to be marked outside, "Tender for silver-pine sleepers." The lowest or any tender not necessarily accepted.

"By order of the Commissioners.

"W. STONE, District Manager."

That evoked the following letter from the general manager of the company:—

"The New Zealand Midland Railway Company (Limited), Greymouth,
"23rd November, 1889.

"SIR,—I beg to draw your attention to the advertisement from the Greymouth paper in the margin. From this you will see that the Railway Commissioners are in the market for silver-pine sleepers. This will undoubtedly cause persons without licenses or authority to cut timber in any direction in the forests now reserved for the New Zealand Midland Railway Company. I would therefore suggest for your consideration that an advertisement to the following effect, and signed by you, should be inserted in these local papers, in order to warn people that they will not be permitted to take timber belonging to the Government or the company without first obtaining authority: 'Notice.—All persons cutting timber on Crown lands without authority will be prosecuted.—A. GREENFIELD, Commissioner of Crown Lands.'

"The Government is, I am aware, as anxious as the company to prevent the forests being destroyed, and the proceedings taken last week at Oxford by the Lands Department in Canterbury (see Christchurch papers of the 16th November instant), where fines ranging from £75 down to £2 were inflicted on persons cutting timber on Government lands in the Oxford bush, will no doubt have considerable effect in deterring persons from doing so in future in this district.

"In order to avoid, if possible, the expense and unpleasantness of taking proceedings shortly against persons who may ignorantly put in tenders for these sleepers on the assumption that they can cut timber without license or payment, I would suggest that some such advertisement as proposed be telegraphed to the local papers at once. So as to facilitate persons getting lands from which they can cut this or other timber, my company will be prepared to deal at once with any such applicants, with your concurrence, under clause 33 of the contract, and I will, if you think it advisable, advertise to that effect.

"I am, &c.,
"ROBERT WILSON,
General Manager."

"The Commissioner of Crown Lands, Nelson.

The suggested notice was, I believe, inserted in some of the local papers. As to the value of this land thus interfered with, I would quote from the report of the Commissioner of Crown Lands for the Westland District, within which a great part of this timber land was situated. It was addressed to the Under-Secretary for Lands, Wellington—

Sir C. LILLEY: This was for damages.

Mr. Hutchison: This goes to show the value of the land generally for timber, and I am dealing with paragraphs two and three of the particulars together, as they both relate to timber.

Sir C. LILLEY: Within the area within which these selections could be made.

Mr. Hutchison: The memorandum states: "Under section 18 of the Midland Railway Contract the company is selecting lands in the Waimea and other districts, lands which, on account of their known auriferous value, the company cannot purchase, but can utilise the timber growing thereon. Good timber lands accessible to the existing sawmills are of considerable value, and as much as £6 and, in some isolated cases, £8 per acre has been paid by some of the sawmillers for the right to cut timber on certain freehold lands.

"I am requested, under subsection (2), section 33, of the Midland Railway Contract, to assess the value of some of these timber lands, and the question is whether, in doing so, I am to take into consideration the value of the timber, or whether I shall assess them simply as lands for settlement. In the former case their value may be, say, £5 per acre, and in the latter they will be worth no more than any of the other lands around them—say, £1 per acre, because the heavier the timber on lands intended for settlement the greater the cost to the settler to bring such land under cultivation.

"In all cases of applications for assessment of values of lands which I know the company cannot purchase on account of its auriferous nature it must be borne in mind that I am fully aware that it is not for settlement purposes, but purely for the purpose of selling the timber thereon that the application is made, and that in doing so they may, on the basis of their scale of charges for timber-licenses, receive as much as £20 royalty from a single acre of good timber land. The stringency of the conditions under which the company is leasing timber lands in the Grey Valley, and now propose to do so also within Westland, is severely felt by people in the timber trade, and is much commented upon just now, and the opinion is freely expressed that the Government assessment of these timber lands, which bring so rich a harvest to the company, should be proportionately high, &c."

This gentleman then proceeds to offer an opinion as to the construction of the clause, which interpretation is not material. He concludes:—

"I have written at such length because it is an important point, involving a considerable sum of money. Now that the company has commenced farming out our forest lands on the coast, and is on the point of developing the timber trade with Australia, &c., I am anxious to have your opinion on the subject. Please let me have an answer at an early date to the following question: Have I, when valuing land applied for by the company (rather by persons through the company), under section 18 of the contract, to take into consideration the value of the timber on the land, as well as the value of the land proper, or only the value of the land?

"GERHARD MUELLER,
Commissioner of Crown Lands."

"The Under-Secretary for Lands, Wellington.

I quote this to show how valuable the concession to the company was under section 18. The timber was really what gave the value to the land.

Sir B. BURNSIDE: That you say was the report. From whom was it?

Mr. Hutchison: The Commissioner of Crown Lands at Hokitika to the Minister of his department, in Wellington; and it indicates the value of the timber concession to the company.

Now, I would quote a letter from the manager of the company to the Minister, dated 13th October, 1891, having general reference to this question:—

"SIR,—Referring to the correspondence which has passed between us on the subject of the timber on gold-mining reserves, and the duty of the Government to conserve all timber within the authorised area, I have now to confirm the telegram sent you on the subject. It is clear that under the provisions of the contract the Government is bound to conserve all land or timber over which the company may have the right of selection until such time as the land-grants are fully satisfied.

"I now give you formal notice that the company may require to select the timber on the gold-mining reserves which have been or may be made; and I must hold the Government responsible for any deterioration to the land-grant which may be caused through the timber being destroyed or cut otherwise than specially provided in the contract.

"As to the question of issuing licenses to cut timber within the authorised area, the company is willing to consent to licenses being issued on a royalty basis, on the terms which have been forwarded, on the 22nd June last, for the approval of the Government, and to which I have had no reply; but the company will not consent to the old form of £5 licenses, which has proved to be extremely deleterious to the forest and wasteful of the timber.

"I have, &c., for the New Zealand Midland Railway Company (Limited),
"ROBERT WILSON, Engineer-in-Chief and General Manager."

There is a mass of correspondence on this subject which I would leave to the evidence to bring out. The damages under one or other of these two heads is £20,000. I may say this is a claim distinct from all the other claims as being one not involved in the consideration of the damage to the credit and consequent injury of the company. This claim for damage to the timber-rights of the company stands apart—distinct—from the other claims. I now come to the fourth paragraph of the particulars, which deals with clause 33, already referred to in some of the correspondence. It is difficult to entirely distinguish in the correspondence and in the evidence between the evidence as to various clauses of the contract—viz., 16, 18, and 33, which deal with the right of the company to remuneration, as I may term it, in the shape of land. A consideration of clause 33 opens the third branch of the remuneration which the company had a right to expect. First of all, under clause 16, they had the right to select blocks of land as they were earned, taking such of the blocks indicated in the schedule to the contract as the company might consider most desirable. Under clause 18 they had, in respect of lands which might be proclaimed mining reserves, subject to certain exceptions, the right to select timber in lieu of the land itself, the timber being in many cases the sole value which was to be derived from the land. Then, we have under clause 33 another class,—a class of cases where the Queen was to deal with the lands at the suggestion or request of the company. This referred peculiarly to lands on the western side of the main range of mountains, and indicates the different treatment considered necessary as to the lands on either side of the Middle Island. On the east side—the Canterbury side—the lands are open valuable pastoral lands laid off in large blocks; the lands on the western side are covered with timber, fertile in the valleys, and barren along the hills, and are lands which could only with advantage be taken up in small areas. The procedure for working this scheme, devised and agreed to by the parties, by which the Queen should continue to administer the lands on the western side of the mountains, is indicated by the clause which reads: "33. So far as respects any lands within the authorised area in the Nelson and Westland Land Districts, on the western side of the main range of mountains, and being available for selection by the company under clause 16 hereof, the Queen shall, from time to time, on the request of the company, sell any such lands for cash, or on deferred payments in such manner as may be agreed upon between the Queen and the company, or may let the same on lease, to any person or persons desirous of purchasing or leasing the same, subject to the following provisions." These provisions are a number of machinery clauses for giving effect to the arrangement just read. The first is: "The company shall, in writing, authorise such person or persons to make choice of the land required, and such choice shall be made in conformity with the Survey Regulations for the time being in force both as to the shape and frontage, and as to all other particulars." The company, therefore, had the initiation of selection. Then, the next reads: "Upon the company requesting the Queen so to sell or lease any land, the Queen shall forthwith cause the value of such land to be assessed at a price not being less per acre than the certified valuation per acre of the block, and the value of the remainder of the block shall be deemed to be the certified valuation of the whole block, less such assessed value of the portion disposed of." For instance, if a selection of 100 acres were taken out of the 5,000-acre block, it would probably be the pick of the block, or one of the best pieces in it, in some valley or other spot favourable for settlement. The Queen, by the Commissioner of Crown Lands of the district, would assess the value of that particular piece not being less per acre than the value per acre placed on the whole block. If other selections were taken up they would be dealt with in the same way, and it might be a third of the whole block would be taken at a price which would represent the value of the whole, according to the B 1 value. The company, in that case, would have the remainder of the block as a profit. That would illustrate the working out of the clause. Then, we have further directions as follows: "In the case of a purchase, the amount to be paid by such person or persons for the purchase of any such land shall be fixed by the company, but shall not be less per acre than the value assessed by the Queen in the last-preceding paragraph; and on payment by the purchaser to the Queen of a deposit of 10 per cent. of the purchase-money, together with the estimated cost of survey of the land required, the Queen shall cause the same to be surveyed, and, after completion thereof and payment of the balance of the purchase-money has been made to the Queen, and on the further request of the company in writing, the purchaser shall be entitled to receive a grant of the lands so purchased." Then the clause proceeds: "In the case of a lease, the rent or royalty and the terms and conditions of the lease shall be agreed upon between the Queen and the company; and the applicant for the lease shall, at the time of such applica-

tion, pay to the Queen the estimated cost of survey, and, before the execution of the lease, shall also pay one half-year's rent in advance; and so soon as the company shall have earned such grants of land as to entitle it to receive a further grant of such value as may be shown by the assessment hereinbefore mentioned of any land so leased as aforesaid, then the Queen shall, on the request of the company, issue to it a grant of such land, subject to the then-existing lease." Then, we have the finance clause: "All purchase-moneys, rents, or royalties received or collected under these provisions shall be paid to the Receiver of Land Revenue of the district in which the land is situated, who shall pay the same into the Receiver-General's Deposit Account; and all such moneys, rents, or royalties shall from time to time be taken into account as provided by these presents, and the whole or part thereof, as the case may be, shall be paid over to the company on its request, after it shall have become entitled to the same in respect of grants of land earned in accordance with these presents." Then: "In the event of any lands being sold under this clause upon any system of deferred payments, or being disposed of by way of lease, the duty and cost of collecting and enforcing all such deferred payments, or compelling payment of any rents or royalties, or enforcing the covenants and conditions of any such lease, shall devolve on the company, which shall collect and receive such payments, rents, or royalties as the agent of the Queen, and shall forthwith pay the same, without any deduction, to the Receiver of Land Revenue as aforesaid, to be dealt with under these presents; and the Queen shall from time to time grant to the company such power or authority as may enable the company, in the name and on behalf of the Queen, but at its expense, to recover or receive any moneys due or payable on deferred payments or under any lease, or otherwise to enforce the performance of the covenants and conditions contained or implied in any such lease or contract for purchase on deferred payment." Another provision refers to deferred-payment land. There may have been a few sections sold on deferred payment, but, I am informed, not many. The remainder of the clause is as follows: "When any land has been so sold or let by the Queen under these provisions, the same shall be deemed to have been selected by the company, and the value thereof shall from time to time be debited against the company in the account mentioned in clause 24 at the price at which the same shall have been so assessed as aforesaid. On selection by the company of the remainder of a block within which land has been so sold or let, the value thereof shall be the amount of the certified valuation of the whole of such block, less the assessed value of such lands as shall have been so sold or let. Nothing in this clause shall be deemed to prevent the company selecting any land to which this clause applies in blocks as provided in clause 32; but the company shall not be entitled to become the purchaser or lessee from the Crown of lands affected by this clause, nor shall this clause extend to any other lands than those in the Nelson and Westland Land Districts as hereinbefore mentioned." Thus we have a comprehensive scheme, devised for working and developing the lands on the western side of the main range of mountains, such as were likely to be taken up in small areas: a most important part of the contract, inasmuch as these lands on the western side were, from the fact of the timber on them and the comparative scarcity of agricultural land, more valuable in many respects to the company as a source of revenue than the pastoral lands on the eastern side of the mountains. The company would, of course, endeavour to make its selections where it would probably get the best return. That was only to be expected from any company in business. The company, however, was not favoured by the assistance of the Government, or the Queen, in seeking to have its payment in land, on the western side, and it was driven, therefore, to select land on the eastern side. As to those selections on the east, the manager will tell the Court that the company, on the whole, made an average profit upon the B1 value of something like 33 per cent. That was upon the land selected on the eastern side, which was less valuable than the land on the western side. It will be shown, when we come to the question of damages, that the company suffered severely in being blocked on the western side of the main range of mountains. Now, a question of some little interest arises as to what is the western side of the main range of mountains. Over a certain portion of what we claim to be on the western side, the Crown peremptorily forbade dealings under clause 33, because they said it was not on the western side but on the eastern side of the main range of mountains. A glance at the map of New Zealand will show that a range of mountains runs, roughly speaking, almost north and south in the direction of the Islands themselves. Starting from the south of the Middle Island, we find a confused mass of mountainous country impinging on the sea-coast, where there are picturesque sounds. The range then trends to the eastward, away from the coast, until on the borders of the Provincial District of Nelson there is a fork. Now, the contention of the Government is understood to be that the mountains which here form a broken line to the westward is the main range. The contention of the company is that the main range is that which runs north-easterly in an almost continuous line. If the arbitrators will look at a map of the colony they will see that the main range starts in the south of the Middle Island, close to the water's edge, and trends off to the eastward. It will be seen that there is a fork near Tophouse from which there is a line of mountains running away in one direction, and another line in another direction. The contention of the Government is understood to be that the main range of mountains runs towards Cape Farewell. On the other hand the company contends that the main range continues to the Pelorus Sound, where it is intersected by the deep fissure called Cook Strait, and is seen again in the range of mountains which dominates Wellington, continues towards the Coromandel Peninsula, with an outpost in the shape of the Great Barrier. Now, in this colony we have a statute which allows evidence to be given from standard works of scientific and other value; and there was a scientist in New Zealand, by name Dr. Hochstetter, who published a book in 1867——

Sir R. Stout: I do not think such evidence would be permissible under that Act.

Mr. Hutchison: I refer to "The Evidence Further Amendment Act, 1885," section 4.

Sir R. Stout: That cannot be looked upon as the work of a scientist. He could not have examined the main range. There were no roads made at the time, or anything else.

Mr. Hutchison: Is objection taken to this being admitted as evidence?

Sir R. Stout: I do not see how the evidence can be of any value, as no one knows about Dr. Hochstetter.

Mr. Hutchison: He was a scientist, but a geologist primarily.

Sir R. Stout: I should say, a traveller.

Mr. Hutchison: The work is entitled "New Zealand: Its Physical Geography, Geology, and Natural History." Dr. Hochstetter says, on page 37, "The most striking and important feature of New Zealand is an extensive longitudinal mountain-range, which, interrupted by Cook Strait, runs through the whole length of the two larger Islands in the direction of south-west to north-east, from the South Cape to the East Cape. This range, consisting of upheaved zones of stratified and massive rocks of different ages, constitutes the powerful backbone of the Islands. At its foot—on the South Island at the eastern foot, on the North Island at the western (perhaps also partly at the eastern)—it is accompanied by a volcanic zone," and so on. And again, on page 463, dealing with the Nelson District, he says, "From a central point, forming the watershed between the east and west coasts, and containing the sources of the boundary-rivers of the two provinces, Nelson and Canterbury, the Hurunui running eastward and the Teremakau running westward, the Southern Alps send forth towards north two branches through the Province of Nelson, the extremities of which are washed by the waters of Cook Strait." These, probably, are the two branches I have mentioned as making a fork at the Tophouse. He says also, "These two branches present very different geological features. The western ranges, terminating in Separation Point and near Cape Farewell, have an almost northerly strike . . . The eastern ranges"—that is, the other range not striking to the west coast—"stretching from south-west to north-east, consist of stratified sedimentary rocks of sandstones, red, green, and grey clay-slates, with a few limestone banks intervening. The strata are highly inclined, all more or less vertical, and the parallelism of their strike from north-east to south-west continues with remarkable regularity. They are accompanied by an immense dyke of intrusive rocks, striking in the same direction, from the northern extremity of D'Urville Island, across the French Pass, through the Croixelles, by the Dun Mountain, Upper Wairau, and traceable as far as the Cannibals Gorge, in the south of the province, a distance of a hundred and fifty miles; thus constituting one of the most prominent features of the country . . . On Cook Strait those ranges terminate in numerous islands and peninsulas, enclosing those fiord-like inlets and sounds (Pelorus Sound, Queen Charlotte Sound, &c.), which already in Cook's time were noted as most excellent harbours." A similar description of the main range of mountains is given by another scientist, Von Haast, in the "Geology of the Province of Canterbury and Westland," where at page 172 he describes "A large longitudinal mountain-chain, running from south-west to north-east. . . . Beginning at the south-western end of the South Island, running to the East Cape of the North Island, separated by a broad gap formed by Cook Strait."

Sir R. Stout: You know that Von Haast was Hochstetter's assistant.

Mr. Hutchison: No doubt. They were both scientific men, and one followed the other. In Von Haast's "Report of the Topographical and Geographical Exploration of the Western Province" (that is Nelson), he refers to the western range as a distinct branch, running out at Cape Farewell—a sandy point. He refers to "three rugged, serrated peaks of an isolated range." Perhaps it might satisfy my learned friend, on a subject of this importance, to have the opinion of Sir James Hector, the present Director of Geological Surveys of the colony, who will be called. In the fork made by these ranges—the main range and the offshoot—is the district called Tadmor, in which the company claimed that the Government should exercise the powers under section 33, but was denied.

Sir R. Stout: Tadmor proper is outside of the B 1 boundary.

Mr. Hutchison: Part of Tadmor is within the authorised area. I have not referred to any lands not within the authorised area. I am referring to that part of Tadmor which is within the authorised area. Of course, if the selections were outside the authorised area, there is nothing more to be said on that subject. The applications I refer to for land in the Tadmor district were peremptorily ruled out.

Sir C. LILLEY: You said you asked the Crown?

Mr. Hutchison: Yes; and the Crown replied that the applications were on the eastern side and not on the western side, and consequently not within the purview of clause 33 of the contract.

Sir R. Stout: What date?

Mr. Hutchison: The date will appear in the correspondence which I am about to read. The first communication was on the 27th September, 1888, from the manager of the company (Mr. H. Alan Scott) to the Minister of Lands:—

"SIR,—With a view of meeting the demand for small blocks of land for settlement, which has been unable to be satisfied during the time the lands have been reserved for the Midland Railway purpose, I have now the honour to forward a list of the names of some of those persons who have, under authority from the company, made choice of some lands in Westland which they wish to acquire, with particulars of the lands applied for. I have the honour to request that you will cause the value of those pieces of land to be assessed as compared with the valuation price of the remainder of B 1 Block in which they are situated, as provided for in clause 33, subsection (2), of the contract. An officer of the company will be ready to accompany any one whom you may appoint to assess the value of these lands and point out their exact position, if you will inform me with whom I should communicate on the subject.

"I have, &c., H. ALAN SCOTT, General Manager."

Sir B. BURNSIDE: Then, I understand that these blocks that are opposed are mostly in B 1?

Mr. Hutchison: Yes, they are all in B 1—that is, within the authorised area—and were intended to be taken up in smaller areas than the blocks themselves. The reply is as follows:—

"General Crown Lands Office, Wellington, 6th October, 1888.

"Sir,—I have the honour to acknowledge the receipt of your letter of the 27th September, requesting that some person may be appointed to assess the value of the land applied for by certain persons whose names you forward, and to inform you that the Commissioner of Crown Lands at Hokitika (Mr. G. Mueller) will be instructed to assess the value of the lands on behalf of the Government. I have, &c.,

"G. F. Richardson, Minister of Lands.

"H. Alan Scott, Esq., New Zealand Midland Railway Company (Limited), Christchurch."

Out of the very lengthy correspondence that followed, and which I am afraid will all have to be considered later on, I only wish at this stage to read a few letters emphasizing the points that arose in difference between the two parties. The next I will read is all dated 23rd June, 1890, from Mr. Wilson, who had become general manager about that date, to the Minister for Public Works:—

"Sir,—In dealing with small applications for land within the authorised area under clause 33 of the Midland Railway contract, we have hitherto understood that the fact of the Commissioner of Crown Lands handing to the company his assessment of the land applied for included the assent by the Government to the sale of that land, and that before handing it over he had taken any necessary steps to ascertain whether the particular land might be so dealt with. As evidence of this, the assessments have provided for applications about which there is any doubt being advertised. It was therefore deemed unnecessary to refer such applications direct to the Minister for the two months mentioned in clause 29 of the contract,"——

I may mention that clause 29 contains a provision requiring that two months' notice shall be given of intended selection, so that the Minister, if he were justified, might proclaim them under subclause (c) of clause 16—that is, as mining reserves.

Sir C. Lilley: You say these lands are all within the area?

Mr. Hutchison: Yes, all these blocks; every acre which was reserved for mining purposes is within the authorised area on the western side of the Island. The letter concludes,—

——"but the Commissioner of Crown Lands for Nelson has written me, under date of 20th instant, stating that it is necessary to do so. This clause was not intended to apply to dealings under clause 33, but to selections by the company of whole blocks.

"The delays which must necessarily arise from every small application having to be first referred to the Commissioner for assessment, and then to the Minister for a period of two months, will be so great as to be a serious delay to applicants, and greatly hinder any dealings with such lands, while clause 33 was inserted to facilitate prompt dealings with small applications. Such delays will be made a public grievance if it thus becomes impossible for the company to meet the natural demands of settlement by dealing with lands under this clause.

"The difficulty may be avoided by the Government authorising the Commissioner of Crown Lands for the district to give its assent at the same time as he makes the assessment; and I have the honour to suggest that you should cause such a course to be adopted.

"I have, &c., for the New Zealand Midland Railway Company (Limited),

"Robert Wilson, Engineer-in-Chief and General Manager."

That letter not having apparently been replied to, a further letter on the same subject was sent by he manager to the Minister on the 4th July, 1890:—

"Re *Morris, and Watson, and Co.*

"Sir,—In consequence of a communication from the Commissioner of Crown Lands, Hokitika, I beg to inform you that the company wishes to deal with the lands as per plan and description attached by letting them to Morris and Watson and party respectively.

"The Commissioner informs us that, after inquiry into the question by both himself and the Warden, he is prepared to consent to the company dealing with the land, but subject to its being referred to you under clause 29 of the contract.

"In order to save time, and meet the convenience of the applicants who have already advertised their applications for the land, I now beg to inform you of the company's wish to deal with this particular land,—though, as we have already pointed out, we do not consider it necessary under the contract that all such applications should be so referred, and do so in this case without prejudice to the question as to whether it should be the practice in other cases.

"As I understand that full inquiry has been made by the Government officers into the particular matter, I would further ask you to consent to the company's dealing with the land at your earliest convenience, without waiting for the expiration of the two months provided by clause 29. It is now eight months since the application was made to the Commissioner of Crown Lands, and the applicants have been already put to considerable inconvenience."

This is the reply of the Minister. It is dated the 29th August, 1890:—

"Re *Midland Railway.—Land Selection.*

"Sir,—In reply to your letters of the 23rd June and 4th ultimo on the subject of the procedure to be adopted in effecting sales or leases of land under clause 33 of the Midland Railway contract, and applying for authority to lease certain land to Messrs. Morris and Watson and party under the provisions of the clause referred to, I have the honour to inform you that this matter has received very careful consideration. The Government is, however, advised that, although clause 33 provides a special mode of dealing with the lands on the western side of the mountain-range, it does not shut out the provisions of clause 29, and that the usual notification under the latter clause must be made in all cases. The Government is further advised that there is no power which would authorise a Minister to delegate his functions in this matter to the Commissioner of Crown Lands.

"With regard to the application of Messrs. Morris and Watson and party for the land referred to in your letter of the 4th ultimo, I regret to have to state that, as the land in question is partially auriferous, and, in the opinion of the Governor, is likely to be required for *bona fide* mining purposes and the several purposes connected therewith or incidental or conducive thereto, it comes within the exceptions specified in clause 16 of the contract, and I have, therefore, to object to its being dealt with as desired.

"I may add that steps will be taken to set apart and define such lands by Proclamation as required by the contract.

"I have, &c.,
"T. FERGUS,
Minister for Public Works.

"R. Wilson, Esq.,
"General Manager, New Zealand Midland Railway Company, Christchurch."

It will be seen that at this date a question had arisen as to whether these applications under clause 33 should be made, subject to the two months' notice, under clause 29, which is a preceding clause in the contract, and which, we submit, does not in any sense govern clause 33, either in the literal interpretation or by reasonable application, inasmuch as the whole object of clause 33 was to provide for speedy settlement in small areas, while clause 29 appropriately applied to the selection of entire blocks of considerable area. It may be remarked incidentally that the Minister at this date ventures to block applications under clause 33, not only on the ground that such applications required two months' notice in addition to being advertised, but that the lands were "likely to be" required for mining purposes.

Sir C. LILLEY: They were auriferous.

Mr. Hutchison: The Minister applies to mining reserves the words "likely to be" which only apply to timber reserves. The Minister may have made a slip in that, and probably intended to mean that it was proposed to proclaim them in the words of subclause (*c*). "Likely to be" are the words used in clause 18 referring to timber, and "are or may be" are the words used in clause 16 as referring to mining. Our contention as to clause (*c*) is that it should be read contemporaneously with the discovery of gold—not a prospective discovery, but an actual ascertained fact of mining.

Sir C. LILLEY: That is in the "opinion of the Governor"?

Mr. Hutchison: I submit that means a judicial opinion, not an arbitrary one. The Governor should be able to show cause if necessary. That is my contention. But I am being led off from my argument as to clause 33 by this phrase, "likely to be," in the letter of the Minister. The reply of the manager to that letter is dated 9th September, 1890.

Sir B. BURNSIDE: You say that there is a different use of the word in clause 16 and in clause 18?

Mr. Hutchison: Yes; and I say that the difference is most significant.

Sir B. BURNSIDE: I think you said the Minister might have used one term intending to use the other?

Mr. Hutchison: Yes; it is probable he did so carelessly; but he was not warranted in applying them as of the same meaning; they are distinctly different in meaning. The reply of the general manager, of the 9th September, 1890, is as follows:—

"SIR,—In reply to your letter of the 29th ultimo, while not concurring in the opinion that a reference to the Minister under clause 29 of the contract is necessary in cases of dealing with lands under clause 33, I have the honour to point out that my suggestion was not that the Minister should delegate his functions under the contract to any officer, but merely that he should instruct the Commissioners of Crown Lands (whose duty it is, as already arranged, to assess the value of all lands to be dealt with under clause 33) to advise the Minister at the same time whether there is any cause for his objecting to the particular land applied for being dealt with, and that the request of the company for an assessment of the land shall be sufficient notification to the Minister under clause 29, assuming that he be entitled to such notice.

"By this means much loss of time and inconvenience to applicants would be avoided, as, if necessary, the whole two months would have to elapse should the Minister, or the Commissioner of Crown Lands on his behalf, not earlier notify his agreeing to the company's dealing with the particular land but if the notification thus came to the Minister through the Commissioner of Crown Lands, whom I presume to be the official land officer, and who is consulted on all land matters in connection with his district, I imagine that the Minister could consent or otherwise to particular pieces of land being dealt with in much less time than two months. Already applications have to be advertised for a month, and it would seem possible, immediately that time expired, to ascertain in the majority of cases whether there is any need for delay. Should it be necessary to make further inquiries in particular cases, further time could of course be taken, up to the two months or longer, if necessary, by arrangement with the company.

"Shortly after the signing of the Midland Railway contract, 1888, an arrangement was come to with Ministers that the company should communicate direct with the Commissioners of Crown Lands on these subjects, expressly to save the delays which the exigencies of the post and other causes would create if a reference to the Minister was necessary in all cases.

"In the past, owing to the peculiar difficulties of the situation, there has been among the inhabitants of the district concerned considerable dissatisfaction with the delay in dealing with the lands, and for this they have blamed the company; but it is becoming known that now and for the future the delays do not rest with the company.

"In making such a suggestion the company is not asking the Minister to delegate his functions, but merely to execute those functions through some officer with whom the company, to save time, can be in direct communication, the Minister obviously being unable to attend to all detail matters personally.

"The company's chief wish and interest is to assist in every possible way the spread of settlement within its area by giving every facility, within the rights of the Government and the com-

pany, for carrying out speedily sales to all applicants, and I have no doubt that the Government equally wish to assist in such a desirable object."

The next letter is by the manager in reply to the Minister's letter of the 29th August:—

"SIR,—In further reply to your letter of the 29th ultimo, *re* Morris and Watson's application, I notice that you object to the company dealing with these lands on the grounds that they are partially auriferous, and that steps will be taken to set apart the land as mining reserves. I am surprised to hear that these are considered auriferous lands, as the company is of opinion that they are not such within the meaning of the contract, in which opinion they are confirmed by very experienced authorities, whose evidence can be brought forward. I would remind you of the promise made by the Hon. the Minister of Lands, under date 13th August, 1888, that the company will be given full opportunity of conferring with the Government before any mining reserves are made."

I now pass on to a letter, from the Under-Secretary of Public Works to the manager, of the 31st October, 1890, which runs thus:—

"Re *Midland Railway.—Land Selections under Clause 33 of Contract.*

"SIR,—I have the honour, by direction of the Minister for Public Works, to forward herewith, for your information, copy of memoranda of instructions *re* the above, recently issued by the Hon. the Minister of Lands to the Commissioners of Crown Lands at Nelson and Hokitika."

I will not trouble the Court with the regulations enclosed, and which cannot be of importance, as it will be seen that they were amended afterwards, and ultimately withdrawn; but there is a letter here which raises a point of importance. It is from the manager to the Minister, on the 11th November, 1890:—

"SIR,—I have to acknowledge the receipt of your letter of the 31st ultimo, forwarding a copy of proposed instructions to the Commissioners of Crown Lands of Nelson and Westland, as to dealing with land under clause 33 of the Midland Railway Contract, and to point out that in some respects these instructions would be unworkable, and are at variance with the Midland Railway Contract. The chief objection is to advertising the lands before the assessment is made by the Commissioners. It is obvious that the applicants will not go to the expense of advertising until they have come to terms with the company as to the price, &c., and, of course, the company cannot fix their selling price until the assessment be made. It is necessary, therefore, for the assessment to be made before the application be advertised; and at the same time as the Commissioner makes his assessment he should state whether there are any objections within his knowledge to the land being dealt with, leaving only open any objections which may be called forth by the advertisement. Further, if the routine proposed by these regulations were adopted it would mean first that a month must elapse after the applicant had agreed to advertise, then obtaining the assessment would probably take another month, and the consent of the Minister would occupy another two months. Thus it would take four months before any piece of land could be definitely dealt with. The contract, however, provides that the value shall be *forthwith* assessed, and even if the provisions of clause 29 apply to sales under clause 33, which the company does not yet admit, the longest delay allowed by the contract is two months and not four months. For convenience I enclose draft of some alterations which I would suggest should be made in your instructions to the Commissioners of Crown Lands. As at present applications have been held over for a long time, I have the honour to request that you will give the matter your earliest attention."

I will not trouble the Court with the enclosures, but proceed to a letter from the manager to the Minister, dated 11th December, 1890:—

"*Regulations for dealing with Lands under Clause 33 in M. R. Contract.*

"SIR,—Referring to the suggested amendments to the regulations which I sent you on the 11th ultimo, I have the honour to state that on further inquiry I find that it will be extremely injurious to the interests of settlement in the districts concerned if the two months' reference to the Minister must always elapse before any land can be dealt with. I hope you will, therefore, see the necessity of devising some means for doing away with such a long delay."

The reply of the Under-Secretary is dated 23rd December, 1890:—

"Re *Midland Railway.—Regulations for dealing with Lands under Clause 33 of the Midland Railway Contract.*

"SIR,—Referring to your letter of the 11th ultimo and 11th instant, forwarding draft of some suggested alterations in the instructions recently issued by the Hon. the Minister of Lands to the Commissioners of Crown Lands at Nelson and Hokitika, on the subject of the selection of lands within the authorised area, under clause 33 of the Midland Railway Contract, I have now the honour, by direction of the Minister for Public Works, to forward to you herewith a copy of the amended instructions which have been prepared to give effect to your suggestions as far as possible, and which it is proposed to issue to the Commissioners, provided that you concur therein."

I pass by the enclosures in that letter, and come to a letter of the 30th December of the same year (1890), from the manager to the Minister:—

"*Regulations for dealing with Lands under Clause 33.*

"SIR,—I have to acknowledge the receipt of your letter of the 23rd instant, enclosing draft regulations to be issued to the Commissioners. These are receiving careful attention; but one point arises at the outset in considering them—namely, they are drawn on the basis of all applications for land under clause 33 being advertised.

"If considerable mining reserves are about to be made, this advertising is both unnecessary and objectionable from the company's point of view. If, however, mining reserves are not to be made

at present, the company would be prepared, as you have already been informed, to agree to the system of advertising. I must await your reply on this point before returning the regulations."

About this time there was a change of Ministry, and we find that on the 27th January, 1891, the manager telegraphed to Mr. Seddon, the new Minister for Public Works, as follows:—

"(Telegram.) "Christchurch, 27th January, 1891.

"HOPE can count on your assistance get regulations settled for dealing with lands in Westland. Waiting reply to letter 30th December to Minister Public Works.

"Hon. R. J. Seddon, Wellington. "ROBERT WILSON."

Then, we have a letter of the 7th February, from the Acting Engineer-in-Chief of the Public Works Department to the manager of the Midland Railway Company:—

"Re *Midland Railway.—Regulations for dealing with Lands under Clause 33 of the Midland Railway Contract.*

"SIR,—I am directed by the Minister for Public Works to acknowledge the receipt of your letter of the 30th December last relative to advertising applications for lands under clause 33 of the Midland Railway Contract, as required by the draft regulations for dealing with these lands, forwarded for your concurrence on 23rd December, and intimating that, should the Government be about to make large reserves for mining purposes, the system of advertising proposed would not be necessary.

"In reply I am to state that the question of the reservation of land for mining purposes has not yet been decided by the Government, but under any circumstances the Hon. Mr. Seddon considers that it will be necessary for all applications affecting lands under clause 33 to be duly advertised."

Then we have more regulations proposed, which drew from Mr. Wilson a letter dated the 10th February, in which he discusses the proposed new regulations; and the battle went on, backwards and forwards, for some time, until the 10th March, when the manager writes to the Minister as follows:—

"*Regulations for dealing with Lands.*

"SIR,—We are very much pressed by applicants for land on the West Coast to deal with their applications, which have been held over for some time pending the settlement of the regulations for dealing with these lands. As the interests of the district are suffering considerably, we must ask you for an early reply to our letter of 10th February, in order that we may proceed at once."

Nothing seems to have been done till July, when, on the 10th, Mr. Wilson records a further protest. The letter is as follows:—

"SIR,—Referring again to my letter of the 10th February last, forwarding draft regulations for dealing with lands under clause 33 of the Midland Railway Contract, and to subsequent correspondence and interviews with yourself and the Hon. Minister of Lands on the same subject, I have the honour to again bring under your notice—(1) That the districts concerned are being greatly retarded, and settlers put to much inconvenience, and are even leaving the districts through the locking-up of the lands; and (2) that the company is not only incurring a present monetary loss through losing opportunities of making sales of land, but will also seriously suffer in the future from a traffic point of view through the delay of settlement along the line of railway.

"I desire, therefore, again to point out that the responsibility rests with the Government both in respect to the stoppage of settlement in the West Coast districts and in respect of the restrictions placed in the way of the company realising its land-grant, which are contrary to the terms of the Midland Railway Contract.

"Trusting that you will give the matter your early attention,—I have, &c."

Then, we have this answer by the Under-Secretary to the foregoing letter:—

"Re *Midland Railway Regulations for dealing with Lands under Clause 33 of the Midland Railway Contract.*

SIR,—"I am directed by the Minister for Public Works to acknowledge the receipt of your letter of the 10th instant, calling attention to alleged delay in the manner of opening land for settlement under the Midland Railway Contract on the west coast of the Middle Island, and stating that the districts affected are being retarded thereby. In reply, I am to state that the Government is not in any way responsible for any delay in this matter, as all the lands which have so far been earned by the company have been duly granted to it, and if the company has seen fit to make almost the whole of its selections on the east side of the range instead of on the West Coast, the Government cannot be blamed therefor. No impediment has been placed in the way of your company selecting lands within the railway area on the west coast of the Middle Island. It would, moreover, appear that the company desires to avoid publicity being given to the proposed selections of land in localities where gold-mining operations are being carried on. This has already been, and is likely to be, an obstacle in the way of approval being given to the draft regulations submitted by the company for dealing with lands under clause 33 of the Midland Railway Contract."

It will be noticed that this letter puts forward a view of the case which to the company was not a little startling, and it called forth the following reply from Mr. Wilson on the 28th July:—

"*Regulations for dealing with Lands under Clause 33.*

"SIR,—I have the honour to acknowledge receipt of your letter of the 22nd instant on the above subject, in reply to mine of the 10th instant, calling the attention of the Government to the injury caused by their not permitting the company to proceed with dealing with lands under the above-mentioned clause.

"After careful examination of the correspondence which has passed between the Government and the company on the subject, I am reluctantly forced to the conclusion that the Minister has

either not studied the correspondence or has entirely misunderstood the subject, the Minister's statements, as expressed in your letter, being inaccurate.

"In the first place, the lands earned by the company have not all been granted to it, as there are earnings to the amount of £50,000 (about), over and above what has been selected, now due; and the only block of western lands (No. 240) which the company has applied to select (notice of which selection was given on the 24th November, 1888) is still awaiting a final reply. The Minister's remarks, however, about the company's selections of blocks on the eastern side of the range are quite foreign to the point at issue, and my letter to which you reply did not attempt to cast any blame on the Government *re* the blocks which the company has found it expedient to select, and did not even mention the subject in any way. The subject of my letter was clause 33, which was specially inserted in the contract to enable the West Coast lands to be dealt with irrespective of block-sections, it being obvious that the selection of a block, say, of 5,000 acres to 10,000 acres, near Westport, would not in any way facilitate settlement, say, near Hokitika. Successive Governments have caused the delay in settlement, which would have been going on under the clause during the last two or three years, by the unworkable regulations issued by the late Government, which have not been withdrawn or altered up to the present time, though reasonable and workable modifications were proposed by the company, and sent with my letter of the 10th February last. Though this is now nearly six months ago, yet, judging from your letter under reply, consideration of the subject by the Government has not apparently advanced.

"As to the allegations that the company desires to avoid publicity being given to the proposed selection of land in localities where gold-mining operations are being carried on, if the Minister refers to the correspondence he will find the contrary to be the case, and that the company has been urging the Government to adopt the system of advertising all applications where any question of the land being payably auriferous is involved, *vide* my letter of the 10th February, and regulations therewith, and subsequent letters, in which I urged the adoption of advertising instead of making at once large mining reserves, which would, I consider, be a useless and needless hindrance to settlement, without profiting the gold-mining industry. Of course the company would object to the advertising if these large gold-mining reserves were made, as once they are made there can be no necessity for advertising, as the question of auriferous lands would then be done with. There can, therefore, be no obstacle in the way of approval of the draft regulations on this account.

"I must ask you for a further explanation of the Minister's statements on these points as contained in your letter under reply."

The next letter is dated the 20th August, 1891, from the Acting Under-Secretary of Public Works to the manager:—

"Re *Midland Railway Regulations for dealing with Lands under Clause 33 of the Midland Railway Contract.*

"SIR,—I have the honour to acknowledge the receipt of your letter of the 28th ultimo, on the subject of the proposed regulations for dealing with lands under clause 33 of the Midland Railway Contract.

"In reply, I am directed by the Minister for Public Works to state that reserves of land for mining purposes are now being and will be made as rapidly as possible, and that when the total area of land which it is considered necessary to reserve for this purpose has been so reserved the draft regulations referred to in your letter will be dealt with, and such modifications made therein as may be considered advisable."

An extraordinary letter certainly. It will be seen that the Government proposed to continue reserving until they had reached, possibly, the limit of the 750,000 acres. Until then settlement was apparently to remain in abeyance. The next letter is from the Under-Secretary to the manager on the 23rd December:—

"Re *Midland Railway.—Proposed Regulations for dealing with Lands under Clause 33 of the Midland Railway Contract.*

"SIR,—Referring to former correspondence on the above-mentioned subject, I have the honour, by direction of the Minister for Public Works, to state that, upon a closer examination of the provisions of the contract relating to the matter, it would appear that no provision is contained therein for making regulations such as those proposed by your company."

So that at last it would seem that after all this controversy, extending over about eighteen months, the Minister suddenly discovers that there was no power to make any regulations. The next letter I will read—passing over several comparatively unimportant—is one of the 28th April, 1892, from the manager to the Minister:—

"*Applications under Clause 33, Midland Railway Contract.*

"SIR,—I have the honour to point out that the company has, between February, 1890, and January, 1892, sent to the Government more than two hundred applications for western lands for assessment, under clause 33 of the contract, and without receiving any replies. This delay is quite contrary to the terms of the contract, which states that, upon the request of the company, 'the Queen shall *forthwith* cause the value of such lands to be assessed,' &c., and has already entailed much loss and inconvenience to the company and the public. I have, therefore, to again request your early attention to the matter, and that you will cause the assessments to be forwarded without further delay."

I should read the reply to that; it is from the Minister to the manager on the 25th May:—

"Re *Applications for Land under Clause 33 of the Midland Railway Contract.*

"SIR,—Referring to our recent interview on the above subject, and the understanding then arrived at in reference to the matter, I have now the honour to state that the Government is advised

that all applications already received from the company for land under clause 33 are informal, as they are addressed to the Minister for Public Works instead of to the Queen, as required by sub-clause 2 of clause 33 of the contract, or the Governor, in terms of clause 49 of the same; also, that you have omitted to state whether the land referred to in the applications is to be sold for cash or on deferred payment, or to be leased, as the case may be.

"To save the company any unnecessary trouble and delay in the matter, however, the Government is willing to treat the applications so far made somewhat exceptionally, provided that the company agrees to the following conditions, namely:—

"(*A.*) That the company will, as quickly as possible after being informed of the value at which the land is assessed on behalf of the Queen (but only as regards such of the lands as are not within mining reserves already made or proposed, and have not been dealt with under any of the Mining Acts), formally request the Queen or the Governor to have the same sold or leased; and also formally notify the Minister for Public Works that they have selected the same under clause 33 of the contract, and advised the Queen or the Governor accordingly.

"(*B.*) That all applications for land within any of the mining reserves (present or proposed), or land that has been dealt with under any Act relating to gold- or silver-mining, will be withdrawn.

"(*C.*) That all applications with regard to which any complication may exist or any doubt be held as to the lands affected being auriferous or argentiferous will be advertised if and as required by this department.

"As regards future applications, I would propose—(1) That the company's application to have the value of lands assessed should be regarded as a preliminary proceeding merely; (2) that on receipt of the Government valuation the company should address a formal request to the Queen to sell or lease the land referred to, and forward the same through this office for submission to the Governor; and (3) that at the same time formal notice of selection be given to the Minister for Public Works, as required by clause 29 of the contract.

"Will you kindly intimate your concurrence or otherwise in these proposals as early as possible, so that the applications which are now waiting to be dealt with may be disposed of without loss of time.

"Herewith please find list of applications for land that have been assessed. The applications numbered by company 682, 683, 684, 688, 705, 730, 742, and 793, will not be objected to if the company will formally ask to have the same sold, and duly notify the Minister, as mentioned in paragraph 1 on page 2 hereof. In regard to applications numbered 780 and 789, no objection will be offered, provided the conditions suggested by the Surveyor-General on the schedule enclosed are complied with.

"As regards applications numbered 152, 476, 648, and 689, these are objected to, and, as arranged at our interview, should now be withdrawn.

"In regard to applications numbered 381 and 835, the same must be advertised for one week in some paper published nearest to and circulating in the locality."

The reply is under date the 31st May, 1892:—

"*Application under Clause 33.*

"SIR,—I have to acknowledge the receipt of your letter of 25th instant.

"With regard to the first portion of your letter, the company is willing, of course, to amend the applications sent in in the direction you point out; but I am glad to learn from your letter that the Government is willing to facilitate dealing with these lands by dispensing with the somewhat needless formality of having the application addressed to the Queen instead of the Minister for Public Works. In future the applications shall be so addressed.

"As to the conditions upon which you say the Government is willing to deal with the applications already sent forward, I have to remark as follows:—

"(*a.*) The company agrees to the course suggested; but it does not appear that the words contained within the brackets are necessary, as it is presumed that the Government will disallow any applications which are required for *bonâ fide* mining purposes, and the words 'dealt with under any of the Mining Acts' are too wide, as they would prohibit the company selecting lands let under occupation license, subject to termination without compensation at three months' notice.

"(*b.*) It seems unnecessary for the company to *withdraw* applications which may be within mining reserves present or proposed. The Government will presumably exercise its power of disallowing such applications, and, of course, then they cannot be dealt with.

"(*c.*) To facilitate matters, the company will agree to the advertising of such applications as the Government may think necessary. The Government must bear in mind that advertising is to be done at the expense of applicants for the land, and therefore any undue expense of this sort must be a hindrance to settlement.

"It will therefore be seen that there is no reason why the Government should not proceed immediately to deal with the applications already sent in.

"As to future applications, the company is quite willing, for the sake of getting them dealt with as expeditiously as the Government will allow, to act as indicated in your letter; but with regard to paragraph (2), which reads, 'That on receipt of the Government valuation the company shall address a formal request to the Queen to sell or lease,' &c., this should read, 'That after receipt of the Government valuation, and upon the company having agreed with the applicant for the sale or lease of the land applied for, the company,' &c. (as in letter under reply).

"It is understood, of course, that after assessment the company's formal request to have the lands sold or leased is dependent on an agreement having been made with the applicant for sale or lease of the land in question. This is not apparent in your letter. Further, there is no necessity for the notice mentioned in clause (3) of your letter, as by section 33, clause (7) of the contract, it is

provided that lands sold or let by the Queen for the company 'shall be deemed to have been selected for the company,' and that 'the value thereof shall be from time to time debited against the company,' &c.

"I note your remarks with reference to the applications which you now return assessed, and about which I will write in another letter."

Then, we have a letter of the 14th June, 1892, from the Minister to the manager:—

"Re *Applications for Land under Clause 33 of the Midland Railway Contract.*

"SIR,—I am directed by the Minister for Public Works to acknowledge the receipt of your letter of the 31st ultimo on the above-mentioned subject, and to reply thereto as follows:—

"As regards the applications which have already been sent in, I am to state,—

"(*A.*) That it appears to the Minister that the words within the bracket in the paragraph marked *A* in his letter of 25th ultimo are necessary, as one of the conditions agreed upon at your recent interview with the Minister on this subject was that any applications that had been made to have lands dealt with under clause 33 should (as regards any of such lands that are within any of the mining reserves present or proposed) not be further proceeded with, and it was necessary therefore to make it quite clear that the proposals for further proceedings with existing applications do not extend to such lands.

"It was equally necessary to stipulate that as a general rule applications should not be further proceeded with when they affect lands that have been dealt with under any of the Mining Acts, though it is possible that the Government may allow some of the applications falling under this head to be proceeded with, if, upon due inquiry, there should seem to the Minister to be no valid objection to the same.

"(*B.*) As regards paragraph marked *B*, I am to state that possibly it would have been better if the letter of 25th ultimo, to which you are replying, had stated that applications coming under the head of paragraph *B* would not be further proceeded with, instead of stating that they were to be withdrawn.

"In cases where the lands applied for are within any of the mining reserves (present or proposed) the company will be duly apprised of the fact, and if it is agreed that such applications shall not be further proceeded with, but that they will be allowed to lapse, that will meet the case. There would seem to be no reason why the company should desire to proceed with these applications merely to compel the Minister to disallow them.

"As regards future applications, I am to state that the Minister has no objection to the alteration you propose should be made in the proposal numbered (2) in his letter of 25th May last, but he is unable to agree with you that the notice mentioned in proposal (3) is unnecessary, as he is advised by the law officers that such a notice is required by the terms of the contract, and there does not in any case seem to be any good reason why it should not be given."

Then, there are proposed regulations, which are unnecessary to read, and need not be referred to at present. I would only add two or three short letters on this subject. The first is a letter from the Minister to the manager, dated the 13th July, 1892:—

"*Midland Railway.—Application for Assessment of Land under Clause 33 of the Contract.*

"SIR,—In reply to your letter of the 22nd April last, forwarding, for assessment under clause 33 of the Midland Railway Contract, an application by Messrs. Loughnan and Halley for a piece of land containing 50 acres, situated in Block II., Waitahu Survey District, I am now directed by the Minister for Public Works to inform you that the land in question is within one of the proposed mining reserves, and is therefore not available for selection under clause 16 of the said contract. The application cannot therefore be entertained."

The last is a short letter, of the 17th August, from the same to the same, and reads as follows:—

"*Midland Railway.—Applications under Clause 33 of the Contract.*

"SIR,—I am directed by the Minister for Public Works to forward to you herewith a further list of applications for lands to be dealt with under clause 33 of the contract, with the assessment of value duly noted against each. There is no objection to these lands being now dealt with as provided in the contract, and in terms of the letters from this office of 25th May and 14th June last."

"[NOTE.—*Enclosed with this letter is a list of sixty-six applications, with assessments thereof.*]"

In the following year the correspondence is resumed. The first reads as follows:—

"New Zealand Midland Railway Company (Limited), Christchurch, 6th January, 1893.

"*Assessment under Clause 33.*

"SIR,—I have to acknowledge the receipt of your letter of the 22nd ultimo, forwarding assessments of certain applications which have been sent in to the Government.

"Owing to the delays which have occurred in getting these and other assessments, and the uncertainty which now exists as to the company's proposals, which are now before the Government, it is impossible for the company now to deal with these applications, if the lands must necessarily be debited to it, as selections on account of land-grant, since I cannot now tell what value of lands will be earned.

"The company would, however, be willing, in order to assist settlement, to agree to these particular lands to be dealt with on the basis of the proposal which I recently made to you—viz.: 'That it shall be optional with the company to treat the lands which may be so dealt with as a selection under its contract or not as may hereafter be found practicable.'

"By adopting this plan, settlement can proceed without hindrance, and if the company never select the lands the Government will, of course, retain the funds.

"I offer this as a solution of a somewhat serious difficulty, which will, of course, arise by the company being compelled to refuse to deal with any more of the western lands."

Sir B. BURNSIDE: He would be obstructing. I presume he was within his rights.

Sir C. LILLEY: There may be many shapes of obstruction.

Mr. Hutchison: No doubt; ranging from infinitely bad to indefinitely good.

Sir C. LILLEY: He might be doing what he thought his duty, and yet obstructing from another point of view.

Mr. Hutchison: It will be observed that at this date the difficulties of the company from accumulated grievances were such that the manager indicates that it is impossible for the company to deal with further applications, since, the work of settlement having been suspended, he felt it was no use endeavouring to withstand the obstruction any longer. This is the reply to that letter:—

"Public Works Department, Wellington, New Zealand, 24th February, 1893.

"SIR,— "*Midland Railway—Applications for Land under Clause 33 of the Contract.*

"I am directed by the Minister for Public Works to acknowledge the receipt of your letter of the 6th ultimo, stating that in the position of your company's affairs it will be impossible for you to deal with applications for lands under clause 33 of the Midland Railway contract, but that your company would be willing, in order to assist settlement, to agree to lands being dealt with on the basis of the verbal proposals recently made by you—viz., 'That it should be optional with the company to treat the lands which may be so dealt with as selections under its contract or not, as may hereafter be found practicable.'

"In reply I am to state that, as already intimated to your Mr. Wilson verbally at the time the proposals were made, the Minister is unable, in view of the clear and express provisions of clause 33 of the contract, to agree to the same.

"I have, &c.,
"H. J. H. BLOW,
"Under-Secretary for Public Works.

"The General Manager, New Zealand Midland Railway Company (Limited), Christchurch."

The reply is as follows:—

"New Zealand Midland Railway Company (Limited), Christchurch, 1st March, 1893.

"SIR,— "*Applications for Western Lands.*

"I have the honour to acknowledge the receipt of your letter of 24th February, and much regret that you cannot see your way to fall in with the suggestion of the company, which would remove the present block to settlement on the West Coast. Though it may not be possible to deal with the lands under clause 33 of the Midland Railway contract, there seems no reason why it should not be done under clause 31 by the company giving its written consent to the Government dealing with any applications, a condition of such consent in each case being that the company should be entitled hereafter, or within a specified time, to take over the proceeds of lands so dealt with, if it should so desire.

"Unless something of this be done, it will be some years before any lands can be dealt with for settlement within the authorised area in Westland or Nelson.

"I have, &c.,
"The Hon. the Minister for Public Works, Wellington." "ROBERT WILSON.

Then we have a short letter in answer:—

"Public Works Department, Wellington, New Zealand, 23rd March, 1893.

"SIR,— "*Midland Railway—Application for Western Lands.*

"In reply to your letter of the 1st instant, suggesting that the lands available for selection by your company on the western side of the main range of mountains might be dealt with under clause 31 of the contract, with the assent of your company, instead of under clause 33, I am directed by the Minister for Public Works to state that the matter has been duly considered, but, as clause 33 contains special provisions for dealing with such lands, and specifically prescribes the manner in which the lands should be sold or leased, and in what way the proceeds of such sale or lease should be applied, the Minister regrets that he cannot see his way to adopt your proposal.

"I have, &c.,
"J. A. MCARTHUR,
"For Under-Secretary for Public Works.

"The General Manager, New Zealand Midland Railway Company (Limited), Christchurch."

The last letter I shall refer to is, almost appropriately, not signed:—

"Public Works Department, Wellington, 10th August, 1893.

"SIR,— "*Midland Railway—Applications under Clause 33 of the Contract.*

"I am directed by the Minister for Public Works to forward you herewith a further list of ninety-four applications for lands to be dealt with under clause 33 of the Midland Railway contract, with the special assessments made by the Government duly noted thereon, and to inform you that there is no objection to the selection of these lands by your company.

"I have, &c.,

"Under Secretary for Public Works.

"The General Manager, New Zealand Midland Railway Company (Limited), Christchurch."

That closes the correspondence dealing with the subject of settlement under clause 33. I would now mention the damages claimed under this head.

Sir B. BURNSIDE: Is there any estimated value of the land?

Mr. Hutchison: Yes, I have it in schedule form, showing the damages under section 33. The

total is £96,790 in respect of applications not dealt with, owing to the action of the Government. The area covered by their applications was about 97,500 acres.

Sir R. Stout: There are inside mining reserves and outside mining reserves. Applications for 10s. were put in for £1. I would like you to give a list of the applications and the dates.

Mr. Hutchison: We will be able to do that too. The amount mentioned is, as I have indicated, the damage in respect of applications sent in to the company, and not dealt with, owing to the obstruction of the Government. The company, besides, claims £122,000 as damages in respect of the consequent loss of traffic to the railway constructed, and on probable future dealings under clause 33, supposing the company had not been prevented, through this and other causes, from continuing its enterprise. The grievances under clause 33 will also come in under the head of general damages.

Sir C. LILLEY: I suppose a million and a half covers all, but these are the particulars?

Mr. Hutchison: Yes. As I have mentioned before, all the various heads under the particulars of claim, with the exception of timber alone, come in under the claim of general damages as affecting the company; the claim in respect of timber alone stands apart from the claim for general damage. The operations of the Government complained of under this head, and every other head except timber, affected the finance of the company. I now come to deal specifically with the fifth head of the particulars, that dealing with taxation. The proposition of law which I would advance in connection with this matter is from Storey's Commentaries. The paragraph is 1330, second volume, which reads as follows: "As there are incidental powers belonging to a State in its sovereign capacity, so there are incidental rights, obligations, and duties. These are to be ascertained by the law of nations. The same general rights, duties, and limitations which the common law attaches to contracts of a similar character between private individuals are applicable to contracts of the Government." This rule would, I submit, bring this contract under the same rules of interpretation, as nearly as possible, as are applicable to contracts between private individuals, and that an act of one party to a contract affecting the consideration of a contract is matter of claim for damages by the party aggrieved.

Sir R. Stout: Do you sue the Queen for what Parliament did?

Mr. Hutchison: We do not impugn at all the legislative right of any colony to impose taxation.

Sir C. LILLEY: Have you any law here on the question of suing the Queen?

Sir R. Stout: Yes; "The Crown Suits Act, 1881": the case of Williams *v.* The Queen.

Sir C. LILLEY: She can be sued for negligence and for unliquidated damages?

Sir R. Stout: We deny the applicability of Royal instructions. It was raised by the late Justice Higginbotham. It is not known to our Constitution, any Royal instructions of that sort.

Sir C. LILLEY: The Governor's position is that of an agent, and is bound by the other.

Sir R. Stout: But we say he is not a mere agent; our Constitution provides that he is not a mere agent.

Mr. Hutchison: Under the Royal Instructions the Governor is directed to form an Executive Council "to advise and assist him in the administration of the government of the colony."

Sir B. BURNSIDE: Would you inform me which is the Constitution Act of the colony?

Mr. Hutchison: 15 and 16 Victoria, "An Act to grant Constitutional Representation to the Parliament of New Zealand." The Governor is empowered by a Commission from the Queen.

Sir C. LILLEY: The Queen's commission could not override the Constitution Act of the colony.

Mr. Hutchison: No, it recites it.

Sir B. BURNSIDE: The evidence will be the authority she has delegated to the Governor.

Mr. Hutchison: Perhaps I may be permitted to read the 6th clause of the Royal Instructions: "There shall be an Executive Council for the colony, and the said Council shall consist of such persons as are now or may at any time be members thereof in accordance with any law enacted by the Legislature of the colony, and of such other persons as the Governor shall from time to time, in our name and on our behalf, but subject to any law as aforesaid, appoint under the Public Seal of the Colony to be members of our said Executive Council." I believe that the Executive Council has uniformly been the Ministry of the day. On the resignation of Ministers they are expected to also resign their positions as members of the Council.

Sir C. LILLEY: This is a complaint respecting taxation?

Mr. Hutchison: Yes. The change in taxation of land went in the direction of reducing the value of the contract by seriously increasing the taxation on the lands the company were entitled to select. As indicating the spirit of fairness which should prevail in such matters, I would refer to the Customs and Excise Duties Act which was passed in 1888, and which considerably increased the Customs duties on goods imported into the colony. Section 18 provides, "(1.) Until the expiration of the time provided for the completion of the railway mentioned in the contract which has been entered into between Her Majesty and the New Zealand Midland Railway Company (Limited), or which may be entered into under 'The Midland Railway Contract Act, 1887,' or until the completion of such railway (whichever shall first happen), the law existing prior to the date when this Act is deemed to have come into operation shall continue to apply to the railway plant and materials which may be specially imported by the said company for the construction of the said railway." The rest of the section is not material; it merely provides that certain formalities must be complied with. This legislative exception recognises the right of the company to be considered under the contract by making an exception in its favour when increasing duties upon articles imported for the purposes of the railway.

Sir C. LILLEY: If they had not passed it, it might have given rise to damages?

Mr. Hutchison: If such an exception had not been inserted, the effect of the Act of 1888 would have increased the duties which the company would have had to pay on its engines and other materials for the railway. The contention of the company is that if the Legislature alters the position to the prejudice of a foreign contracting party, the Crown must make good the injury

sustained. The company does not challenge the right to alter the law, but the law cannot be altered to the prejudice of a party in a contract with the Crown without the Crown being liable for compensation. The Land and Income Assessment Act, which made a great change in the incidence of taxation in this colony, was passed in 1891. It imposed special taxation on land. Schedule A deals with the ordinary tax, by which the capital value of land was subject to assessment for the purpose of taxation, exclusive of improvements—that is to say, on the unimproved value. Schedule B provides for a graduated tax on land—upon all land the value of which is £5,000 or upwards. There were thirteen steps of graduation in 1891.

Sir C. LILLEY: Of course, if the general principle is determined against you, it would not matter.

Mr. Hutchison: No. In 1893 there was a further increase in the tax on lands of £5,000 or upwards in value, by the gradations, and rates being both increased, thus further increasing the burdens upon large areas of land such as the company had the right to select. It is impossible to fix anything like an exact amount of the damages under this head. The tax had the effect of requiring the company to deal promptly with its lands instead of holding them, so as to obtain what is popularly known as the "unearned increment." The income of the company was thereby very seriously affected. This claim is proposed to be treated under general damage. Now to come to the question of time. Paragraphs 6 and 7 of the particulars of claim both deal with time. I apprehend there will be no doubt or challenge of the proposition of law that time is held to be of the essence of the contract only in case of direct stipulation or necessary implication. That is a proposition laid down in Pollock on Contracts, page 415, and in Fry on Specific Performance. On page 492 of the most recent edition of the latter work the following passage occurs: "In order to render time of the essence of the contract, it must be clearly and expressly stipulated, and must also have been really contemplated and intended by the parties that it shall be so: it is not enough that a time is merely mentioned during which or before which something shall be done." And a little further on, upon the authority of Levy *v.* Lindon (New Reports, page 81), it is stated that "the question whether time was of the essence of the contract, and whether it has been waived, is one of evidence, and can therefore be disposed of only at the trial." It is also remarked in Fry, at pages 449 and 450, that it is clear the stipulation as to time must be reasonable. Now, I would ask the Court to note some of the dates and intervals that occurred in the course of the proceedings. The original contract is on the 17th January, 1885. The assignment to the company of that contract was on the 30th April, 1886—an interval of one year and three months. The Midland Railway Act, which authorised the Crown to enter into the present contract, was passed on 23rd December, 1887—another interval of one year and eight months; and the intimation to the company as to the contract having been executed in the colony was not given to the company until the 23rd September, 1888, an interval of nine more months; making the lapse of time from the date of the original to the intimation of the new, three years and eight months. Now, I have to say that, as a matter of fact, time was never treated as important in this contract. It was considered by all concerned as much to the interest of the company to complete the work as it was for the colony to see its completion. It may be asked why, when the contract of August, 1888, was being arranged, no alteration was made in the date for the completion of the works from that mentioned in the original contract. Evidence on that point will be called to show that the question was raised, and that the company was assured it was a matter of no importance.

Sir B. BURNSIDE: Who dealt with the parties in England?

Mr. Hutchison: The Agent-General.

Sir R. Stout: The draft contract was settled here and signed here. Communications were sent out direct to the Government.

Mr. Hutchison: The general manager was here, but everything had to be referred to London, and discussed there between the Agent-General of the colony and the directors of the company. The evidence I propose to offer with confidence on this point is the evidence of the solicitor of the company, who represented the company in settling the terms of the draft contract. The evidence of Mr. Burchell will show that time was not treated as being of the essence of the contract. Mr. Burchell's evidence will be that, while settling the contract, he objected to the term for the completion of the railway remaining as in the original contract, and altered the date to 1897. The Agent-General sent for him, and asked him not to insist on such an alteration as it would necessitate fresh legislation, and give rise to further delay. The Agent-General pointed out the provision appearing in the draft for extending the time, and said, "You need have no apprehension on that point; no reasonable extension of time will be refused, especially as so much time has already elapsed; both the Government and the colony are anxious to assist the company in every possible way." He added, "I have given you sufficient assurance on that point; the company can safely accept the contract as it stands; they will certainly obtain an extension of time when they deem the time has come to apply for it." On that understanding, of course, Mr. Burchell was content. After the sealing of the contract, in August, 1888, there was a further delay, inevitable in the circumstances, before the necessary debenture capital could be raised to go on with the works. The debenture capital was raised some time in April, 1889—a further interval of seven months beyond the three years and eight months already referred to. So that before the company had the money to construct the line from Brunnerton to Reefton, which was expected to be immediately payable, running as it did through a district already partially settled and anticipated as likely to be the field of further settlement to feed the traffic, a total period of four years and three months had elapsed. Then, we come to the delays referred to in paragraph 6 of the particulars—namely, the Brunner deviation and the substitution of an incline for a tunnel at Arthur's Pass. There was considerable controversy as to the desirability of the line being changed from one side of Lake Brunner to the other; but the question may be taken as having been settled by Act of Parliament, which allowed the change to be made.

Sir B. BURNSIDE: How far do you contend that the non-extension of time affects the question which is at present before us?

Mr. Hutchison: Paragraph 6 and the remaining paragraphs of the particulars relate to general damages.

Sir B. BURNSIDE: What effect did the non-extension of time have?

Mr. Hutchison: It simply made it impossible for the company to go on the London market with a view of raising money to continue the construction of the railway, which, on the face of the contract, ought to have been at that time under way.

Sir B. BURNSIDE: Did you then apply for an extension of time?

Mr. Hutchison: Yes.

Sir R. Stout: I understand the extension was not refused, if you could go on with the line.

Mr. Hutchison: The company could not go on without money. The company was incapacitated by the action of the Government.

Sir B. BURNSIDE: Is there any evidence to show that you were ever capacitated?

Mr. Hutchison: We take it that the Act of 1890 authorising the Lake Brunner deviation carried with it an enlargement of time. The conditions of the Act itself involved considerable delay. The plans had to be recast. The company contended, and still contend, that the Governor had power to grant the deviation; but his Advisers considered an Act of Parliament was necessary for the purpose, and that they undertook to get passed. That all took time, and ten months elapsed between the date when the Act was passed and the consent was given. Section 2 of the Act of 1890 provides that: "On its being shown to the satisfaction of the Governor by the said company that the making of the deviation from the line of railway mentioned in the said contract, which is described in the Schedule hereto, will render the railway more efficient for traffic purposes, and also upon the company entering into the contract or contracts mentioned in clause seven of the said contract in respect of that portion of the railway commencing at a point on the Government line at or near Belgrove, and giving security to Her Majesty to the satisfaction of the Governor for the due construction and completion within such period as the Governor may deem reasonable of such portion of such railway, it shall be lawful for the Governor in Council, in the name and on behalf on the Queen, by writing under his hand indorsed upon the said contract, to authorise the said company to make such deviation in accordance with the description thereof set out in the Schedule hereto, or as near thereto as may be practicable. But no such authority as aforesaid shall be given by the Governor unless he is satisfied that the aforesaid company have, by contracts, entered into an obligation with the Corporation of the Grey County to provide the said Corporation with a sum of not less than two thousand seven hundred pounds to defray the expense of widening the road, bridges, and culverts between the Township of Pounamu and Lake Brunner; and also that the said company will provide and maintain in good and efficient order a steam-boat of sufficient size to ply as a ferry-boat on the said lake, between the terminus of the abovementioned road on the said lake and the railway-line on the east side of the said lake: And the Council of the Grey County is hereby authorised in the name and on behalf of the said Corporation to make such contracts with the said company upon such terms, stipulations, and conditions as may be necessary to give effect thereto." We had to appease local jealousy, and to give money to construct a road—a particular road to give access to the lake on the one side, and to undertake to put on a ferry-boat to connect the end of that road with the railway-station on the further side. All that took time; but eventually the conditions were complied with. Now we come to the Abt system. In referring to the substitution of the incline for a tunnel, the following passage occurs in the Public Works Statement of 1892, page 2: "Proposals have been made by the company, under clause 4 of their contract, to substitute a steep incline line over Arthur's Pass for the tunnel line originally provided for. These proposals, being of a very important character, have received most careful consideration, and, with sundry modifications, have now, on the advice of Messrs. H. P. Higginson, M.Inst.C.E., and J. P. Maxwell, M.Inst.C.E., the engineering experts specially selected to advise His Excellency the Governor in the matter, been agreed to." The Government, in connection with that application, went, we say, unnecessarily and improperly into the character of the designs which were submitted for the purpose of constructing the railway. That, we say, the Government were not entitled to do, the only question for the Government being whether an incline line was proper in substitution for a tunnel. The company contend that so long as the drawings were up to the approved standard of the drawings in use on the Government railways, the Government had no right to object to anything but the proposed change of system—not to the working designs. Over that question one year and two months were consumed. Now, I would refer to the correspondence which took place with reference to the extension of time for the completion of the whole railway: that brings us to paragraph 7 of the particulars. The first letter is from the manager to the Minister, on the 15th March, 1892:—

"I have the honour to inform you that financial and other circumstances beyond control render it expedient for the company to apply to the Government for an extension of the contract time for finishing the New Zealand Midland Railway. The contract time is 1895; and I have to request that the date for completing the East and West Coast Section—viz., from the end of the Springfield contract to Jackson's Station—may be extended to 1898—that is, three years; and that the Nelson Section—viz., from Reefton to the end of the Belgrove contract—may be extended to 1900—that is, five years.

"I beg to refer you to clause 42 of the contract, which empowers the Governor in Council to extend the contract time for completing the railway if satisfied that the delay has not been caused by wilful default or neglect of the company. I have the honour to submit that the possible failure to complete the railway within the stipulated time has in no way been caused by 'default or neglect' of the company; on the contrary, every effort has been made by it to carry out the work within the stipulated time for completion. I must draw your attention particularly to the following circumstances, which have been beyond the control of the company:—

"(*a.*) The loss of time caused by the protracted negotiations for the revision of the original contract of 1885, and passage into law of the subsequent contract of 1888.

"(*b.*) The low status of New Zealand credit on the London money market at the time of forming the company, which rendered a large issue of capital at that time impossible.

"(*c.*) From the same cause—lowness of New Zealand credit—the issue by the company of £745,000 of debentures was made with great difficulty, and under restrictions as to new issues until this money was expended on works.

"(*d.*) The company's works were much delayed in reference to the subsequently-obtained deviation at Lake Brunner. The delay to works for ten months, and the protracted opposition to an improvement in the railway, seriously affected financial operations, and produced adverse criticism in London on the *bona fides* of the colony, and consequently postponed finance until the Argentine troubles and the Baring failure rendered these operations for the time impossible.

"(*e.*) Further delay has been caused by having to wait for the consent of the Governor to the substitution of the incline line for the summit tunnel at Arthur's Pass. Consent to this substitution, as provided in the contract, was asked for in August, 1891, and although it was pointed out at the time that any further financial arrangements were impossible until the required consent was obtained, the company have not yet received the reply to their application.

"In asking for this extension of the contract time, which is necessary to meet the requirements of financiers and to assure them that the company will be allowed to finish their works, I must point out that it is the intention of the company to hasten the completion of the railway to the utmost of its ability."

The reply is the 30th March, 1892, from the Minister to the manager:—

"Re *Midland Railway.—Proposed Extension of Contract Time.*

"I am directed by the Minister for Public Works to acknowledge the receipt of your letter of 15th instant, applying for an extension of the time allowed by the contract for the completion of the above-mentioned railway, and in reply to state that the matter will receive due consideration when the appropriate time therefor arrives."

Mr. Wilson replied on the 2nd April of the same year:—

"*Proposed Extension of Contract Time.*

"I have to acknowledge the receipt of your letter of 30th ultimo, stating that the above question would receive consideration 'when the appropriate time arrives.'

"In reply, I must point out that for financial reasons it is essential that the extension of time should be granted at once.

"It is impossible for the company to proceed with any financial operations unless the contract time is sufficiently extended to enable them to show financiers that there is ample time to complete the works. This is a necessary precaution, even though the works could be finished in contract time. You will note that there is a provision in the latter part of clause 42 of the contract that such extension may be made although the time to be extended has not yet expired.

"I must, therefore, urge upon you the necessity of giving the matter your immediate consideration and of letting me have a definite reply, that I may cable to my directors, as no further financial arrangements can be made by them until this extension of time is granted and the consent to the Abt incline received."

The next is a telegram to the manager, on the 6th May, 1892, in reply to a telegram from Mr. Wilson of the 3rd May, which telegram I have not here, but it is probably a reminder of the letter of the letter of the 2nd April which remained unanswered:—

"(Telegram.) "Wellington, 6th May, 1892.

"MINISTER directs me to reply to your telegram of 3rd instant that proposal to extend contract time is very important matter, requiring grave consideration not only of Government but probably of Parliament.

"H. J. H. BLOW,
"Under-Secretary for Public Works."

The next is from the manager to the Minister, on the 19th October, 1892:—

"I have the honour to request the Government to favour me with a definite reply to my letters asking for an extension of the contract time to complete the railway. I am in receipt of a cable from my directors asking for this information. I trust the Government will, therefore, reply without further delay."

That did not receive any reply, and Mr. Wilson, on the 22nd October of the same year, writes a letter in which the following passage occurs (the rest is immaterial to this point):—

". . . I beg to remind you that I have received no reply to my letter to you of the 19th instant relative to the extension of the contract time."

Still no reply, and on the 17th December Mr. Wilson writes again as follows:—

"I beg to remind you that consent to the extension of the contract time has not been received by the company. This question has been before the Government for months, and on your assurance I informed my directors that this extension would be granted on favourable conditions. I request you to give this subject your early and special attention, as it is impossible to even approach financiers relative to new capital until this extension of the contract time is received by the company."

Again no reply, and Mr. Wilson writes on the 17th January, 1893, as follows:—

"I have the honour to remind you that I have not yet had a reply from you as to the application of the company for an extension of the contract time of construction, as requested in my letter of the 29th October. I again beg to urge upon you that this question may have the earliest attention of the Government."

Again no reply, so on the 27th January, ten days after, Mr. Wilson again writes, as follows:—

". . . I must again remind you that I have not received the formal notice of extension of the contract time, though applied for months ago. I need hardly point out to you the impossibility of my directors making even temporary financial arrangements until this extension of time is formally granted to the company. The delay on the part of the Government in carrying out the conditions of the contract has entailed serious loss to the company. . . ."

On the same date Mr. Seddon answers:—

"Re *Midland Railway Contract: Proposed Extension of Time.*

"In reply to your letter of the 17th instant, addressed to the Hon. the Premier, in which you ask for an early decision upon your application for an extension of the contract time for the completion of the Midland Railway, I have now the honour to state that, in the opinion of the Government, it would be best for the settlement of this question to stand over until it is seen whether the negotiations with your company in reference to arranging for an entirely new contract lead to any practical result."

The next one is from the Minister to the manager, on the 31st January:—

"Re *Midland Railway Contract.*

"Your letter of the 27th instant, on the subject of your proposals for a modification of the Midland Railway contract, and stating that you had not received the formal notice of extension of the contract time, has been forwarded to me by the Hon. the Premier, with a request that I would reply thereto. . . .

"As regards the extension of the contract time asked for by the company, the Government considers that it is premature to deal with this question at present, as the existing contract has still about two years to run, and it is unusual for an extension of contract time to be asked for until the original contract time has nearly expired. Moreover, it is impossible to see at present what the condition of the works on the company's railway will be two years hence, so as to indicate what extension of time will be necessary. I would further point out that the question of extension of time is also involved in the company's proposals for a new contract."

Then we have a letter from the Minister to the manager, dated 1st February, 1893. It refers also to a matter that does not concern this particular point; dealing only with the part that does, it says:—

"Re *Midland Railway: Proposals for a New Contract.*

". . . As stated in my previous letter, in regard to the extension of time asked for by the company, the Government considers that it is premature to deal with this question at present, seeing that the existing contract has two years to run, and it is unusual for an extension of contract time to be asked for until the original contract time has nearly expired. Moreover, it is impossible to see at present what the conditions of the works on the company's railway will be two years hence, so as to indicate what extension of time will be necessary."

Sir B. BURNSIDE: Are these two letters?

Mr. Hutchison: They are both signed by the Minister for Public Works.

Sir R. Stout: Were they both sent from here?

Mr. Hutchison: Both from Wellington. The first one is dated 31st January and the other 1st February—the latter containing a passage which is a repetition of the first.

Sir C. LILLEY: The letters had probably crossed.

Mr. Hutchison: The explanation may be that the second letter which deals with another matter inadvertently repeated a paragraph of the former letter. The reply, on the subject of the extension of time, is from the manager to the Minister, on the 12th February. It is as follows, and, after dealing with other matters, proceeds:—

". . . In further reference to the extension of time which, upon the authority of the Hon. the Premier"—that would be the late Mr. Ballance—"I informed my directors would be granted under reasonable conditions, I must call your attention to clause 42 of the contract, which provides for the extension of time being granted, and must request you to withhold this consent no longer, as it is impossible to make any, even temporary, financial arrangements without proof that the time available and allowed under such an extension is sufficient to enable the work to be carried out."

Then we have the Minister to the manager, on the 2nd February:—

"*Midland Railway:* Re *Proposals for New Contract.*

"As regards the extension of time asked for, the Government is quite unable to understand what grounds you had for sending the cablegram referred to to your directors. The Premier, on being shown the paragraph on this subject in your letter, expressed his surprise, and stated that he had not informed you that an extension of time would be granted, but merely that the matter would be submitted to Cabinet for consideration when dealing with the other questions involved in your proposals for a new contract. . . .

"I deem it necessary to correct your apparent misapprehension on these subject at the very earliest possible moment, to avoid the possibility of any further misapprehension arising in respect thereto."

On the same date Mr. Wilson replies:—

"Your letter of to-day's date will receive reply on my arrival in London. I must maintain that if there is any misunderstanding relative to extension of time this rests with the Hon. the Premier."

Mr. Wilson, on the same day, I believe, left for England to consult with the directors on the position of the company. As to the misapprehension which appears to have arisen as to the promise of the Premier, it would be observed that Mr. Wilson first refers to it in a letter to the Premier himself on the 17th December; and that it was only when reference to the promise was repeated by Mr. Wilson in a letter on the 1st February to the Minister for Public Works that the Minister, on the following day raised, for the first time, any question as to the promise having been made by the Premier.

Sir R. Stout: Not the first time. Mr. Ballance was not in Wellington. He was very ill; he was ill for several months.

Mr. Hutchison: That no doubt is quite true; he was very ill.

Sir C. LILLEY: When did he die?

Sir R. Stout: On the 27th April, 1893.

Mr. Hutchison: The evidence, however, on this point will, I think—though, of course, it is to be regretted that any question should arise as to what occurred between the late Premier and the manager of the company—clearly show that there could have been no misapprehension on the part of Mr. Wilson, who, having a duty to perform to his directors in England under most important and responsible circumstances, went to the Premier and showed him the draft of a cable he was about to send to his directors in England as to the promised extension of time. The Premier, I am instructed, assented to the contents of the cable and to its being sent. At this point Mr. Wilson went to England—in February, 1893. He returned towards the end of the year, and certain proposals were made by the company to the Government for modifications of the contract, which did not result in anything being done, and in the following year further efforts were made for a *modus vivendi*, but again without result.

Sir R. Stout: Parliament refused.

Mr. Hutchison: No; in 1893 the proposals were considered by a Select Committee, which reported in a certain direction to the House, which proposals did not result in anything being done. The company could not accept the position indicated by the report of the Committee. The following year, 1894, renewed efforts were made to come to some arrangement, and these went so far that a report of the Committee was brought down and a Bill framed thereon was introduced by the Government of the day.

Sir R. Stout: In 1894.

Mr. Hutchison: Yes, in 1894; and lost by a majority of six or seven, which was probably an unfortunate circumstance—perhaps more unfortunate for the colony than for the company. However, that is a matter of opinion. If the Bill had been passed it would have settled this matter altogether. On that occassion a statement was made by the Premier——

Sir R. Stout: In the House? You cannot quote *Hansard.*

Mr. Hutchison: I am not going to quote *Hansard;* I am going to prove what the Premier said.

Sir R. Stout: I object. Surely a statement by the Premier cannot bind the Queen.

Sir C. LILLEY: Surely not.

Mr. Hutchison: He was Minister of Public Works as well as Premier. He was the member of the Executive Council administering the departments having charge of this contract. The opinion of my learned friend opposite (Sir R. Stout) might not at the present time, when a private member, be of much importance, although, intrinsically, of great value. But it would be of importance if he were the Minister representing the Government in relation to this contract, and, in that capacity, made certain statements in reference to the time the company was entitled to, in the nature of admissions.

Sir R. Stout: How can it be an admission against the Queen?

Mr. Hutchison: The Queen speaks through her Ministers.

Sir C. LILLEY: How can you get evidence of the admission at all? I thought the proceedings of Parliament were not open to the public?

Mr. Hutchison: Oh, that is a mere fiction.

Sir C. LILLEY: We had a case in Queensland in which a person could not get into the House. It was a case of trespass. Certainly persons were excluded. It was alleged to be a violation of one of the Standing Orders. Our Court held—I was not on the bench at that time—that you could give no evidence of what took place in the House.

Mr. Hutchison: That was a decree of expulsion temporarily.

Sir C. LILLEY: Yes, the labour members. It is reported in the Queensland Law Journal. If you could get inside the House—that is, if you could give evidence of what took place in the House—it would surely be alleged that it was a violation of the rights of members.

Mr. Hutchison: I wish to put it to my learned friend that if a person heard the Premier on this particular point, would his evidence not be allowed?

Sir R. Stout: Surely you must show authority. How can you say the Premier, making a speech in Parliament, was an agent of the Queen?

Mr. Hutchison: He made the statement as Minister of Public Works, and as such was agent for the Queen touching this contract.

Sir R. Stout: He has no right to have the Queen's name mentioned in the House at all. He would be guilty of a breach of privilege. How can the opinion of the Premier on a contract be evidence at all as between the contracting parties?

Mr. Hutchison: The Minister in charge of the department made a certain statement in the nature of an admission. I claim to give evidence of that admission.

Sir B. BURNSIDE: If you asked him to give evidence; but touching his credit——

Mr. Hutchison: We would prove the admission by calling persons who heard it made.

Sir B. BURNSIDE: Would you call a person to prove an admission of fact by another unless you had called that other to see whether he had admitted it or not? You want to prove a man made a certain statement.

Sir R. Stout: Surely the elementary principles of "agent" is this: A man may be a general or special agent. Can it be for a moment contended that he was a general agent for the Crown?

Mr. Hutchison: I say he was the Minister in charge.

Sir R. Stout: Then, put it that he was a special agent. You must give us something to show that he was the special agent of the Queen.

Mr. Hutchison: He was the Minister of Public Works.

Sir R. Stout: The fact of being Minister of Public Works does not permit him to make an admission for the Queen.

Sir C. LILLEY: Could the Executive Council make such an admission, or any particular member of it do so?

Sir R. Stout: No.

Sir B. BURNSIDE: He may be said to be the representative of the Governor.

Mr. Hutchison: We say in the introduction to the particulars of claim that "the acts and defaults complained of are those of the Executive of the Colony of New Zealand, acting for the Queen by and through the Governor of the colony, and by and through the Minister of Public Works."

Sir B. BURNSIDE: Put the Queen in the position of a private individual and a party to this contract resident out of the jurisdiction; then, who would be the representatives in this country of the Queen as a private individual?

Mr. Hutchison: Primarily the Governor. However, he never acts; and, like the Queen, can do no wrong. It would be the Ministers who are responsible.

Sir B. BURNSIDE: Are there no representatives of the Sovereign in reference to this contract?

Sir R. Stout: No.

Mr. Hutchison: I say the Minister of Public Works is, for the purposes of this contract, the agent of the Queen.

Sir R. Stout: It must be, then, by statutory authority, and I am not aware of any.

Sir B. BURNSIDE: You say statutory authority?

Sir R. Stout: To make him agent for the Queen in reference to the contract.

Sir C. LILLEY: How would he dissever his character as a member of the House? I suppose he could not be severed. Whatever he said as a member of the House, if he happened to be Minister of Public Works, might be used against the Queen.

Sir R. Stout: It is the old case of Sir Walter Mildmay, in the time of Queen Elizabeth. The Queen can only speak by sign manual. You cannot have anything like this—admissions against the Crown.

Mr. Hutchison: There are some observations by Mr. Justice Richmond in the case of *Williams* v. *the Queen*, reported in the first volume of the New Zealand Law Reports, Court of Appeal, on this point.

Sir C. LILLEY: Observations.

Mr. Hutchison: Part of the judgment. The head-note is, "When a snag, the existence of which was known to the Government, and which formed a hidden danger to ships frequenting the wharf, had been suffered to remain, and no steps had been taken to warn shipmasters of its existence, held, that the Crown was liable for damage done by the snag to a ship while moored at the wharf. Such an omission is a wrong or a damage suffered by or under the authority of the Government within the meaning of 'The Crown Suits Act, 1881,' section 37."

Sir C. LILLEY: What became of that case?

Sir R. Stout: It went to the Privy Council, and followed the same course as the Mersey Dock case. The latest is the Canadian case of the Municipality of Pictu, which modified to some extent the well-known case of Macpherson *v.* Bathurst. That was a question about a drain.

Sir C. LILLEY: In these cases it has lately been decided that the Municipality is not liable.

Mr. Hutchison: In the case I am quoting, his Honour Mr. Justice Richmond, in considering the duty of keeping the wharf clear of hidden obstructions, says: "The neglect of this duty would be an actionable wrong, and I think the declaration sufficiently shows that there has been such neglect in the present case. It avers that the plaintiff's steamship was moored at the staiths or wharf, by and under the direction of the Harbourmaster, and that whilst alongside she settled upon a snag in the bed of the river, and was damaged and sank. It further avers that the Executive Government and Harbourmaster were aware of the existence of the snag, but had negligently suffered it to remain; and, moreover, that no steps had been taken to indicate to shipmasters the existence of the hidden danger. In case any person or body corporate other than the Crown were defendant, a good cause of action would be disclosed. But I have had some difficulty in satisfying myself that the case is provided for by the Act. Section 37, subsection (2), speaks of or refers to a wrong or damage done or suffered by or under authority of the Executive Government. I have felt some doubt whether such language can be construed to include mere omissions and neglect on the part of the Government. I have, however, come to the conclusion that it ought to be so construed. Undoubtedly a duty omitted is a wrong done, and though the words 'by or under authority,' &c., do not so well suit omissions as acts, yet, where, as is averred in the present case, the Executive Government has knowingly left undone something which ought to have been done by it, the wrong occasioned by such omission may be said to have been suffered under its authority." And in the same case Mr. Justice Johnston makes this observation, at page 227: "If the act was done under the authority of the Government it was not a wrong. We must then say that the words mean done by a person acting under the authority of the Government." That is how he puts it.

Sir R. Stout: I may mention that there is a case (29, Ch. Div.) where one of the parties to the case was a man named Devala, which went to this effect: "Supposing the chairman, at a meeting of shareholders or directors, makes a statement, can it be said that that statement can be used against the company?" It was a case where a man wanted to get his name removed from the share-list on the ground that he had been misled, and he wanted to use the admission or statement made by the chairman that the prospectus was wrong, and it was held that it could not be so held. Statements made by members of Municipalities are not binding on the Municipalities.

Mr. Hutchison: But an admission made by an officer of a Corporation in relation to a claim by a ratepayer would be evidence, and that would be this case. I do not think there need to be any tenderness about statements made by those in authority. The Minister for Public Works is the representative of the Queen for the operative works of this contract.

Sir R. Stout: Is he in authority; that is the question?

Mr. Hutchison: It will be seen under clause 4 of the contract that the plans of the railway are deposited with the Minister of Public Works. I will, however, pass by for the present the statement I intended to open, made by the Minister on the introduction of the Midland Railway Bill, until we have been able to gather a little more light on the subject; but I do not abandon the point, and, as at present advised, will, at the proper time, tender it in evidence. On the 18th October, 1894, another letter was written by the manager to the Minister on the subject of extension of time:—

"*The New Zealand Midland Railway Company's Contract.*

"I have the honour to state, for reasons of which the Government are fully aware, that the above company will not be able to construct and finish the railway within the period limited in the contract of 3rd August, 1888.

"I have the honour, therefore, to apply through you to His Excellency the Governor to extend, by indorsement upon the original contract, the period thereby limited for the completion of the railway for such further time as His Excellency may deem reasonable, having regard to the circumstances of the case.

"It will hardly, I think, be suggested by the Government that the delay has been caused by the wilful default or neglect of the company, but, as I make this present application in the terms of clause 42 of the contract, I am advised that it is necessary that I should formally offer to satisfy His Excellency in Council upon the point, should it be raised.

"In making the request, I must be understood to be doing so without prejudice to the position which the company may be compelled to adopt with regard to the other matters in question between the Government and the company.

"I trust that I may have the favour of a reply at your early convenience, and that you will inform me what extension the Government will be prepared to advise His Excellency to grant."

The reply was, on the 30th October, 1894, as follows:—

"*The New Zealand Midland Railway Company's Contract.*

"In reply to your letter of the 18th instant, applying for an extension of time for the completion of the above-mentioned contract, I am directed by the Minister for Public Works to state that before submitting the application to the Cabinet for consideration he should like it to be accompanied by a full statement of the grounds on which it is based, and he will therefore be glad if your company will be good enough to furnish such information at their early convenience with the view of the application in question being considered in Cabinet at an early date.

"I have, &c.,
"H. J. H. Blow,
"Under-Secretary for Public Works."

The reply to that was as follows:—

"Sir,— "Christchurch, 1st November, 1894.

"In reply to your letter of the 30th ultimo, requesting the company to furnish a full statement of the grounds on which the application to His Excellency the Governor for extension of time for the performance of the contract is based, I beg to submit that if it be suggested as a bar to the extension of the time that the delay has been caused by the wilful neglect or default of the company, that a statement of the facts (if any) constituting neglect or default should in the first instance be prepared by the Government against the company, in order to enable the company to satisfy His Excellency the Governor that the delay has not been caused by such acts.

"I have, &c.,
"The Hon. the Minister for Public Works, Wellington." "Robert Wilson.

Then came this letter:—

"Public Works Department, Wellington, 6th November, 1894.

"Sir,— "*Midland Railway Contract: Application for Extension of Time.*

"I have the honour to acknowledge the receipt of your letter of the 1st instant, in reference to the above matter, and in reply to state that I think you have somewhat mistaken the position. The contract provides that the Governor shall, before granting any extension of time, be satisfied that the delay has not been caused by the wilful default or neglect of the company; but it by no means follows that the Governor is bound to grant an extension of time simply because the company has not wilfully or negligently caused the delay.

"Under the circumstances, therefore, it is only reasonable, I think, that the company should furnish a statement of the grounds on which its application is based, and for what period an extension is sought. I shall be glad, therefore, if you will kindly let me have such a statement at your convenience.

"I have, &c.,
"R. J. Seddon,
"Minister for Public Works.

"The General Manager, New Zealand Midland Railway Company (Limited),
"Christchurch."

On the 16th November we have the following reply from Mr. Wilson:—

"Christchurch, 16th November, 1894.

"*The New Zealand Midland Railway Contract: Application for Extension of Time.*

"SIR,—

"I have the honour to acknowledge the receipt of your letter of the 6th instant.

"The company adheres to the advice given to it as regards the construction of clause 42 of the contract, that, if it be suggested that the delay has been caused by wilful default or neglect on its part, charges constituting such default or neglect should be specifically alleged against the company in the first instance.

"Without abandoning and without prejudice to this view of its legal position, the company would desire to draw the attention of His Excellency the Governor to the following circumstances which have been beyond the control of the company, and which have prevented the completion of the work within the time originally contemplated by the contract:—

"(*a.*) The loss of time caused by the protracted negotiations for the revision of the original contract of 1885, and passing into law of the subsequent contract of 1888.

"(*b.*) The low status of New Zealand credit on the London money market at the time of forming the company, which rendered a large issue of capital at that time impossible.

"(*c.*) From the same cause—lowness of New Zealand credit—the issue by the company of £745,000 of debentures was made with great difficulty, and under restrictions as to new issues until this money was expended on works.

"(*d.*) The company's works were much delayed in reference to the subsequently-obtained deviation at Lake Brunner. The delay to works for ten months, and the protracted opposition to this improvement in the railway, seriously affected financial operations, and produced adverse criticism in London on the *bona fides* of the colony, and consequently postponed finance until the Argentine trouble and the Baring failure rendered these operations for the time impossible.

"(*e.*) The delay caused by having to wait for the consent of the Governor to the substitution of the incline line for the summit tunnel at Arthur's Pass.

"(*f.*) The delay caused by the protracted negotiations (entered into at the request of the New Zealand Government) of the last two years for variation of the contract, which necessitated the absence of the company's general manager and engineer-in-chief from the colony, and which resulted in the rejection by Parliament of the scheme approved by the Government of New Zealand.

"As the Government are already in possession of evidence showing the length of time which will be required for the construction of the works, I have the honour to suggest that the extension of the contract be for a term of not less than five years from the 17th January, 1895.

"I have, &c.,

"The Hon. the Minister for Public Works, Wellington." "ROBERT WILSON.

It will be observed that this was in November, a couple of months, as nearly as possible, before the date for the completion of the works on the 17th January, 1895. The answer was on the 24th December, 1894; I will read it, merely premising that the company by no means agrees with the reasons set out. This letter concludes the correspondence on the subject:—

"Public Works Department, Wellington, New Zealand, 24th December, 1894.

"*Midland Railway Contract: Application for Extension of Time.*

"SIR,—I have the honour to acknowledge the receipt of your letter of the 16th ultimo, in which you state the grounds on which your company applies for an extension of time for the completion of the works provided for under its contract.

"The Government is unable to admit that the grounds urged give the company any valid claim to the extension of time asked for. As regards the several grounds urged in the paragraphs marked respectively (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), in your letter, I may remark as follows:—

"(*a.*) This was anterior to the signing of the contract in 1888, and cannot therefore be urged as any ground for granting an extension of time under that contract.

"(*b.*) This also was anterior to the signing of the contract, but, even had it not been so, would not, in the opinion of the Government, constitute any ground for an extension of time.

"(*c.*) This would seem to be a matter with which the Government has nothing to do, and can in no way affect the conditions of the company's contract.

"(*d.*) The deviation at Lake Brunner was asked for by the company in its own interests, and if any delay took place in connection with the matter (which is not admitted) the Government cannot be held accountable therefor.

"(*e.*) The proposal to substitute an incline line for a tunnel at Arthur's Pass was also made by the company in its own interests, and cannot therefore be urged as a ground for extension of time. Moreover, as the saving in both time and money to the company by the substitution will be very great, the Government is at a loss to understand how this can possibly be urged as a ground for an extension of time.

"(*f.*) The negotiations for a new contract were likewise entered into by the company in its own interests, for the reason that it professed to be unable to carry out the contract as it stood. The Government cannot admit that a failure on the company's part to give effect to the contract constitutes any ground for an application for an extension of time.

"I must also distinctly negative the statement contained in paragraph (*f*) of your letter, to the effect that the negotiations for a new contract were entered into at the request of the Govern-

ment. As already stated, the negotiations arose solely out of the professed inability of the company to carry the existing contract to completion, and were entered into by the company without any request or suggestion by the Government. While unable to admit that the company has shown any good grounds for an extension of the contract time, the Government is nevertheless desirous of meeting the company in every reasonable way; and if, therefore, you are in a position to furnish other and sufficient reasons for granting an extension of time, as well as satisfactory proof that the company is or will be in a position to carry out the contract to completion provided a reasonable extension of time is granted, the Government will carefully consider the company's application; but until such proof is furnished the Cabinet is unable to entertain the same.

"I have, &c.,
"R. J. SEDDON."

It was vain to hope that anything could be expected in the circumstances. There was no help for it but to go to arbitration, the proceedings for which had been commenced, as a precautionary measure, in London, so far as the company was concerned, in the latter part of 1894. Notice of the appointment by the company of an arbitrator was served on the 14th January of the present year. The points which will be taken in connection with clause 42 are mentioned in the course of the correspondence I have read—that is, as to the extension of time, and we say with confidence that there was no default or neglect on the part of the company; on the contrary, that there was obstruction, and more than neglect, on the part of the Queen, through her agents acting in the colony. That leads me, now, to the next point—paragraph 8 of the particulars—the subject of defamation, which I admit would be, between private persons, the subject of an action for damages founded on the injury done, but under a contract such as this, made between a company formed in England and the Government of a colony, is properly, I submit, included in the company's general claim for damages under the arbitration clause of the contract. The words of reference are exceedingly wide—in fact, as wide as could be made; and I submit we are right in here seeking damages for the damage done to the company arising from statements made before a Select Committee in connection with the present contract. The statements complained of were not made in Parliament.

Sir R. Stout: Yes: our Act provides that, if they were before a Committee they are privileged.

Mr. Hutchison: We are not suing him—the Minister.

Sir C. LILLEY: You are trying to get the right.

Mr. Hutchison: I do not admit there is any such privilege as that claimed. It will be for my learned friend to set that up.

Sir C. LILLEY: You will have to establish your own right.

Sir R. Stout: You are suing for general damages.

Mr. Hutchison: We are suing the Queen for the result of injurious statements made by her agents.

Sir B. BURNSIDE: Is there such a thing for the purposes of a primary action as an action for defamation because a man spoke ill of the estate of another, except he called him a bankrupt? For saying a man is a bankrupt, for instance, an action would lie; but speaking of the affairs of a man whereby he is damaged in a particular transaction, is that the subject of a practical action for defamation, unless it imputes something personal to a man, or to his trade? The question, I understand, here with reference to this statement and the Act, have the effect of decreasing or increasing the damages which may be considered by a jury. That is the question, I think.

Mr. Hutchison: I was proposing to contend that the reference to arbitration under the contract is much wider than any rule of procedure as to any action between private persons: everything affecting the rights and liabilities of the parties, every question in dispute under the contract or in relation thereto is subject of arbitration.

Sir B. BURNSIDE: It might be that between two parties, one suing the other to carry it out, there might be a question of damages.

Mr. Hutchison: I am referring to the familiar term of defamation; but my point is that the statements made by the agent of the Queen as one of the parties, affecting the financial position of the company and its ability to raise money in London upon its credit, was such a wrong as gives us a right to claim damages against the Queen.

Sir B. BURNSIDE: It having resulted in damage of which you are prepared to give proof?

Mr. Hutchison: Yes. That leads me to the subject touched upon in the opening part of my address, with reference to the communications between the Agent-General and the Chairman of the company in London prior to the date of the contract. I mentioned that I would return to the events that led up to the contract, basing my contention on the Act of 1884, and the specific reference to the borrowing powers of the company as expressly recognised by clause 9 of the contract, which deals with the possible assignment of the contract, but provides "that this clause shall not be deemed to interfere or in anywise abridge the powers of borrowing given by the said Act"—that is, the Act of 1884. In the same connection I would refer to clause 44 of the contract, in which the same thing is recognised: "In the event of the purchase of the said railway by the Queen, or on her behalf, in accordance with the Acts relating thereto, such a sum shall be included in the price to be paid for such purchase as is equal to the amount which may have been actually paid to the shareholders or debenture-holders of the company as interest during construction for the period ending the thirty-first day of July, one thousand eight hundred and ninety-seven, the rate not to exceed an average of four per cent. per annum, except in the case of shares or debentures representing five hundred thousand pounds in amount of capital first raised, in regard to which the rate shall be five per cent. The total amount of such interest to be added to the price of the said railway shall not exceed the sum of four hundred thousand pounds." I have had occasion to mention more than once that the whole basis of the contract is the power of the company to

finance, and the dates I desire to refer to are between the period of the first contract, in 1885, and the date of the present contract, in 1888.

Sir R. Stout: On what principle of law do you want the negotiations to go in?

Mr. Hutchison: As explaining the circumstances of the contract itself.

Sir B. BURNSIDE: How can you explain the contract when there is nothing in it to explain?

Mr. Hutchison: It is necessary so as to understand the position of the debenture-holders. They have certain rights, and the company is necessarily involved.

Sir C. LILLEY: We have no claim on behalf of the debenture-holders. How can you arbitrate on their behalf?

Mr. Hutchison: I am not asking the arbitrators to adjudicate on the rights of the debenture-holders; but, seeing the power of borrowing was necessarily based on the construction of the railway, the ability to borrow is recognised as an essential constituent of this contract. The company's land-grant depends on the course of construction, and on that we were entitled to raise money. It was known to the other contracting party that we should raise money not only by share capital but also by debentures.

Sir C. LILLEY: You have power.

Mr. Hutchison: And the company was prevented from using it.

Hon. E. BLAKE: The share capital being limited to one and a half millions, and the cost being estimated—as I understand, only for the purpose of finance—at something like two and a half millions, it is very plain you were supposed to be going to borrow. If you raised the whole capital there would still be something to borrow.

Mr. Hutchison: Yes, for the actual construction, without equipment.

Hon. E. BLAKE: It is available. It would be carried out by borrowing.

Mr. Hutchison: Yes, but the Government interfered and prejudiced the company in its efforts to borrow.

Sir B. BURNSIDE: You mean to say, that was the special privilege they would enjoy by the contract?

Sir R. Stout: We never stopped them.

Mr. Hutchison: It was no use trying after what you had done.

Sir C. LILLEY: How are the lands vested? Have you to acquire them from the Native race?

Sir R. Stout: It was all acquired; but there was no question of the acquiring. We have never recognised a Maori title: all the Maoris must take from the Queen.

Sir B. BURNSIDE: You treated it as a conquered country?

Sir R. Stout: No.

Hon. E. BLAKE: The arrangement was only as to the portions dealt with at the time?

Sir R. Stout: The point is this: that no Maori gets a title until he gets a Crown grant, but we have recognised that they (the Maoris) are entitled to the Crown grant.

Sir C. LILLEY: All the other lands in that position are vested in the Queen?

Sir R. Stout: No; it is called Native land, but is not vested in the Natives.

Sir B. BURNSIDE: There is no other land but what is vested in the Natives. Has the Queen any direct sovereign power over that land?

Sir R. Stout: Yes.

Sir B. BURNSIDE: Have they no direct right without that grant?

Sir R. Stout: It has been held by a decision of the Privy Council--in the case of the Falkland Islands, it was held in 1882 that the Queen cannot give any grant except by virtue of a statute. There is also a case relating to a copper-mine.

Sir B. BURNSIDE: The land is simply called the Queen's, and if you want to make a grant of it I suppose the grant is made in the name of the Governor?

Sir R. Stout: No, in the name of the Queen, under the Great Seal of the colony.

Sir B. BURNSIDE: Therefore it is the Governor of the colony who has the disposal of the Crown lands?

Hon. E. BLAKE: I suppose it is in the name of the Queen.

Sir B. BURNSIDE: The fee in the land is, I presume, in the Queen, and the use of it in the Governor.

Sir R. Stout: There was a very great question fought out in the House of Parliament of 1860 as to whether the Natives were to be recognised as owners, or if they must take as if in feudal tenure from the Crown. It was recognised that the titles could not be held except under Crown grant. There is a Native Land Court and they can go to it, and it says they are entitled to the grant.

Hon. E. BLAKE: All these lands in the area got into the hands of the Queen, from whom?

Sir R. Stout: They were part of the Arahura purchase.

Mr. Hutchison: My object in seeking to open this evidence is to show that the company was to have a free hand without prejudice. To show how essential it was, I may probably be allowed to refer to one or two letters which passed on the subject. It will be proved by the chairman of the company that hardly had the capital been raised in 1886 when reports began to be circulated in England, based on speeches made in the colony, that the contract was of no value, and that the lands reserved for selection were worthless. At the same time, in 1886, the company was making arrangements for a further issue of capital, but these reports entirely stopped such issue being made. There was also the effect of Larnach's Proclamation, which I have already referred to. In January of the following year—1887—the chairman wrote to the Agent-General as follows:—

Sir R. Stout: Is that letter official?

Mr. Hutchison: There may be a doubt as to whether the Agent-General was not representing the Executive of the colony in London in connection with this contract; but as to that I anticipate there can be no real question; assuredly, I say, he was, and, if necessary, the company will prove

the fact; but I should have thought it was so obvious that it would not be contested. This is the letter from the Chairman to the Agent-General:—

"DEAR SIR FRANCIS BELL,— "15th January, 1887.

". . . I have not been idle, but have had further negotiations with respect to the raising of money for the purpose of pushing on the line more rapidly. These negotiations have been tolerably favourable, but I hope you will be able to impress upon the New Zealand Government—what I fear Mr. Scott has not done—the absolute necessity of putting the land-grant in such a position (that is so intelligible and easy) that it can be dealt with on the London market.

"The two questions that are asked me, and very naturally so, are—first, have you got the land? secondly, is the land saleable? If I can answer these two questions in the affirmative, there is every probability of our being able to throw the security into a shape that would be acceptable; but the easy acquisition and the clear position of the land are points absolutely essential, and I wonder that this has not struck our friends in New Zealand more forcibly than it has done."

The Agent-General replies, on the 29th of the same month, as follows:—

"DEAR MR. SALT,—

"I was so hard pressed for both mails, Thursday and yesterday, that I could not write before.

"I telegraphed to the Government as we arranged on the 25th,—'Midland: The directors are giving the new contract friendly and favourable consideration, but we want a few days reflection over some points before we can telegraph to you about it.' . . .

"I didn't write about the £150,000, because it is clear we shall have to telegraph about it, as well as the clauses relating to new contracts at Belgrove and Springfield. Everything depends on two points: whether (*a*) you will agree to work at the three points simultaneously, and (*b*) can get money on the land under the process defined in the new agreement. It is so difficult to keep in mind the provisions of a long deed drawn up in legal phraseology that we must have a *précis* of it to work upon before we can get further: I am making this, and will send it you. Then we shall be able to see exactly what the agreement defines in regard to quantity and value of the land-grant, and to arrive at some idea of whether money can be got upon it as it stands. At present I don't see either point any more clearly than yourself. When this is done, we had better meet and agree on a telegram to the Government for their guidance.

"Don't give me any thanks for help. Nothing could ever have been done if we hadn't worked in the same spirit from the first, and with the mutual wish to make light of the difficulties. As you say, we shall be laughing over them one of these days. Believe me, &c.,

"F. D. BELL."

Notwithstanding the adverse influences arising from detraction of the value of the land-grant, in July of that year (1887) there was no less a sum than three millions of money promised to the company, on certain terms; and the company, in order to take advantage of that favourable position of the London market, sought to arrange for a new contract, with some necessary modifications on the drafts which had been shortly before prepared by the Government. The company sealed such proposed contract, and sent it out to the colony, in the hope that it would be accepted, and the company thus be at once enabled to take advantage of the offer that had been made. The secretary of the company writes to the Agent-General as follows:—

"SIR,— "79, Gracechurch Street, London, E.C., 6th August, 1887.

"I am instructed by my directors to inform you that they have to-day settled the form of the new contract, and have given instructions to the solicitor of the company to send you some copies. Copies are also about to be sent to the representatives of the company in New Zealand, one of which, in order to save time, will bear the company's official seal.

"My directors are very sorry not to have had the advantage of personal consultation with yourself during the final revise of the contract. As you are well aware, they have been compelled to frame it in such a manner as to suit the views of financial friends who have practically undertaken to supply the balance of the authorised share-capital of the company—viz., £250,000, and such an amount of debentures as may be necessary.

"The necessity of seizing this opportunity without delay, after the protracted and difficult negotiations, will be sufficiently obvious, as time is really very pressing.

"My directors have, while keeping these important points in view, endeavoured to carry out your wishes, as well as those of the New Zealand Government. Indeed, there is not much in the contract which has not been already discussed by you, and in many cases approved or suggested by yourself. In other words, in accordance with your telegram long ago, my directors have accepted the contract in spirit, subject to necessary alterations in detail."

Two days after the Chairman writes to the Agent-General thus:—

"MY DEAR SIR FRANCIS BELL,— "8th August, 1887.

"We have at last got to the point where we can deal with the contract. Mr. Burchell, our solicitor, informs us that he has practically got the promise of £250,000 share capital, and any quantity of debentures that may be needed, from some very strong financiers. He says he can get this money if he can go to them, with the contract approved, early in October. It was therefore necessary to deal promptly, and after so many months of waiting and working it was a great pleasure to reach a definite point at last. It has been a great loss and disappointment to me not to be able to consult you during the last few days. I am, however, very glad that you are taking a real rest, and if it were not that we should talk about New Zealand I should like to be near you in Switzerland.

"Some copies of the contract as sealed and sent out by us will be sent to you. Now, I am exceedingly anxious that this contract should be accepted, as it will practically mean the comple-

tion of the line, unless we are very much misled by our solicitor, which is not likely. Can you manage to get the Government to give their consent by telegraph? If they will not consent absolutely, let them consent with the reservation of one or two doubtful points, and leave it in your power to settle them with us. These could easily be adjusted, if necessary, by an additional document. I much hope, however, that it will not be necessary, as it is so much in the interests of all parties to bring matters to a conclusion. There is nothing unreasonable in our contract. The Larnach incident has compelled us to be more careful in the drafting of the document and in its provisions than would have been the case if that occurrence had not happened.

"I have confidence therefore that all will come straight; but of this I am certain: that there will be no difficulty in arranging any matters with you if the New Zealand Government will accept the contract as it stands, leaving it to you to arrange with us any modifications or explanations that they may desire, within reason. You will find us quite reasonable and willing to meet your views as far as possible. I feel, however, I need scarcely have said this, as you know it already."

As reporting the position of affairs about this time, I would read a letter from the Agent-General to the Colonial Treasurer in the colony:—

"SIR,— "7, Westminster Chambers, London, S.W., 10th August, 1887.

"I received last week an intimation from the chairman of the Midland Railway Company to the effect that they had made up their minds as to the alterations they desired in the draft contract, and were forwarding a new draft to their representatives in the colony by this mail. Being absent from London, I asked the company, if convenient to them, to favour me with a copy of their draft before sending it out; but, as you will see in their letter (copy herewith) of the 6th instant, they were anxious not to delay the communication they were making to their agents, and the new draft contract will therefore go by this mail, without my having had an opportunity of reporting to you on the proposed alterations.

"Meanwhile I received your cablegram of the 6th instant, inquiring what was the position of affairs, and I replied to the effect that the company had framed a new contract so as to suit the views of the capitalists who they expected would provide the money, and that this new draft was being forwarded to the colany by this mail. I herewith enclose a copy which Messrs. Burchell, the company's solicitors, have supplied.

"I have this day received your second cablegram, stating that Mr. Scott has been informed by the company that the contract has been settled, and instructing me to report.

"With reference to the communication which has been received by Mr. Scott, you will see by what I have already written that the company, in stating that the contract had been settled, merely intended him to understand that such settlement applied only to the views of the company themselves and their financial friends.

"Now that I have received a copy of the new draft, I will take the earliest opportunity of examining it and reporting to you in respect to the alterations to which the company wish the Government to agree."

A week later Mr. Salt writes to the Secretary to the Agent-General, Sir Dillon Bell, who about this time had left London for a holiday:—

"MY DEAR SIR,— "17th August, 1887.

"I am much obliged by your letter. I think if you again read the clause which contains the guarantee you will see that, though in one sense it may be called a guarantee, in another sense it is not a guarantee, and furthermore it is almost impossible that the clause should ever come into operation. It is, however, necessary, in order to give lenders in this country who know nothing of the matter some assurance of the *bona fides* of the New Zealand Government.

"All that the clause says is that, if 2,300,000 acres do not produce £1,250,000, more land shall be given. This is entirely in the spirit of all our negotiations, and the idea originally emanated from the Agent-General himself.

"There is a clause in the contract, which I caused to be inserted, to the effect that the company does not ask for legislation for a certain period—I think it is five years. The probability—I might almost say the certainty—is that before that time has elapsed legislation will have become quite unnecessary.

"These are very favourable terms to the New Zealand Government, the only question being whether capitalists will lend upon these terms. We are assured that they will.

"I am very anxious to get all these preliminaries settled, in order that we may get at our real work—the making of the railway. "Yours faithfully,

"W. Kennaway, Esq." "THOS. SALT.

On the 19th August the secretary to the company writes thus to the Agent-General,—the communications being all addressed to the Agent-General, though he was not present in London at the time:—

"The New Zealand Midland Railway Company (Limited),

"DEAR SIR,— "77, Gracechurch Street, E.C., 19th August, 1887.

"I am instructed by my directors to inform you that they propose to send the following telegram to Mr. Scott, if you see no objection to it. They think you might like to send a similar telegram to the New Zealand Government, so that they should not learn its contents only from Mr. Scott: 'If Cabinet approve contract, finance satisfactory, and Springfield and Belgrove lines will proceed.'

"My directors conclude that you have to a great extent informed the New Zealand Government of the terms of the contract as now sent out."

Then there is a reply from Mr. Kennaway, which indicates a hitch in the proceedings, so that I had better read it:—

'SIR,— "7, Westminster Chambers, S.W., 21st August, 1887.

"I am now directed by the Agent-General to acknowledge the receipt of your letter of the 6th instant, informing him that your directors had that day settled the form of contract they wished to substitute for the one drawn up by the New Zealand Government last December, and that the same was being sent out by the San Francisco mail to the company's representative in the colony. He would have replied to your letter sooner, but was desirous of first communicating with the Government on the subject.

"The Agent-General could not but regret that it should have been deemed necessary to send out the new draft in its present shape, because it involved even greater difficulties than those which attended the amendments suggested by the company's solicitors last May. In all the communications which took place between your chairman and himself the essential point always kept in view by both was, that whatever amendments were wanted in the December draft should be made within the lines of the existing legislation. It was obvious that there was no legal power in the Government, without a fresh Act, to enter into a contract containing the amendments proposed by the company in May, and notably the one for guaranteeing the value of the land. Moreover, no one could imagine that, even if an application were made to the New Zealand Parliament for power to give such a guarantee, the Legislature would hand over the land to the company to dispose of at its pleasure, while the colony was to be responsible to the company for the land realising a given sum. It was abundantly clear that, in any such case, the colony must retain an absolute control over the time, manner, and price at which the land should be disposed of, a condition which would reduce to an absurdity the elaborate provisions that had been made for valuation of the blocks to be selected by the company. For this and other reasons which the Agent-General endeavoured over and over again to explain to your chairman he could not, last May, encourage your directors to hope that the amendment containing the guarantee would be accepted, and it is now his duty to state that the Government must decline to entertain it. . . ."

The next is a short letter from Mr. Kennaway to the Secretary of the company :—

"SIR,—. . "7, Westminster Chambers, S.W., 22nd August, 1887.

"I am directed by the Agent-General to acknowledge the receipt of your further letter of the 19th instant, stating that your directors propose to send a telegram (as quoted in your letter) to Mr. Scott, and suggesting that a similar one might be sent by the Agent-General to the New Zealand Government.

"At the time that letter was written your directors were not aware of the New Zealand Government having declined to entertain the amendment in the contract proposed by the company containing a guarantee of the value of the land. That decision having now been made known to you, by my letter of yesterday's date, it will be for the directors to judge whether it would be expedient to send the telegram to Mr. Scott. The Agent-General would not himself be prepared to send a similar message to the Government, as he does not feel any doubt of their decision against the proposed guarantee being final."

It will be found afterwards that the Government did what the Agent-General and his secretary said they would not do. No doubt the decision on the point was that of another Government than the one in office when this correspondence took place. The Ministry of my friend (Sir Robert Stout) went out, and the Atkinson Ministry came in. But that is anticipating. Resuming the course of the correspondence, we have a letter from the chairman to the Agent-General :—

"DEAR SIR FRANCIS BELL,— "19th December, 1887.

"I am much obliged by your letter. I hope that the telegram you have sent will have a proper effect. The real point, and the essential point, is, Have we satisfied the London capitalist?

"It is a thousand pities that the New Zealand Government did not accept the contract, so as to secure the money for the whole of the line, as promised to us in October last. It was with great difficulty and constant perseverance that we brought matters up to the point which would have settled everything, and proved of great benefit to every one concerned. We were compelled to be rapid in our movements, because the capitalist had said, 'Come back in October with the contract, and you shall have the money.' We hope for the best, but we cannot promise it now. . . ."

There is another part of the letter which is not material. The next is a letter from Sir Dillon Bell to the chairman :—

"7, Westminster Chambers, London, S.W., 20th December, 1887.

"MY DEAR MR. SALT,—

"Many thanks for your letter. What we have to do is to pull the business through, as you have so often said. I have often regretted beyond measure having been away from London at the end of July, as I think we might have managed to pull it through then, if we had been able to talk over the clauses together. . . ."

No doubt it was a great misfortune that Sir Dillon Bell's health had required his absence from London at that particular time. After the passage of the Act of 1887, which empowered the Government to enter into a contract on the lines and as nearly as possible in the form as reported by the Select Committee in the second session of that year, there were in 1888 a number of messages backwards and forwards between London and the colony as to settling the terms of the contract before its execution on the 3rd of August. There are a number of cablegrams before me, but only two will be of importance in this connection. One is from the Agent-General to the Premier, on 7th May, 1888, as follows :—

"Midland: Burchell objects to many deviations from original contract and Committee draft. Nevertheless my opinion is could be arranged, as selection clause accepted and incline sheets waived; but at present three objections vital—namely, proviso clause 38, because fatal obtaining money; also clause 39, because alleged reduces rates thirty seventy per cent.; also clause 4 present shape;

but supposing other objections arranged, company ready make alternative proposal. Strongly instruct whether you wish me telegraph particulars minor objections until it is decided whether three allowed."

Sir R. Stout: Is that a correct interpretation of the code? Code-words are used in cablegrams.

Mr. Hutchison: It is from a parliamentary paper, and is therefore probably correctly transcribed. The next is from the Agent-General to the Premier on the 21st July:—

"Midland: Message received. Money impossible unless clause 38 operative. On the other hand, nothing else prevents seal affixed, capital issued, works proceeded. All now depends upon your decision insertion. Providing that, if powers exercised before terms agreed or arbitrated, then terms, whenever settled, shall relate back."

Sir C. LILLEY: All this is before the contract.

Mr. Hutchison: These led up to the contract, which was dated the 3rd August. The arrangement had been that two copies on paper and two on parchment should be prepared and executed simultaneously at both ends, as nearly as possible. The last execution seems to have been that by the Governor of the colony; but the communication as to its completion did not reach the company until the 23rd September, although time was then of vital consequence.

Sir B. BURNSIDE: How can you tell which was signed first?

Mr. Hutchison: The contract was signed by the company first, and the final signature was that of the Governor, Sir William Francis Jervois. I have a letter here, dated the 10th August, from the Agent-General, which explains the procedure agreed upon:—

"The contract, as reprinted by the company, was then finally revised, to carry out all the amendments as agreed to by the Government; and, in accordance with your instructions, I directed Messrs. Mackrell to settle the necessary formalities to be adopted in affixing the company's seal. Thereupon the following procedure was settled: (1.) The company's seal to be affixed to four prints of the contract, two on parchment and two on paper, the sealing of one of the parchment prints being notarially attested and verified by the Lord Mayor's seal. (2.) The two parchment prints, upon being sealed, to be handed to me for transmission to the colony, the notarially-attested one to be retained by the Government, and the other one to be returned to me when signed by His Excellency the Governor, in order that it should be handed to the company. (3.) One of the prints on paper to be retained in this office, the other to be handed to the company with a certificate thereon by me of its being a true copy of the contract as approved by the Government.

"The company's seal was duly affixed on the 3rd instant, in the presence of Mr. Salt and Mr. Brodie Hoare; and I now beg to enclose the two sealed parchment copies, together with twelve spare prints. In due time, and after due verification, you will, no doubt, be pleased to return to me, when signed by His Excellency, the counterpart which is to be handed to the company.

"Great care has been taken to examine the contract as now sealed with the Government draft sent to me in your memorandum of the 24th March last, No. 16, as well as to make sure that it embodies the amendments which have been subsequently agreed to by the Government; and for convenience of reference I append a memorandum showing exactly where the sealed contract is identical with the Government draft and where it varies from the same.

"The unavoidable absence of Mr. Maton (the member of Messrs. Mackrell's firm who has been specially charged with this business) delays for a few days the form of the certificate to be placed by me on one of the paper copies, but it will go to you by next mail.

"The plans which you will find annexed to the sealed contract are those originally sent by you with the Government draft."

So it will be seen that on the 3rd August the contract was first executed by the company in London, and that the company awaited intimation as to the execution in the colony, which intimation reached the Chairman on the 23rd September. The letter from Sir Dillon Bell, which I have read, as to the procedure on the execution of the contract, has also these words:—

"In conclusion, I beg to be permitted to offer my congratulations to the Government on the final settlement of these complicated questions. It could only have been obtained by mutual concession; and the company have expressed themselves to me as being entirely satisfied with the reasonable consideration that has been shown to them, enabling them now to go on with their work in good heart, and with a confident hope of making it a success."

The gravest difficulties, however, were met with when the company came to raise the money which was necessary to proceed with the works, and negotiations after negotiations broke down. It was not until April of the following year (1889) that the prospectus was issued for raising £745,000 by 5-per-cent. debentures. That prospectus was submitted to and approved of by the Agent-General. But the circumstances at that time were not favourable to the raising of money, and the net amount received was only about £650,000. The subscribed share-capital, a quarter of a million, had previously been spent on necessary works. Of the amount raised on debentures the directors had themselves to take up a hundred and seventy thousand pounds' worth. So great was the tension of the money market in London that it was found the money could only be raised upon an undertaking by the company that no further public issue would be attempted until after the opening of the line to Reefton,—from Brunnerton to Reefton,—which promised an early and favourable return. The desire of the company that the Agent-General should be one of the trustees for the debenture-holders was acceded to by him, and the trust deed was approved of in that shape.

Sir C. LILLEY: Is the Government any party to that?

Mr. Hutchison: No; the Government afterwards desired the Agent-General to retire from that position, and he accordingly did so. It was under these circumstances, after the lapse of the interval of which I have been speaking to-day, and under shadow of the trouble in connection with the mining reserves, the denial of rights with reference to timber rights, and the obstructions

in connection with settlement, that the company approached Parliament in the year 1892 by petition. In that petition the company detailed its grievances: first, with reference to the Proclamations of land for mining purposes; secondly, as to the grievances under clauses 18 and 33 of the contract; thirdly, as to the unnecessary delays that were caused by the Government over consent to the deviation at Lake Brunner; fourthly, the great and unnecessary delay in consenting to the substitution of the incline line at Arthur's Pass; fifthly, as to the procrastination of the Government over the applications of the company for an extension of time under clause 42 of the contract; and sixthly, the imposition of the graduated land-tax. These are the several matters I have been opening to-day. It might, however, be of interest to the arbitrators to hear the proposals of the most able counsel for the company (Mr. Bell) before that Committee, as indicating the position the company then took up.

Sir C. LILLEY: How long will you make this?

Mr. Hutchison: It is only an explanation.

Sir R. Stout: Do you mean that part of Mr. Bell's address saying that the company was insolvent?

Mr. Hutchison: I do not find any mention of that in Mr. Bell's address. His address before the Committee was on 6th October, 1892.

Sir R. Stout: Surely you are not going to read the address?

Sir C. LILLEY: You do not mean to put that in? You do not hope to prejudice our minds?

Mr. Hutchison: I do not wish to do that.

Sir B. BURNSIDE: I do not suppose you think you will be successful.

Mr. Hutchison: I have no wish to prejudice the mind of the Court. I desired to refer to Mr. Bell's address only in so far as it indicated the proposals of the company in 1892, as these might be of some interest even now.

Sir C. LILLEY: I do not know.

Mr. Hutchison: Very well; I will not pursue that line at present.

Hon. E. BLAKE: The company proposed some change in the contract in 1892?

Mr. Hutchison: Yes. Now we come to what occurred before the Select Committee to which the petition was referred. The Minister of Public Works himself appeared and conducted the case for the Crown. Mr. Bell appeared for the company. The Minister of Public Works made an advocate's speech on the subject, and in the course of it he said this——

Sir R. Stout: Of course, I object to all this.

Sir B. BURNSIDE: I understand you object to it?

Sir R. Stout: Yes.

Mr. Hutchison: Mr. Seddon said before the Committee, on 5th October, 1892, "I should regret any straining as against the company, or that there should be an opinion that evidence has been submitted which would bear that construction, because it is in the interests of the colony that this work should proceed. If any undue straining took place, when the company went to raise its capital it would be damned by the evidence given by the Government as against the company. . . I have had a table prepared, and I would ask the Committee to let it be considered as part of my speech, for I have not time now to read it. I had intended to do so, but I do not think there can be any objection to letting it stand as part of my speech. We have taken the evidence of Mr. Maxwell and Mr. McKerrow, and worked the matter out, and these are the results. . . ." Messrs. Maxwell and McKerrow are two witnesses called in connection with the inquiry. They were both Railway Commissioners at that time. Mr. Seddon continues: "I will ask that these should go in as a portion of my speech, and then I shall be prepared, when they have been checked by Mr. Maxwell, to correct them accordingly."

Sir R. Stout: The Court must understand that my learned friend is not reading the speech straight on, but only picking out parts here and there.

Mr. Hutchison: I am reading the more important sentences; I will read the whole of it if required.

Sir R. Stout: I do not wish you to read any of it.

Mr. Hutchison: I am referring to those parts that are material to my point of view.

Sir R. Stout: As long as it is known that this is not a continuous speech.

Mr. Hutchison: The context will not alter anything I have read as far as I know. The extract goes on: "I have Mr. Maxwell's estimate of traffic, and the working of it out by Mr. Gordon. Mr. Gordon's is not so favourable as Mr. Blow's. This is worked out on the basis of Mr. KcKerrow's evidence and Mr. Maxwell's as well. Both statements are here, gentlemen, and I will leave them with the Committee. . . . ." The statements were there, and they are also here. They are most extraordinary statements, I think, that could possibly have been compiled. Perhaps the Court will look at the print of these statements. I may have to refer to some figures, and it will be convenient if the statements themselves were before the Court for reference. They have been printed separately, so as to be put in evidence at some future stage of the proceedings.

Sir R. Stout: I suppose it is all a question of guarantee.

Sir C. LILLEY: In respect to the question of the guarantee of land?

Sir R. Stout: They wanted a guarantee of land.

Mr. Hutchison: That is why I proposed to refer to Mr. Bell's speech, when addressing the Committee, as indicating what the company wished. In the petition they only set out their grievances and asked that they might be considered. Their counsel stated the proposals of the company, and I was about to refer to what he said as indicating the position the company then took up. Mr. Bell mentioned that the proposals of the company were that, to enable it to raise capital to complete the East and West Coast line, the colony should guarantee interest on £1,600,000; and that the colony should permit the company to abandon the connection between Reefton and Belgrove, except an extension of about five miles from Belgrove into the Motueka

Valley. As to the connection north and south, however, the company made alternative suggestions for its construction if desired. Mr. Bell went on to say that it would cost a further sum of £1,070,000 to complete the line from Springfield to Jackson's. That explains what the company proposed. Perhaps it would further elucidate this point if I mentioned how the £1,600,000 was made up. First of all, the cost of completing the line east and west was estimated at £1,070,000; and rolling-stock, £60,000; the extension of the line from Belgrove to Motupiko Valley, Nelson end, £30,000; cost of raising the necessary capital for works above mentioned, £140,000; and a sum of £300,000 proposed to be set aside as a trust fund, to be invested in the colony, so as to provide interest on the new debenture capital necessary to be raised. These several amounts make up the sum mentioned—namely, £1,600,000. Then, if it be desired to know how the sum of £618,000, also mentioned in Mr. Bell's proposals, was made up, I would give the figures as follows: Cost of construction east and west, Springfield to Brunnerton, based on the statutory estimate, £1,500,000—less spent at the Springfield end, £60,000—reducing the amount to £1,440,000—and less, also, amount spent between Brunnerton and Jackson's, £203,500; leaving £1,236,500, which, on the B1 value, is to be divided by 2, leaving £618,250, which was taken, for convenience of reference, at the round sum of £618,000. The £300,000 of trust funds was a part of the £1,600,000 not required for the work of construction, and was proposed to be invested in the colony at 4 per cent. It would not have got so much in England.

Sir C. LILLEY: Was this completed by any acceptance on the part of the parties or Parliament?

Sir R. Stout: No; Parliament declined to accept it.

Mr. Hutchison: Scarcely so. The Committee reported so late in the session that nothing could be done by Parliament.

Sir R. Stout: What about 1893?

Mr. Hutchison: In 1893? We will come to that. I am at present dealing with 1892. The tables put in by Mr. Seddon, and which, as I have said, formed part of his speech, are supposed to be based upon the proposals of the company; but they are the greatest travesty in respect to what the proposals of the company really were that could have been devised; and the point that the company makes is this: that these representations, having been made officially in the colony by the Minister of Public Works, rendered it absolutely impossible for the company to do anything further in the way of finance. After these statements became public property it was not worth a cab-fare from the company's office to the bank for the purpose of endeavouring to raise any more money on debentures. The fatal character of the representations, not admitted by the company as correct, but, on the contrary, contested throughout, will appear from the figures in these wonderful statements. The statement No. 1 is that of Mr. Blow, Under-Secretary, Public Works Department; statement No. 2 is that of Mr. Gordon, Inspecting Engineer, Mines Department, both of which departments were under the control of the same Minister—Mr. Seddon. I will ask the attention of the Court to the statement on page 1: "No. 2, Mr. McKerrow's estimate, now, £14,660"—that is, the net earnings out of profit—which is left to be understood as a general estimate over years; as a matter of fact Mr. McKerrow's figures were based on an estimate for the first year only, yet there is no mention made of that. "No. 3, Mr. Maxwell's estimate, now, £20,000." This was for the first year only, yet no mention whatever is made of that. Then, we have Table "A 2," which is constructed upon the basis of proposals and certain figures given by the company as regards receipts from traffic, and according to this table the £300,000 which was proposed to be invested in the colony, for the purpose of insuring interest upon the debenture capital proposed to be raised, would work out in six years to an absolute loss of over £25,000! The figures in the fourth column, as to the receipts from traffic, are wholly a misrepresentation of the facts. The other figures are arithmetically correct—that is to say, the third column is added to the first, and the fifth is deducted, and the balance is given in the sixth; but with reference to the fourth column—starting with "Traffic Receipts for Three Years pawned to meet Interest on £745,000," and which was, we know, £37,250—we find that this reference, adopted for the first three years from the company's estimates, in the fourth year drops the company's estimate, which was on an ascending scale, and for the fourth, fifth, and sixth years gives arbitrarily lessened amounts. The result is, of course, absurd and delusive. These supposed receipts are brought down from £37,250 in the first, second, and third years, to £23,000 in the fourth year—a fall of £14,250—instead of which, by all the evidence which was before the Committee, an increase should have appeared. Then, we have a "Note" column, headed "3-per-cent Interest payable," which includes (1) 3 per cent. on £1,600,000, which is £48,000; (2) 3 per cent. on original share capital, £250,000—namely, £7,500: making, altogether, £55,500—the sum with which the fifth column starts, and made to represent necessary charges upon the £300,000 lodged in the colony—whereas it is quite clear that the interest upon the share capital is not a necessary charge at all. Shareholders may receive dividends or they may not; but a percentage on the shareholders' capital was never in any sense intended or expressed to be a charge upon the money proposed to be deposited in the colony. To that extent the £7,500 was wholly imaginative. Of course, such errors throw the whole of the calculations into confusion. Now, I will come to Mr. Gordon's statements and opinions, and these are even more extraordinary than Mr. Blow's computations. Mr. Gordon starts off by taking Mr. Maxwell's estimate of traffic: "Profit on working Reefton line." He states it at £2,000. But Mr. Maxwell's evidence was that the profit on that section would be £4,000, and that for the first year only; yet we find Mr. Gordon calculating (and the Minister adopting his calculation), on the basis of one-half that amount, and for the whole continuous period of working the railway.

Sir R. Stout: There is the other side to this statement; Mr. Maxwell's reply appeared as printed.

Mr. Hutchison: Quite so. I am going to deal with Mr. Maxwell's reply. My friend will admit that these figures of Mr. Blow's and Mr. Gordon's are all wrong?

Sir R. Stout: I do not admit anything. I do not think that they have any bearing on the question the arbitrators have to try.

Sir C. LILLEY: This will come under one of your objections?

Sir R. Stout: Yes.

Mr. Hutchison: Then we have, "Profit on East and West Coast line, £20,000," making, with the £2,000 above mentioned, £22,000; whereas the figures should be, for the first year only, £24,000, according to Mr. Maxwell's own statement. Then we have, "Guarantee of 3 per cent. on £1,600,000, £48,000," less £22,000 before mentioned, leaving £26,000; but, the amount to be deducted, and for the first year only, should have been £24,000, making a difference of £2,000 wrong in the first year's working, with an increasing difference in future years. The basis being entirely wrong, the whole table is simply ridiculous. By such means Mr. Gordon has no difficulty in showing a loss on the proposed guarantee, at the end of the twenty years, of £683,800. Mr. Maxwell's memorandum, published with the same paper, is to the following effect:—

"The basis of this statement is erroneous. My evidence was to the effect that the Reefton line might possibly give a profit similar to the Nelson one; in which case, allowing for the length, the profit should be taken at about £4,000 a year. The amount of profit the first year would then be £24,000, not £22,000 as stated. I consider the character of the table misleading. In dealing with subsidies of an annual character it is not usual to reckon interest on the subsidy—in the case of mail contracts, for example: this is never done, as a subsidy is usually regarded as a current expense in carrying on the government of the country."

Then, going on, we come to "B 3," which is more extraordinary still, and brings out a loss on working, on the erroneous data he adopts, of £797,287. The remarks of Mr. Maxwell on this production are as follows:—

"The nature of my evidence appears to be misrepresented. I explained particularly that I considered my estimate of profit to be for the first year's working, and that there would be a gradual increase with the growth of population. I estimated the profits of the Christchurch line at £20,000, and those of the Reefton line, if assumed similar to, say, Nelson, at about £4,000, allowing for the relative length of line; total, £24,000 a year. I made no mention of 'an average,' as the heading to the table wrongly alleges."

And yet Mr. Gordon heads his paper with the assumption of "an average" by Mr. Maxwell, who in another memorandum on the subject, says,—

"I made no mention of 'an average.' I consider that it would be misleading and improper to introduce a table based on statements attributed to me which I did not make. I think the results of the table are misleading."

Of course, it might be imagined that a gentleman of fertile ideas as Mr. Gordon enjoys, expands as he proceeds, so that on page 4 we have another computation which shows a loss on the guarantee of £585,607. In "B 5," lower down, he misrepresents more figures given in evidence before the Committee by Mr. McKerrow, who afterwards found it necessary to remark:—

"Referring to the enclosed statements, B 4 to B 7 inclusive, prepared by Mr. Gordon, and showing the estimated financial results of the East and West Coast Railway (Midland Company) for the first twenty years after the railway is in working-order, I have to point out that, in so far as my evidence is concerned, the mistake is made of assuming that my estimate of £14,860 (taken as £15,000) is the average net profit for twenty years, whereas my estimate was for the first year after the railway was in operation. As regards the succeeding years, my evidence before the Committee was that there would most likely be a gradual, though not a rapid, increase in the volume of traffic and profit. Mr. Maxwell informs me that, according to his views, the estimate for the Reefton line would be £4,000—not £2,000, as given by Mr. Gordon."

The next page of Mr. Gordon's calculations contains another deduction—a further argument based on more fallacious premises, showing a total loss to the colony of £815,300. Naturally we might expect greater disaster from further computations by this gentleman. In "B 6" he shows a loss to the company of £920,701·80. Naturally, he would not stop short of millions if he has a chance. So he goes on to "B 7," which is particularly misleading. He purports to give a comparison of misquoted estimates of the traffic and working-expenses of the East and West Coast line, but says nothing about the company's estimate.

Sir R. Stout: Quite the contrary.

Mr. Hutchison: Not so; it will be seen that there is nothing opposite "the Midland Railway Company" but a series of dots. Mr. Maxwell's estimate he gives as a credit of £3,420, whereas it ought to be £24,000, and for the first year only; then he misrepresents Mr. McKerrow also in the same way. His own estimate shows a loss of £4,042. The result of the guarantee he gives as follows: "Midland Railway Company, nil." There, again, the evidence by Mr. Wilson is entirely ignored. Mr. McKerrow's estimate is put down as involving a loss to the colony of £815,300, which is an entire misrepresentation, for Mr. McKerrow did not give any estimate of the kind at all. Mr. Maxwell's figures are put down as a loss to the colony of £683,800, which is another gross misrepresentation. Appropriately Mr. Gordon winds up with his own estimate, which indicates a loss to the colony of £1,262,400! The proposals of the company, which are throughout suppressed, show a profit from the first, increasing year by year.

Sir C. LILLEY: There would have been a profit to the company?

Mr. Hutchison: There would have been if the whole line had been constructed, but, owing to the difficult position the company was placed in, it was prevented from making any but a small profit on the constructed portion of the line. These official calculations which were put forward, as I have indicated, had the effect, under the circumstances I have mentioned, of making it impossible for the company to finance a single shilling.

Sir C. LILLEY: Your contention is that where the calculations are erroneous the Government is liable for damage resulting outside the contract?

Mr. Hutchison: Certainly. These officials—Mr. Blow and Mr. Gordon—were under the wing of the Minister.

Sir C. LILLEY: Do you say they affected the company's proposals?

Mr. Hutchison: Certainly. It appears as if a dead set were made against the company from this time. It seems as if those in power considered that the conditions at first had been far too favourable to the company, and were envious enough to place obstacles in its way. On the basis of fair-play, the concessions to the company would have meant great benefit to the shareholders of the company.

Sir C. LILLEY: These public officers agreed between them that everything the company asked for should be objected to?

Mr. Hutchison: We do not say all. We do not accuse Mr. McKerrow, for instance, or Mr. Maxwell, who were Railway Commissioners. Their evidence before the Committee was misrepresented by Mr. Blow and Mr. Gordon. But, so far as the officials of the Public Works and Mines, and the head of those departments were concerned, there did seem to be a desire on their part to blacken the prospects of the company. Mr. Seddon, in his speech, while admitting it was in the interests of the colony that this work should proceed——

Sir C. LILLEY: Officers misrepresented the prospects of the company?

Mr. Hutchison: Yes; which, according to Mr. Seddon himself, appears to be undue straining of the evidence. In the words of Mr. Seddon, "If any undue straining took place when the company went to raise its capital it would be damned by the evidence given by the Government as against the company." And so it was.

Sir C. LILLEY: But it never went to raise it?

Mr. Hutchison: It was hopeless.

Hon. E. BLAKE: Your point is this: This was a resistance to the proposal of the company to make the alteration in the contract, and in resisting that these improper statements were made to the Committee, and these statements made it impossible to obtain money on debentures.

Mr. Hutchison: Yes.

Hon. E. BLAKE: I understand that the answer of the Government to that is that, at that time and before, statements had been made by Mr. Bell, acting for the company, that the company was at the end of its finance?

Mr. Hutchison: Yes, I believe that was counsel's statement; but it was in consequence of all these injuries of which the company complained. I was just going to observe, as a conclusion to this official evidence, that financiers in London were not likely to go into calculations as to whether an official statement was based on erroneous data or not. They would consider the prospect so officially represented was so suspicious that they would not touch it.

Sir C. LILLEY: Also doubtful.

Mr. Hutchison: It would appear from these official calculations that the result was, at any rate, so doubtful as to prevent financiers embarking capital at the other side of the world. Now, I would approach the last ground of the particulars (No. 9), which relates generally to all the foregoing particulars of claim.

Sir B. BURNSIDE: The summing up?

Mr. Hutchison: Yes. The preceding paragraphs relate to the mining reserves, the timber rights, the imposition of special taxation crippling the company's finance, the delays, and the defamation. This brings us past 1892. During 1893 and 1894 the company and the Government discussed proposals for a modified contract, but without coming to any agreement. Meanwhile, as we have seen, the applications for the extension of time, which for the purposes of finance had to be definite, were evaded, although the company had the personal promise of the Premier (Mr. Ballance) that the extension would be granted. The application was eventually refused on the eve of the expiration of the time for the completion of the works.

Sir C. LILLEY: You do not contend that that would be legally binding—that Mr. Ballance could pledge the colony?

Mr. Hutchison: Yes, I would contend that the Premier could.

Sir C. LILLEY: But the Governor?

Mr. Hutchison: He is only a lay figure.

Sir C. LILLEY: The Queen is a lay figure?

Mr. Hutchison: Yes. I refer to the active members of the Executive especially; the Premier first. He governs all the departments, including those of the Minister of Public Works and of Mines, which had supervision of the contract.

Sir C. LILLEY: He may pledge the whole of the departments?

Sir R. Stout: That is directly in conflict with all the authorities. Mr. Gladstone lays the position down in his work "Our Kin beyond the Sea."

Mr. Hutchison: I imagine that the Premier does control all departments. It will be proper for me now to indicate what evidence we shall adduce to show the value of the contract which we say we have been deprived of by the action of the Government. Evidence will be directed to showing the extent of country that would be benefited by the proposed railways north and south as well as east and west, for I shall say, notwithstanding what the learned counsel has indicated as to the statement of Mr. Bell, that the company has been, and still is, if allowed fair-play, prepared to complete the whole of the railway mentioned in the contract. The total area which would be benefited by the railway would be about 10,550 square miles, including about 6,750,000 acres. The table I have here shows the general character of the country—the figures, of course, being approximate:—

——	Open.	Bush.	Total.
	Acres.	Acres.	Acres.
Arable flat lands	298,700	663,000	961,700
Arable hilly lands	237,800	292,800	530,600
Open pastoral lands	1,220,500	...	1,220,500
Mountainous bush lands	...	2,968,700	2,968,700
Mountain-tops and other rough country of little value ...	964,000	...	964,000
Lakes, river-beds, and barren lands	105,000	...	105,000
Totals	2,826,000	3,924,500	6,750,500

Sir R. Stout: Is this on the west side of the range?

Mr. Hutchison: It is the whole of the country likely to be benefited. The figures, of course, are quoted as merely giving an idea of the value of the railway. But it will be proved, if necessary, although probably it may be taken as admitted, that there is no part of New Zealand which contains so much mineral wealth as that proposed to be traversed by the Midland Railway. The western part of the district still continues to export gold in large quantities, but more valuable still are the coal and timber which are exported from the West Coast.

Sir R. Stout: The main coalfields are not near the railway at all, and cannot be utilised by it.

Mr. Hutchison: Of course, to my learned friend nothing good could come out of this railway. The coalfields which the railway would immediately open would be the Grey Valley coalfields.

Sir R. Stout: The Government line runs down from Brunner to Greymouth.

Mr. Hutchison: Yes; a very large quantity of coal is shipped there at great expense and waste to other parts of the colony. That, however, is what witnesses can testify, and it is not for counsel to dogmatize on. I am now going to refer to the advantages of land-carriage as compared with sea-carriage in respect of coal alone. The great advantage which the railway would have is that the coal can be brought straight from the mine to the place where it may be required to be used without any further shifting or handling; whereas, if carried by sea, it has first to be brought from the mine to the port—in this case to Greymouth—and then loaded into the ship for carriage to Lyttelton, or Timaru, or other ports on the east coast of the Island, which would be served by this railway either by itself or over the Government system of railways which it connects with on the East Coast.

The Court rose at five o'clock.

WEDNESDAY, 27TH NOVEMBER, 1895.

The Court sat at 10 a.m.

Sir B. BURNSIDE: Before we attempt to go further with the arbitration we wish to mention to you that Sir Charles Lilley and myself have appointed Mr. Blake, whom you know to be umpire in this arbitration which is now going on, to be umpire between us in the second reference which has taken place upon the seizure of the railway. I hold Mr. Blake's appointment in my hand, which I now hand in. You will understand, of course, that the first reference has been proceeded with to a certain extent, and what we desire is now that the two references shall go on together, and that it shall be distinctly understood and agreed to by both parties that these two references are running together, and that anything which arises with reference to one or the other is to be determined in the single action or proceeding which is now before us. I understand this mode of procedure has already suggested itself to the counsel on both sides. For the purpose of giving effect to that we have now endeavoured, so far as we can, to amalgamate the two references. We shall be now ready to hear, if counsel on either side have anything to this proceeding we propose.

Mr. Hutchison: Of course, the company has first to file particulars of its second claim, but as soon as that is done I can see no objection to the evidence being taken as applicable to both. Possibly it might be as well to consider yet whether or not we should concur in one award covering both references. It might be desirable to have separate awards. That is a point which may be considered. In the meantime we can go on taking evidence, and let the proceedings be common to both.

Sir R. Stout: I do not object to the two being taken together. Of course, I raise the point that there is no power to arbitrate under this at all.

Sir C. LILLEY: You keep your rights reserved to protest

Sir B. BURNSIDE: All that is being said is that whatever has already taken place in this arbitration shall also apply to the other arbitration. All your rights are reserved absolutely to make any motion of that kind. I understand that there is before us an application for particulars in the second arbitration, which, of course, Mr. Hutchison has already recognised, and which will be given to you in the regular course.

Mr. Hutchison: We have not felt it incumbent upon us to do anything in the second reference yet; nor would I say anything further as to that until the particulars are filed. My learned friend will follow to-day perhaps as to the first arbitration.

Sir B. BURNSIDE: It is being understood now that we have given direction that the particulars in the second reference shall be given as soon as possible.

Mr. Hutchison: They will be prepared at once. I suppose to-morrow morning they will be ready. I was referring yesterday when the Court rose to the advantages which we would endeavour to prove as to the traffic which might reasonably be expected to follow the construction of the railway, and I was dealing specially with the item of coal, which is a distinctive product of the West Coast. I mentioned the advantages not only in respect of the considerable territory which would be traversed by this railway, but also the advantages which would incidentally apply by reason of the connection of that railway with the Government system of railways running north and south on the east coast of the Island; and I would just, without labouring the matter, seek to direct the attention of the Court to the advantage of the railway-carriage across the island as compared with sea-carriage of coal. The coal on the West Coast is of a friable nature. It deteriorates both in quality and quantity by handling. It has been pointed out before, and may be here again, that the handlings in connection with the transport of coal from Greymouth to, say, Lyttelton, which is from one side of the South Island to the other, will be as follows: Putting the coal into the truck at Brunnerton would be the first handling; then into the ship at Greymouth the second handling; trimming on board the third handling; discharging from the ship to the truck at Lyttelton the fourth handling; delivery from the truck to the coal-yard at Christchurch or Timaru, or wherever it may be, the fifth handling; and delivery to the customer the sixth handling. Many of these would really mean double handlings, as, for instance, delivery from the truck to the coal-yards would mean being twice turned over. However, as against those, the handlings by railway would only amount to three. There is the putting the coal on the truck at Brunnerton, the delivery at the place of destination, and the delivery to the customer, at the very most. Now, the advantage does not cease only with the handling, which is estimated to amount to a difference of something like 2s. a ton in favour of the lesser number of handlings. The cost of carriage on the basis at present in force is also important. The figures I have been supplied with indicate that the carriage from the mine at Brunnerton, some miles from the sea-coast, to Greymouth is 2s. per ton; the freight by ship or steamer to Lyttelton, 8s.; the railway-charges, Lyttelton to Christchurch, including wharfage, 4s. 6d. per ton, or a total of 14s. 6d. per ton; while the overland carriage by railway from Brunnerton to Christchurch, which is taken as a convenient and important centre, 138 miles, would be 11s. 5d., or a difference of 3s. 1d. for every ton of coal so dealt with; and to allow the shipping to compete with the railway-carriage would mean that the railway charges would have to be reduced by 4s. 11d. per ton, which is not in the least degree likely. Besides, the difference in the coal-handling which I have indicated represents about 2s. per ton. Then, I would mention, in passing, the other important item of timber-carriage; and as that article is not on the sea-coast but rather upon the line of railway itself, it is obvious that the carriage of it to the west would almost entirely be by railway. Then, we have the population at both ends of the line, not along the whole track. That, I am told, is a most important element in the cost of working a railway; the traffic would nearly all be that which pays best—namely, long carriage. There is no need under such a system to provide for frequent stoppages, nor for a large number of intermediate stations, which have been found to very materially increase the cost of construction and the working of the Government railways in the colony. Now, I would pass on to consider what the capital cost of this railway would have been, supposing the company had been allowed to do its work, as it had a right to expect, under the contract. It will be noticed in the preamble of the contract that the cost of the railway—the complete system—was estimated to be two and a half millions; but that was only an approximation. Clause 24 of the contract provides means for ascertaining the cost in relation to the land-grant: "With all convenient speed the parties hereto shall ascertain and agree upon the proportion which the estimated cost of construction of the several sections of the said railway, or such other sections as shall be agreed upon between the parties hereto, bears towards the sum of two million five hundred thousand pounds, being the estimated cost of construction of the said railway, so far as the same relates to the lands to be granted by the Queen to the company; and the amount of such proportionate estimated cost of construction of each respective section when so ascertained shall be entered against such section in an account which shall be kept by the Queen with the company for that purpose, which shall also show the value of the land to which for the time being the company shall be entitled, at the same rate per acre as that named in the certified valuation for the block within which such land is contained. And such account shall be so arranged that the value of the land selected by the company in respect of each such respective section of the said railway shall be shown as ascertained, in accordance with these presents. Such value shall be equal to 50 per cent. of the proportionate estimated cost of each section of the said railway in relation to the lands to be granted by the Queen to the company, as hereinbefore mentioned." This will be better understood if I ask the Court to look at the agreement which was come to in accordance with that clause, and which therefore governs the account as to estimated cost in relation to the land-grant. It is in the form of the following table:—

PROPORTION of estimated COST OF SECTIONS in relation to STATUTORY COST, PRELIMINARY STATEMENT, "to be further detailed with all convenient speed as regards Sections 1 to 10 and 25 to 35 inclusive."

No. of Section.	—	From	To	Length of Section.	Estimated Cost.	Statutory Cost.
		M. Ch.	M. Ch.	M. Ch.	£	£
1 to 10	Springfield to Jackson's	0 00	64 20	64 20	1,296,500	1,296,500
11	Jackson's to Paerua	64 20	67 50	3 30	34,100	34,100
12	Paerua to Laketown	67 50	72 50	5 00	21,300	21,300
13	Laketown to Hohonu	72 50	77 30	4 60	33,500	33,500
14	Hohonu to Summit	77 30	80 70	3 40	26,400	26,400
15	Summit to Tunnel	80 70	85 45	4 55	32,300	32,300
16	Tunnel to Kokiri	85 45	88 10	2 45	18,200	18,200
17	Kokiri to Brunnerton	88 10	94 17	6 07	37,700	37,700
	Total, Springfield to Brunnerton ..	..	..	94 17	1,500,000	1,500,000
18	Stillwater to Nelson Creek	0 00	7 15	7 15	63,000	47,400
19	Nelson Creek to Ahaura	7 15	12 55	5 40	35,000	26,300
20	Ahaura to Totara Flat	12 55	17 55	5 00	26,000	19,600
21	Totara Flat to Ikamatua	17 55	22 15	4 40	33,000	24,800
22	Ikamatua to Mawheraiti	22 15	28 35	6 20	37,000	27,800
23	Mawheraiti to Slab Hut	28 35	33 05	4 50	24,000	18,000
24	Slab Hut to Reefton	33 05	38 35	5 30	57,000	42,900
25 to 35	Reefton to Belgrove	38 35	140 63	102 28	1,055,000	793,200
	Total, Stillwater to Belgrove ..	..	..	140 63	1,330,000	1,000,000
	Total, Springfield to Belgrove ..	..	..	235 00	2,830,000	2,500,000

Agreed to in accordance with clause 24 of contract entered into between Her Majesty the Queen and the New Zealand Midland Railway Company (Limited), dated the 3rd August, 1888.

C. NAPIER BELL.

5th November, 1888. W. N. BLAIR.

It will be seen that the estimated cost of the line east and west—that is, under the first part of the table—coincides exactly with the statutory cost; but, as regards the second part of the table, which relates to the line north and south, the estimated cost is £330,000 more than the statutory cost. And it will be seen how, in the first part, each item in these two columns, six and seven, exactly corresponds; while in the second part, aggregating the difference in the gross amount, each item is distinctly different. It would seem that there was no disadvantage, as far as could be anticipated, on the construction of the line east and west; but that there would be a disadvantage on the line north and south. That will explain what may be referred to hereafter, that the company at one or two stages of the negotiation was anxious, as a matter of business, if possible to drop the north and south line and continue only with the line east and west. I say the company was anxious to do so, and, naturally, would prefer it from a business point of view. But the proposals, as to abandoning the connection between north and south, were tentative, and merely directed to a possible agreement, which was never come to. The portions of the railway which have been made are those indicated by the lesser amounts in the two divisions of the table. For instance, Springfield to Jackson's has not been made, except as to some small pieces at the eastern end. Speaking generally, the first and largest item has not been made—that is, sections one to ten. But the rest have all been made—that is to say, from Jackson's to Brunnerton—and consequently the company became entitled to land-grants representing half the estimated cost, which amounts to £203,500. That is the addition of the amounts against sections eleven to seventeen. Those sections in the second half of the table which are indicated by the lesser amounts have also been constructed, or, in other words, that all but the largest amount of all, which comes last in the table—viz., Reefton to Belgrove—has not been earned, excepting two small portions at the northern end. Speaking generally, I would point out that, though the largest item—sections twenty-five to thirty-five—has not been done, all the other sections indicated by the lesser figures have been constructed; and it will be seen that they represent an estimated cost of £275,000 against a statutory cost of £206,800, or a difference in round numbers of £70,000 between the estimated and statutory cost—that is, in respect of works actually done. There is a much greater discrepancy, however, between the amounts against the last item. There the discrepancy is £261,800, and on the whole of the second part of the table it will be seen at a glance that the difference is £330,000. So that, in considering the land-grants earned and to be earned, the basis was much more favourable to the company on the construction of the east and west line than on the north and south. However, they were bound to go by their contract, and the proposals made for alteration were, as I have indicated, tentative. It is clear, therefore, that the estimated cost would not have represented the actual, and we have to consider what the actual cost would probably have been, with a view of ascertaining what the value of the contract would have been to the company if it had been allowed to pursue the work of construction. The estimated cost of the north and south line was £1,330,000. But that portion could not have been constructed for such a figure. The east and west was estimated to cost £1,500,000, and if the tunnel line had been adhered to it would have cost nearer two millions than one and a half millions. The change, however, from the tunnel to the incline line saved about £400,000 upon the actual cost. I would here ask the attention of the Court to what was agreed should be the result if the incline were substituted for the tunnel at Arthur's Pass. Clause 4, after dealing with plans and so on, pro-

vides in the concluding sentences: "If the cost of the construction of the entire line from Springfield to Belgrove shall be less than two million five hundred thousand pounds, a reduction shall be made in the grant of land to the company proportionate to the amount saved by the substitution of the incline line for the tunnel line." That having been done, it meant that there was a saving on the line east and west, but not more than would compensate for the very considerable discrepancy between the actual and the estimated cost north and south, and yet not sufficient to cover the actual cost of that line. The result is this: that instead of the whole system—north and south, east and west—costing, as estimated, two and a half millions, the company found, according to the best information that it can obtain, and giving the fullest allowance for all possible errors, that the construction of the railway would have cost not two and a half millions, but £2,880,000.

Hon. E. BLAKE: That is with the substitution?

Mr. Hutchison: Yes. After taking credit for the substitution, which would have meant a saving of about £400,000, the whole railway system would still have cost the company in round figures £2,880,000.

Hon. E. BLAKE: Therefore the proviso for reduction would have no operation at all?

Mr. Hutchison: It would have had no operation at all. The saving under it would have been swamped in the actual increased cost of the whole railway. In addition to the cost of the line at £2,880,000, there should be the estimated cost of equipment, for the sum mentioned is merely for "construction." We put down the cost of equipment in round figures at £120,000, which is, I am told, a liberal estimate. Thus the cost to the company of this railway, first and last, would have amounted to £3,000,000 or thereabouts. This is what it would have cost the company to build this railway and equip it for traffic right through. As against such an expenditure the company was entitled to 50 per cent. in land on the B 1 basis.

Sir C. LILLEY: On the three millions.

Mr. Hutchison: On the estimated statutory cost, £2,500,000; but the company, by the rights it claims to have had under the contract, expected to double that amount from the land. So that it expected to get £2,500,000. No doubt that would have been under a system of management which would have involved in many cases waiting for the increase of settlement resulting from the construction of the railway, and would mean waiting for the incoming of that large sum of £2,500,000 over a period of, say, ten years, which is a convenient period to take, in view of the fact that at the end of ten years the Government had the right to purchase the railway. As the £2,500,000 was not to be expected at once, but by a process of husbanding the land-grants, and also by financing in the meantime, I take off from the two and a half millions 25 per cent.—viz., £625,000, which is considered a most liberal allowance to make for the purpose of earning the gross amount. The net advantage would be £1,875,000, which, deducted from the capital cost of the line—viz., three millions—leaves a balance of profit and loss amounting to £1,175,000 against the company at the end of ten years. But the company would then be the proprietors of a railway which had cost three millions to construct and equip. And now as to the earnings which that railway was likely to have brought in. Dealing first with the line north and south. As that line was disappointing in the estimations as to cost of construction, so also it was one that was likely to be disappointing as to receipts. The estimates on an average over ten years may be put down at only £15,000 a year. That will be conceded, I think, to be a very safe estimate—probably an underestimate—when it is considered that the small piece actually contructed from Brunnerton to Reefton brought in a profit on receipts of £4,000 the first year, and has been increasing since. Last year, I believe, under the company's management, it amounted to about £5,000.

Sir R. Stout: Profit?

Mr. Hutchison: Yes. The balance of receipts over expenditure connected with working the north and south line I have stated at £15,000 only. The east and west stands on a different footing. We claim that would have been a tolerably profitable line, and according to the estimate which will be submitted in detail to the Court the average income over expenditure during ten years would be £61,900 per annum. This would mean a total on both of £76,900. Taking it for convenience of reference at £77,000, that would represent 2·6 per cent. upon the three millions.

Sir C. LILLEY: Rather over 2½?

Mr. Hutchison: No, £2 3s. 2d.; or 6·8 per cent. on the balance, profit and loss account, of £1,175,000. Compared with the results of the Government railways in the colony, these figures will be found to be on the safe side. I hold in my hand the official Railway Statement for the year ended 31st March last, and the third paragraph is as follows: "The working results for the year, as compared with those of the previous year, are as follows: The gross receipts have declined by £21,941, and the net receipts by £18,743. The percentage of expenditure to receipts has advanced from 62·70 to 63·62, while the interest on the capital invested has declined from £2 17s. 9d. per cent. in 1893–94 and £3 1s. in 1892–93 to £2 14s. 6d. in 1894–95. The railways, however, earned about £40,000 for services rendered to the colony but not paid for (carriage of mails and such-like). Had this amount been credited, the earnings would have been £2 19s. 9d. per cent." That was under circumstances of very considerable depression. So that the figures I have given may be said to be safe. The Government railways, as may be known, include a variety of lines—good, bad, and indifferent—some of which return no profit whatever, while some, necessarily, make a good deal of profit to bring the earnings up to the average just quoted. That would be the position of the company at the end of ten years, when the Government had the right, if they chose, to purchase the line under the contract. Clauses 43 and 44 both deal with purchase. Clause 43 says, "The power of purchase conferred upon the Governor by the principal Act and the said Act may be exercised at any time after the expiration of ten years from the completion of the said railway. If under the provisions of the principal Act or the said Act, or under or by virtue of these presents, the Governor shall be entitled to take possession of the said railway, or any part

thereof, then in lieu of taking such possession he may, if he think fit, exercise the right to purchase the said railway, although the said period of ten years may not have expired, or the said railway may not have been wholly constructed, and such right shall be deemed to arise on his giving six months' notice to the company of his intention to exercise this right; and thereupon, and without any further notice as prescribed in the principal Act, the price to be paid for the said railway shall be ascertained and determined as provided by the principal Act, except that section 118 thereof shall not apply." Clause 44: "In the event of the purchase of the said railway by the Queen, or on her behalf, in accordance with the Acts relating thereto, such a sum shall be included in the price to be paid for such purchase as is equal to the amount which may have been actually paid to the shareholders or debenture-holders of the company as interest during construction for the period ending the thirty-first day of July, one thousand eight hundred and ninety-seven, the rate not to exceed an average of four per cent. per annum, except in the case of shares or debentures representing five hundred thousand pounds in amount of capital first raised, in regard to which the rate shall be five per cent. The total amount of such interest to be added to the price of the said railway shall not exceed the sum of four hundred thousand pounds." Section 117 of the Act of 1881 describes how the price shall be ascertained: "No compensation whatever shall be paid for the good-will of any railway; but the arbitrators in determining the price to be paid to the company aforesaid shall take as a basis of the valuation the cost of other similar railway works, plant, and rolling-stock at the time when the works forming the subject of such arbitration were constructed or the plant or rolling-stock was acquired as the case may be. The arbitrators shall also take into consideration the depreciation in the permanent-way, plant, and rolling-stock, buildings, and other works of the railway, including therein any onerous or burdensome provisions respecting the use of the said railway or the works thereof, or any easements, rights, or privileges in connection therewith." Section 118 provides for a percentage being added to that section; but this section of the Act is expressly negatived by clause 43 of the contract just read, and consequently does not apply. Supposing the Government were paying the cost of construction of the railway on the basis of similar lines, I assume that cost would, including the equipment that I have mentioned, be three millions, off of which there is depreciation to be taken. Now, there is little or no depreciation within ten years on a railway which is properly worked; indeed, so far as the permanent-way is concerned there is none——

Sir C. LILLEY: The cost of maintenance?

Mr. Hutchison: The depreciation would chiefly be on station-buildings. The working-expenses are deducted from the earnings.

Sir B. BURNSIDE: How about depreciation on rolling-stock?

Mr. Hutchison: There would be none, as the company is required to keep its rolling-stock up to a certain standard.

Hon. E. BLAKE: What about bridge-structures?

Mr. Hutchison: There would be very little to be done to such bridges as the company have built.

Hon. E. BLAKE: Are the structures iron?

Mr. Hutchison: I believe they are mostly all iron. The Engineer will be able to say.

Sir B. BURNSIDE: Iron and stone.

Mr. Hutchison: Some of the piers are stone, but there are no stone bridges. The depreciation might be put down at 10 per cent.

Sir C. LILLEY: And how about the depreciation in maintenance?

Mr. Hutchison: A railway properly maintained is better at the end of ten years than at the beginning.

Hon. E. BLAKE: No doubt the permanent-way is better if properly maintained.

Mr. Hutchison: And to purchase would not be less valuable than at the time of construction. I am reckoning that the depreciation would be chiefly on the station-buildings, and I am putting it down at 2 per cent., or £60,000, which is a large amount if we consider that station-buildings are the most serious item in depreciation. That would reduce the cost of purchase to £2,940,000, to which has to be added the sum mentioned in clause 44 of the contract for interest during construction, £400,000. That is the most that can be claimed. £400,000 added to £2,940,000 makes £3,340,000, which probably would be the figure which the colony at the end of ten years would be entitled to acquire this railway at. Of course, the colony need not purchase it.

Sir C. LILLEY: It is optional.

Mr. Hutchison: Entirely optional; but, seeing that this railway connects with the Government lines on the West Coast from Brunnerton to Greymouth, where there is another connection to Hokitika, and seeing that on the East Coast it connects with the whole system of Government railways running through the Provincial Districts of Canterbury, Otago, and Southland, there is every reason to suppose the Government would seek to acquire this line, if completed. If that were so, the position of the company would be that, after paying off the balance of profit and loss —£1,775,000—it would have £2,165,000 to the good, or over eight times the subscribed capital of its shareholders, who would in the meantime have received substantial dividends. Even if not purchased by the Government, the company, with a property so valuable as I have indicated, would have, as an ordinary matter of business, no trouble in raising that balance of profit and loss at a low rate of interest in the London market, at 3 or 3½ per cent., and thereby proportionately increase the dividends payable to the shareholders. So that it will be seen, if my figures are correct or even approximately correct, that the value of the contract to the company was enormous. And it may be that the enormous advantages which the company obtained under the contract, when they came to be realised by the Government, supply a motive for the hostility which unfortunately arose against this company. The whole amount which is claimed for damages in this present arbitration proceeding is £1,584,900. I have given, under the first three heads of the particulars, specific amounts which aggregate £622,000; that would leave £962,900 as claimed

in the nature of general damage under the other heads, except timber, which is in its nature distinct. I will now give an analysis of how the whole sum of £1,584,900 is made up. As indicated in the last paragraph of the particulars, we say the share capital and the moneys raised on debentures have been lost, as well as other moneys, so that these amounts are the principal items of the claim:—

	£	£ s. d.
Share capital	250,000	
Debentures—1st issue	745,000	
Debentures—2nd issue...	100,000	
Interest on debentures to 14th January, 1895	18,000	
		£1,113,000 0 0
DEDUCTIONS—		
Land earned	128,000	
Rentals at capital value	5,000	
Railway, 20 years' purchase, at £5,000 per annum...	100,000	
		233,000 0 0
		£880,000 0 0
TO WHICH MUST BE ADDED—		
Loss of traffic, £4,000 per annum, 20 years' purchase	80,000	
Loss under clause 33	122,000	
Forest injury	20,000	
Loss of interest, 4 years	200,000	
Graduated tax (estimate)	32,900	
Destruction of credit (estimate)	250,000	
		704,900 0 0
		£1,584,900 0 0

Some of these items are not in the nature of direct damages, but we say they are consequential, and I would here indicate the authority on which they are based. The following extracts are from the judgments delivered in McMahon *v.* Field, 7 Q.B. Div., pages 591, 595, and 597: Lord Justice Brett says, "The question of remoteness of damage has become a difficult one, since, according to the decision in Hadley *v.* Baxendale, it is for the Court and not the jury to determine whether the case comes within the following rules—namely: (1) Whether the damage is the necessary consequence of the breach; (2) whether it is the probable consequence; (3) whether it was in the contemplation of the parties when the contract was made. These two last are questions of fact for the jury rather than of law for the Court to determine." Lord Justice Cotton says: "It is said that the rule is that the damage to be recoverable shall be such as would be fairly within the contemplation of the parties at the time the contract was made, as the probable result of a breach of it. But, in my opinion, the parties never contemplated a breach, and the rule should rather be that the damage recoverable is such as is the natural and probable result of the breach of contract." These are the general principles on which we seek to justify the claim which has been made. Now a word in conclusion. Up to 1887 the company, formed in the previous year, received, on the whole, fair and honourable treatment. In its efforts to arrive at a settled plan on the basis of the assignment of the Chrystall contract, it proceeded in good faith to expend the money which it raised in the shape of share capital to the extent of £250,000. Towards the end of 1887 the Ministry which had entered into the Chrystall contract went out of office; and the Court will probably remember the remarkable words of Sir Julius Vogel, in the shape of the memorandum left to his successor, in which he anticipated no difficulty whatever in the prosecution of what was then regarded as a work of national advantage. The succeeding Government in 1888 took up the negotiations, and completed them in the form now before us in the contract of the 3rd August of that year. For a time the contract was interpreted with fairness; but difficulties, unfortunately, soon arose, and continued to increase. A change of administration took place in 1891 which certainly did not tend to improve the relations between the parties; and, whether it was from the exigencies of politics or from what I have before suggested—a growing conviction in the minds of those having the administration of the affairs of the colony that the company had too good a bargain—the attitude of the Government towards the company became more and more hostile. The company seems to have been considered a fair subject for attack at all points. Anything more objectionable than plastering the Grey Valley with bogus Proclamations of reserves ostensibly for mining purposes could not, I think, be imagined. What in 1887 had been attempted by the Larnach Proclamation in one fell swoop to take that valley out of the region which the company had a right to consider its endowment—a position retired from almost immediately as being too obviously unjust—was again resorted to in detail in 1891 and 1892, with the effect of locking up the whole of the country in that neighbourhood and drying up the very sources of revenue to the railway along the Grey Valley, which had been specially chosen as a portion of the railway calculated to bring in an immediate and certain source of revenue to pay interest on the debentures for £745,000 raised in 1889. This action with reference to the mining reserves, if it had stood alone, might have been treated as a temporary aberration on the part of the Government; but when that is taken with the denial of timber rights, and with the more serious impediment to settlement in small areas under clause 33, and the disregard for consequences in the penal legislation with reference to land taxation imposed in 1891 and increased in 1893, without any exemption in favour of the company, and when these grievances are followed

by the special misrepresentation of the Minister having charge of the department which had the administration of the contract—such misrepresentation being calculated to damn the company—we have, I submit, such a combination and concentration of hostility as to leave little doubt that there became a deliberate intention on the part of the Government to wreck the company and chance the consequences. These are the circumstances I have endeavoured to open to the Court, and hope to further elucidate by evidence, which must be long and perhaps a little intricate; but I trust our endeavours may be successful in assisting the arbitrators, or the umpire in case of difference, in arriving at a satisfactory decision. I have to thank the Court for the attention it has given me in my efforts to deal with the somewhat intricate points of the case.

Sir R. Stout: Mr. Hutchison has stated his view of the company's case, and it may be better, in order that the arbitrators may really formulate the issues for the management of the arbitration, that I should deal shortly with what I conceive to be the issues involved in this arbitration. My learned friend has dealt with the various contracts which have been made in connection with this railway. I have no objection, so long as public documents are kept to show the agreement between the parties, but I shall object to any negotiations between the parties being utilised in any way to explain the contract or to interpret it. I think, however, when the arbitrators come to understand the history of this contract they will see that it has no doubt been an unfortunate one for the company and a more unfortunate one for the colony. It has been undertaken by a company which has never been able to perform its part of the bargain, and the result is that it has been trying all along to get something out of the colony, and its last attempt is now before the arbitrators. To understand the contract and its value, it may be well to point out how it came to be made. I need not go back to the old statutes. It was contemplated as far back as 1866 that a railway could be made on the land-grant system in Nelson, and an Act was passed in 1867 and 1868 to construct a railway between Nelson and Westport, but no one was sufficiently courageous to take the matter up. One visit to the locality would be quite sufficient to show the difficulties of the undertaking. A new policy was inaugurated in 1870, when the Government undertook to construct a system of railways throughout the colony, but nothing was then said as to this line except a small part which has been made in Nelson up to Belgrove. In 1881 the colony did not want to borrow any more money for the construction of railways, but it thought it might have some made on the land-grant system. The lines chosen for the application of this system were railways which it was known would not pay interest on the cost of construction. There were five lines chosen by the Act of 1881—the Thames Valley and Rotorua, the Wellington and Manawatu, the Belgrove to Nelson Creek, the East and West Coast (by Waiau and Reefton), and the Otago Central; and it was provided in that Act that there was to be 30 per cent. of the value of the railway granted in land as a benefaction from the State to those who would undertake the construction of these lines; but the 30 per cent. was only to be granted on a £5,000-per-mile basis, so that the cost of the line was not to exceed £5,000 per mile. Some lines were taken up on this principle, such as the Wellington–Manawatu line and the Waikato–Rotorua line. Some negotiations were started for the East and West Coast Railway, but it was found that no one would take up the line under these terms; and, of course, the arbitrators are at present under the disadvantage of not understanding the reason why no person could be found foolish enough to undertake the construction of the line on the passing of the Act of 1881. This line has to cross the Southern Alps, and for the greater part of the distance has to pass through land not suitable for anything. It has to pass over mountain passes and gorges in which no habitation can be got at any time, not even in a hundred years after the railway is completed. The country is worse than Switzerland and the Rocky Mountains, or anywhere else. There is no room for habitation, or grazing, or anything else. The difficulties are simply enormous. The line extending from Belgrove has to go down a gorge to a river where there is no suitable land at all, except, perhaps, occasionally a bit of a patch on the top of a mountain, or where a reef might be found; but it has to go down a gorge 2,000ft., and the land is utterly valueless for anything. A great part of it is clad with timber, but it is birch timber, which is not valuable for anything. No doubt the company does not want to take up this portion of the line from Belgrove to Reefton, for it would never pay anything in the way of interest on cost of construction or working capital. I have here a map showing to some extent the topographical features. The railway has to get into the Buller Gorge, but there is a difficulty in saying which route it is to go—some say by the Hope Saddle. Here is Tophouse, and here is the railway running out of Nelson to Belgrove away up by the Little Hope River. It has to go down here, and then climb up to places which are unscaleable except by ladders.

Mr. Hutchison: A coach traverses it.

Sir R. Stout: Yes, a coach traverses it, and generally meets with an accident every year. It is magnificent scenery, perhaps the finest gorge scenery to be seen in the world. I have not travelled abroad much, but I am told it is so. The only means of getting at that land is after you get to the Inangahua Junction, and you are supposed to go on in this way until you get to Reefton, where the line is commenced. I mentioned that for another reason, because from the Inangahua Junction to Westport, there is also a very precipitous gorge, and it was very difficult to get a coach-road made through it, and in some portions you come to where tunnels have had to be cut. There is no railway to Westport, and the result is that here are our railways forty miles apart—though it does not look much on the map; and as for carting coals, it is simply impossible. I shall deal with that in the matter of the Buller reserve. The railway has to go on to Reefton from this point [indicating a point on the map], and from Reefton to the Grey Valley. The nature of the country is such that it is not to be wondered at that nobody was likely to be found willing to take up the contract. A contract was made in 1885, by virtue of the amending Act passed in 1884, because nobody was foolish enough to take it up under the Act of 1883. That Act said, "You are to have 50 per cent. of a land-grant instead of 30 per cent. as in the original Act," and instead of limiting your land-grant to a basis of £5,000 per mile the cost of the mileage was not limited, but the total cost of the

line was not to exceed, for the purposes of the land-grant, £2,500,000. The first part was to cost one and a half millions—that is the East and West Coast line—and the other part of the line one million; and the length of the East and West Coast line was never less than ninety-five miles, so it will be seen that it was to cost about £15,000 a mile. The other length was to cost about a million of money, so that the cost of the section was about £7,500 a mile. On that the land-grants were to be based. That is the Act of 1884; but there was this provision in that Act, that none of the land was to be valued at less than 10s. an acre; and every one knew that some of it was not worth more than 10d. an acre, because they had to take land-grants mile about. One mile would front the railway and go one mile back, as near as could be, and the Government would take one of these blocks and the company the next, and so on. That was the form of the Act of 1884. Under that Act the syndicate undertook to construct the line. They had not the means to do so, but hoped to be able, with the help of these land-grants, to get a company to construct it. That right was assigned to the present company; but when this present company got the contract, or perhaps before they got it—at all events they were not content with it, and, as they have done all through, they asked for further concessions, and the concessions asked for appear in the Act of 1886, page 13, No. 31, Statutes, and sets out that they want alterations as to the selections, as to interest during construction, as to running-powers, as to time for spending the £150,000, part of the contract, as to the assignment of the contract, and as to the amended Act. They wanted all these concessions, and the Government agreed to give them by the Act of 1886. That Act set out the contract that had been made, and said that they might be granted as asked for. But this did not content them. Again they demanded fresh concessions; and my friend knows there is no claim against the colony up to 1891.

Mr. Hutchison: 1888.

Sir R. Stout: Well, 1888. There could be no trouble till then. The company had taken an assignment of the contract, and had no right to ask for further concessions, but the Government gave these concessions in 1886. No sooner had they got these than they asked for further concessions, and then came before the Parliament of 1888. In 1887 they sent out a draft contract—it can be seen by the arbitrators—and it shows what were the concessions asked for. The House said that a new contract should be made and various concessions given to them. And here comes in Mr. Larnach's Proclamation, which frightened them, and they wanted two definite things as concessions. Now, as to Mr. Larnach's Proclamation: he was within his legal rights in making it. There is nothing illegal in it. There is an express provision in sections 84 and 85 of that Act to withdraw Crown lands, and making them practically mining reserves. The section says, "The Governor, in any Proclamation constituting a mining district, and also from time to time by Proclamation subsequently issued, either by general or particular description, may set apart for mining purposes exclusively any portion of Crown lands within a mining district, and in like manner may exempt from occupation for mining purposes, or for water-races, dams, or reservoirs, or for machine, business, or residence sites, any land within the boundaries of such mining district, and from time to time may revoke any such exemption, or may alter the limits and extent of such exempted land as he may think fit." There is also the power of the Minister to set aside for other things, so that Mr. Larnach's Proclamation was perfectly legal, and he did it because he considered it was absolutely necessary for the gold-mining industry of the West Coast that it should be done; and I submit that it was the strongest thing for us, because it was a direct warning to the company that one of the Ministers of a Government against whom they had no complaint thought it was his duty to see that these reserves should be made. Now, how was that dealt with by this Committee of 1887? I have here Mr. Larnach's plan showing the land he set apart—it is the part coloured yellow; these red parts were always included, being practically our coal reserves. It is the Westland goldfield and the Grey coalfield. There is the Blackball coal reserve—I do not deny that—but the Westport coal is to be found under this part [indicating a point on the map], and it was expressly reserved because the railway goes from the gorge [indicating again], and it would have cost, perhaps, £25,000 per mile if they had had the money to make it, and this area is served by the railway which runs to the Mokihinui.

Mr. Hutchison: Yes, now.

Sir R. Stout: Yes, not then. From the Mokihinui the steamers take the coal. In the same way the Grey coalfield was excepted from selection. The Grey mines were also excepted, and the Grey River, and also part of the line here, with which the Government had nothing to do. Here is the Proclamation made by Larnach as Minister of Mines, and he is not said to have had any feeling against the company. It reserves all the piece here in order to carry on the coal-mines of the West Coast.

Sir B. BURNSIDE: What is the date?

Sir R. Stout: January, 1887. The next thing that happened was that this matter came before Parliament, and the question is, how are the gold-mining industries of the West Coast to be preserved. That is the question arising before the Committee, and, instead of taking and setting aside all that Larnach set aside, the Government put in an express contract, which was not in the contract of 1885, so it is an express provision, that they should set aside out of the seven millions of acres reserved an area of 750,000 acres of mining reserves. The Government had the right to select up to that quantity of land for that purpose. Now, that is the reason why the total put in was the amount in Larnach's Proclamation, 750,000 acres, so that it gave power to the Government to take the whole amount of Larnach's Proclamation if necessary. The reason was this: Under the contract of 1884 there was a doubt as to the power to take land for mining purposes at all, except under the Mining Act, because under the Act of 1884 there is a provision that certain land is not to be given to the company. (See subsection (9), section 8, of 1884: "No lands now used for mining purposes, or which shall be known gold-workings, shall be deemed Crown lands under this Act.") So that it was doubtful what was meant by mining purposes; whether it meant land set

apart for mining purposes or land actually mined upon. And there was this difference of opinion as to section 9, and in order to set all this question at rest there was power given, as I have said, to set aside land. Section 16 of the statute deals with it, and sets aside land not then used for mining purposes. I submit the words are of the widest character—"which *may* be used for mining purposes." "All lands which from time to time, in the opinion of the Governor, may be required." It might not be so used at the time the Proclamation was made, but the Governor had to look forward to the development of mining on the West Coast, and set aside what he thought would be a probable payable goldfield. If land is vested in an individual we can take it and only pay for the surface damage. Instead of being harsh with the company, there is one case of a piece of land selected by the company, and which has since turned out to be a gold rush at the Blue Spur, and which, I presume, the Government will have to purchase from the man who bought it.

Mr. Hutchison: The result might apply also to the company.

Sir R. Stout: I have no doubt our law has settled that we can take the land and pay only for the surface. I say it was only to get rid of this question that power was given under a term so different from the Act of 1884. It is so wide as to say "are or may be" for mining purposes. Now, there were various concessions made in this contract of 1887, because I point out the alternative system of blocks was abolished. It was an enormous advantage to this company. The system was this: that they were to get the red or the white blocks; and the meaning would be this——

Sir C. LILLEY: Was the area system introduced by the Act of Parliament, or by the contract alone?

Sir R. Stout: It was in existence once before. I mean to show the working of this system. From Lake Brunner to Jackson's, which is a place on the road to the mountain over the Otira Gorge called after a man named Jackson, the land was practically so valueless that when the parties on behalf of the Government and the company valued the land they never even valued this, but left it shown in white colour, because it is practically without value. The railway on this map is shown here, and they have not shown on either side of the line any value. It is of no value whatever. They would have had to take that at 10s. an acre, one mile frontage and fifteen miles back. It will be seen at once that to allow them to abandon the alternative system, and allow them to select where they pleased in the whole of this million of acres, was an enormous advantage to them; and I will explain why. Here I am left at a disadvantage, because I come to the objection taken to our action on the reserves. Does our friend mean that we have no right to take? I can understand counsel saying, "You have taken A, B, C, &c., that you have no right to"; but we have not had a claim showing what we ought not to take. He has not shown in his argument that we have no right to take. This map shows the B 1 value land; the yellow shows the Government mining reserves. The white shows land either sold or disposed of that they could not therefore select from, as here the land was valueless, so that they did not want to select. These [indicating] are educational endowments before this matter came up at all, and what they have selected is marked red. And, to begin with, I cannot understand a suggestion by the company that we had no right to take 750,000 acres—that we had, in fact, no right to take and ought not to have taken a single acre. That is a most extraordinary position. I understand the reason to be put forward is this: that our Proclamation should have been under the Mining Act, and that, as it purported to be under the contract, and also by virtue of all powers vested in the Governor, therefore it was an improper taking. I submit we need not go to the Mining Act at all. I say there was an express condition in the contract that the Government should say that there were certain lands not open for selection, and that these were part of the mining reserves. Now, let me point out that these reserves in the Buller district never could have been served by a railway of any kind whatever. The railway, to get to them, would have to come down the Buller Gorge, which would cost half a million of money to construct at least; and then there was no agricultural land at all. These reserves are the Buller reserves. These others are altogether away from the line. Of course, on the map, they look near the line. This line here may be called the back range of an impassable mountain; there is no road there. I suppose there is no creature that has ever been there except, perhaps, a bird.

Hon. E. BLAKE: Nothing disentitled them?

Sir R. Stout: No; and I am going to show that they could not have been damnified by this. Except the arbitrators saw the West Coast, and knew all about it, they could not understand the position.

Hon. E. BLAKE: It seems to be too dangerous to attempt.

Sir C. LILLEY: Send the arbitrators and leave the umpire.

Sir R. Stout: This map is, of course, on a small scale. This is the East Coast, and what separates the East from the West Coast is the Southern Alps, an enormous range. The quality of the land on each side is as different as it could be in any two countries. On this side of the line it is bush-timber, called birch, not always valuable. A great deal of the hills are birch, and barely covered in very small patches. The range of rainfall is up to 120in. a year, and that will give an idea to the arbitrators of the nature of the country. When you get up to the summit of the line on the coast it will rain perhaps up to the extent of 150in. The rainfall at Hokitika averages 120in., and that is perhaps the driest part. It is therefore absolutely unfitted for agricultural purposes. There are little patches in the Grey Valley and another place. The people have to depend on the sheep and cattle on the eastern side of the range. The best proof of this, I submit, which could be taken is that, before the issue of the Proclamation and the reserve, the company made all their selections on the side where the valuable land existed. If they thought they could have made grand land of it, why did they not put in a single application for the land on the other side? They did not do so, with the exception of the land on the side of Lake Brunner, which they thought would be valuable for residences on the side of the hill, and no doubt had timber on it. All their selections can be seen from this map to have been of the valuable land—open grass land, good land for sheep, where the rainfall would not be more than

30in., or, perhaps, sometimes 25in., and with a different climate, soil, and everything. Now here, before we made a single reservation, they had the power of selection, and I have here a statement drawn up showing the areas and places of their selections. I have also a statement which will be handed in showing the dates of the Proclamations, and it will be seen that there were 152,950 acres of land selected by them before there was a single reserve proclaimed by the Government. Why did they not select this noble land, which would enable them to get money out of the confiding British capitalist? Because they knew, as they know now, that this land was valueless for agricultural purposes, and they selected on the eastern side of the range, which was practically the only land they had to select from for agricultural purposes. I submit that 950,000 acres were selected before there was a single Proclamation or reserve, and the Proclamations have been gone on with very slowly. It will be seen that up to 1892 there were only about 180,000 acres proclaimed. Again, they had made no attempt to select the valuable Buller and Grey Valley reserves, and the reason they did not select them is perfectly obvious. The fact was that if they had selected them they could never have sold them, because nobody would have bought them. This land in the Grey Valley has been open for thirty years, and nobody would buy it. The amount available for agricultural settlement is what is called "pakihi." Now, this looks like open green spaces, and a stranger going to the West Coast for the first time would say, "That is grand land." But it is utterly valueless; it is generally wet and swampy above the top of the soil. The name is Maori. There is a hard band of iron which nothing can pierce; and even if you could pierce it there is so much iron in the soil, and it would cover up again, and it would be impossible to grow anything. That is "pakihi." As to the bush land, it is perfectly absurd to say it could be used for agricultural purposes. It would cost £20 or £30 an acre to clear it. You might have to wait for years in order to get a good burn; but if you did get a burn you would simply get rushes to grow on the land. That is the reason why, except in a few small places taken up twenty or thirty years ago, it is no good. And that is the reason they selected all the land on the eastern side of the range, land which was suitable for pastoral purposes. Some of it, no doubt, might be suitable for agriculture, but that is different country altogether. Once you pass the range, the fact is, as can be explained, there is, setting on to the west coast of the Middle Island, a warm current from Queensland, and this brings, with all its westerly winds, an enormous amount of vapour, which is condensed by this enormous mountain-range, and which makes the Canterbury Plains perhaps the driest part of New Zealand. The moisture does not get past the mountain-ranges, and the rain-clouds are condensed and drawn down to the western coast, and the result is that there will never be any agriculture of any importance in that special part at all. It can only be for gold-mining purposes. Now, the reserves set apart of the different areas were these: To the 1st December, 1891, there had only been 75,600 acres set apart as mining reserve; to August, 1892, there had been only 174,503 acres of mining reserve set apart; to December, 1892, there was 241,373 acres; to December, 1893, there was 325,773 acres; to December, 1894, there was 419,623 acres; and at the beginning of this year there was 439,623 acres. That is all that has been taken out of the 750,000 acres. The total is 439,623 acres out of the 750,000 acres. Now, it will be seen from the statement of areas got by them that, up to 1890, before any reserves were made by us at all, they had the right to select upwards of 150,000 acres of land, and they had not taken an acre, except a little bit of land near Lake Brunner. And all this valuable area of land they talk about in the Grey Valley, they had not touched nor asked to select, and the reason is obvious. One has only to look at the land to see that the Grey is a narrow valley, down which the Grey River runs, and only opens out really on the West Coast; and all the available open land had been selected years ago, and settled on in small farms. It has all been disposed of for years and years. The people there do very little in farming, however; nearly all of them are interested in the mines, otherwise it would not pay them. All the open flat land in this valley had been taken up. In this narrow strip of valley the hills rise immediately on the one side, and on the other side, especially where the reserves are made, the land is not level at all—it is hills running along the foot of immense mountains. These are really the foot-hills of the mountain-ranges, and, so far from their being useful for agriculture, they would not grow anything. A person has only to visit the locality—to go, for example, to where there have been gold-mining claims, say, at Nelson Creek, or the Nine-mile, or the Red Jack's, or any of those places—to see that they are not used for agriculture. People would never have settled there unless they could use the land for mining purposes. [Counsel here described on the map the lands lying in the Grey Valley.] In fact, we shall be able to prove that some of the reserves are simply covered with diggers and other people mining, and with water-races, and all the other adjuncts to mining. Of course, the water-races have to be brought miles and miles to the places where the mining is going on. I repeat all this land we have taken is not agricultural land at all. It is purely mining land, and if it was to be opened to-morrow all that would be taken up, would be, say, 5 acres here and there for agriculture, or where a miner wished to fence in a bit of land to run his horse in; but it will never be used for agricultural purposes if it is kept open for the next century. [Counsel here described on the map the country lying along the two rivers which trend into the Buller Valley, and which he would call specially the Buller reserves.] And here, again, there can be no pretence of saying there is any agricultural land at all, nor can there be any agricultural land here at all. It can only be reached by diggers with pack-horses. As to the southern reserves, there is no doubt some agricultural land as you get far south. Some of it is open land, where there are cattle-runs, but there have been no reserves made there at all. These reserves made about Hokitika and about Ross are a great number of miles from this railway. There is a Government line running close to it, but the Midland Railway does not touch it, nor would it be served by this traffic. The company knew perfectly well, as the selection shows, that if they had selected any land on the West Coast at all they never would have been able to sell it. The only land they could turn into cash at once was the pastoral land, which was really occupied by runs for the feed of sheep, and since the occupiers of

the land bought it they have generally been able to make some profit out of it. But these lands have not been made valuable by the company's railway. The lands they have selected would not be affected by the railway in the slightest degree. They would not be served by the railway which travels in this direction. [Course described on map.] Not a single acre of it would have been benefited by the construction of their line. As to this land around Lake Brunner, which was going to be cut up into summer residences, there was some land bought by a Mr. Clark near this Lake Brunner for a small run in the hope of making something out of it. At one time there were 40,000 or 50,000 people on this coast, and they, of course, had to be fed with mutton and beef, and that had to come from somewhere, so that men taking up small patches of land, with the enormous price that was being paid for beef and mutton, expected to make something out of it. The cattle could be sometimes kept in the bush, but sheep were more difficult to deal with; and I know of one man who took up 5,000 acres of land in that locality twenty-five years ago, and who has lately sold it at £1 2s. 6d. per acre, including improvements and everything else, and that was after the railway was made. I only wish to say again that witnesses will be called who will tell the arbitrators that these reserves are necessary for preserving the mining industry, and the fact that they are worthless for agricultural purposes can be proved by the fact that the company never used an acre for land-selection, for the reason that they could get no person to buy them. Of course, it would be better far if it could be arranged for the arbitrators to see for themselves the nature of the land at the northern end and across the gorge I have mentioned, and they would then see why it is the company has not selected land. It will also be seen why, in 1892, they abandoned the construction of the line from Reefton to Belgrove. They will see that there would be no traffic from the other side, as there is nothing but steep mountains until you get to the Matakitaki Valley. There are only two people who have cattle or sheep: one is at Braeburn, away on the Matakitaki, and around the lake called Rotoiti there is a run called Kerr's run. It would not pay to raise cattle on the east side of the range, from the fact that at the present time there is a trade in cattle between Wanganui and the West Coast. The cattle are brought to the West Coast by steamers, so that there is no traffic whatever that would ever pay the company—except, perhaps, the coal traffic, and there is no coal even to be carried between Reefton and Belgrove. The coal there is a brown coal, and the main coal is taken from Westport and the other ports by steamers. However, I shall deal with the coal traffic later on. I have shown, then, what is the position with reference to these reserves, and I submit that when the arbitrators see the dates upon which the reserves were selected and the dates upon which our mining reserves were proclaimed, and when the company made their selection, it will be seen that this claim of the company—that we could have injured them in any way by selection, or that their credit is injured—is simply ridiculous. We shall also prove that we acted *bonâ fide* in the selection. Every selection was made by the Government on the advice of their mining experts, officers, and geologists. In fact, instead of having taken too much, the cry was always rather that we had not taken enough for mining reserves. Correspondence will be brought to show that for years the company knew that, and that the company were continually raising a clamour that further reserves should be made on the West Coast. Now, this will raise the question, no doubt, as to the discretion of the Governor in the contract. I do not intend to raise that question. It seems to me that the Governor stands in this contract somewhat in the same position as the engineer stands in many of the contracts that have come before the Courts. It seems to me that everything is left to his discretion, for it reads, "All lands which from time to time in the opinion of the Governor"; and therefore if the Governor expressed his opinion by Proclamation that opinion is binding on both parties. They cannot get behind that. The only cases in which that can be got behind, which I shall cite authorities to show, are cases in which there may have been collusion between, say, the engineer and the employer; or, in another class of work, between the architect and the employer. There are many cases to that effect which I can cite later on if necessary. Now, I would put it like thus: Is not the Governor under this contract really in that position? So that, if in his opinion these reserves were necessary for gold-mining purposes, or might be required for gold-mining purposes, can the arbitrators say anything about it? Some people might think there was too much land reserved, while others might say there was too little; but it was a question which the company was really bound to leave to the opinion of the Governor under their contract, and by that opinion they were bound. I also submit that before my friend can succeed in his contention he must prove fraud in the contract, or that we have not acted *bona fide*. Then, with regard to Larnach's Proclamation, it is not suggested that Mr. Larnach was acting fraudulently to the company.

Mr. Hutchison: It was seen to be unjust, and was speedily ratified.

Sir R. Stout: It was only withdrawn in this way: that when the new contract was to be made and negotiations were going on they had to adopt a different procedure, and the Proclamation was made a part of the contract of 1888, because in the previous contract there was no power whatever to set aside any special mining reserves of a special area, but in the contract of 1888 there was express provision that there might be set aside 750,000 acres, which was the area comprised in Larnach's Proclamation, leaving the amount to be set aside to the discretion of the Governor. Now, can it be apprehended for one moment that there was any fraud in regard to this? One man might say, "If I was Minister of Mines I would not have recommended so much"; but it does not follow that the Minister would not say, "There is too little reserved: there ought to have been more"; and if it therefore comes to be a question of opinion, then the arbitrators have nothing whatever to do with it. I shall prove conclusively from our experts and from other people who have examined the blocks that, so far from there having been too much reserved, there has been even too little. I again repeat that if the company had taken all this mining reserve it could not have helped them, as it is utterly useless for agricultural purposes. That, I submit, deals with the question of the reserves. I now come to the question that it was because of these reserves that the company was

injured. Well, that seems to me a most extraordinary proposition. To begin with, the reserves made up to the end of 1891 were only 75,000 acres. Now, the evidence given by themselves before the Committee was that in 1891 their finance was exhausted, and that they were unable to do anything except they got a further concession from the Government. All that time only 75,000 acres had been selected by the Crown: how, then, could the selection of this 75,000 acres have injured their finance? Can it be suggested for one moment that their contract contained the right to select up to 750,000 acres, and because they selected out of that only 75,000 acres their finance was to be ruined? I submit it is against common-sense to make such a suggestion. They admit, as has been put in in their cross case by Mr. Bell's statement, that in order to press the Government to give them further concessions in 1892 they had to say, "Our finance has come to an end; we are practically insolvent, and unless you can give us a loan or bonds we can do nothing." They said, "Give us seven hundred thousand pounds' worth of bonds to enable us to finance and make the line across the Otira Gorge. Let us abandon the other line: it will never pay us and it will not pay you to make it." They also said, "Now we have taken all the good pastoral land we can, we have nothing else to select; give us therefore cash instead." Unless we do that they say their finance has come to an end. Now there is no more available land for ready sale at anything like a price that would be remunerative. Merino wool has gone down in price from 1s. to 4½d., and the result is that the Government has had to reduce the rent of the runs; and that makes all the land on the eastern side of the range, which is only fit for pastoral purposes—for grazing merino sheep—comparatively valueless as lands for selection. No one wants to buy land for 5s. or 10s. an acre to feed sheep on those ranges. Then, again, last winter in the southern part the snow has been so severe that some of the runs have lost a third of their stock, and the result of all this is there is really no good land left, and the company came to the Government and said, "What is better than land is Government bonds." They were to select nothing but 3½-per-cent. bonds. If the land was going to rise in value by the making of the railway and owing to the progress of the colony, we did not expect them to come and ask for bonds instead of land. They knew perfectly well that there was no land on the eastern side of the range that was likely to sell. Therefore it is a mere pretence to say that our reserves have affected them in the slightest degree. How can this selection out of the 750,000 acres have injured their finance in the slightest degree? and that is the gravamen of their charge. Now I come to the question of timber, and here I am at a loss to understand what is meant about timber. What does it mean? They have had the right to select timber land. If they thought the timber land was so immensely valuable —£5 or £6 an acre—why did they not select timber land? There are still large areas of timber land available around Lake Brunner and elsewhere: why have they not taken it? Because it would not pay them. If they thought they had the right to cut timber on any of the mining reserves, what reserves do they complain about? I want the details and dates and particulars. The only claim they could have would be under section 18, which says this: "It shall be optional for the company, with the consent of the Queen in every case, at any time to select the timber on any lands reserved or set apart as aforesaid," and so on. But were any selections made by them that were refused? It might have been refused when the Crown thought the miners required the timber to put slabs in their mines, especially for tunnelling and other things; and I submit that is covered by the proviso which says, "Provided also that such option shall not be exercisable over lands the timber on which shall, in the opinion of the Governor, be or be likely to be required for sawmilling industries in existence at the date when the Queen shall consent to the exercise of such option by the company," and so on. Therefore the Queen had a right to reserve this part for timber, and if there were sawmills on the spot Government had a right to reserve sufficient timber to last the life of the mills. The reason for that is perfectly obvious. We will take it as an average that a mill may have cost from £5,000 to £10,000 to fit up. Well, in our timber regulations in this colony we generally reserve 800 acres for a timber-mill, and if they ask for it they can get another 800 acres. Now, the Government has a right to look after these sawmillers; but I am not aware of any new sawmills started as my friend states, because we put in an advertisement asking for sleepers for this line and no sawmillers tendered. I am not aware that any new sawmills have been started within the last twenty years; and I submit it will be found that the reserves made by the Governor for the purposes of mills already in existence and working—and have been working, for example, for years—have been very small compared with what the Government have reserved in other bush districts in the colony, and we had a right to reserve them if there were no complaints from the district. We state the reserves were not made improperly, and we also ask for details from the company, otherwise we cannot get evidence or examine at all in regard to this particular claim. I submit that we have a right to these details in order to ascertain if we have offended in any way under section 18. My friend Mr. Gully tells me that, so far as we are informed, there has not been a single application for timber on mining reserves; and I do not wonder at it, because on most of the mining reserves the timber is either too far from the port of shipment or so difficult to get at that it is not valuable. The valuable timber on the West Coast, and that has been made the most use of, has, no doubt, been what is called the silver-pine. It is very valuable for sleepers, and supposed to be the best timber in the colony for that purpose. There is no other valuable timber on the West Coast. There is the red-pine, white-pine, and kaikatea, which may be valuable for purposes of export when the railway is completed. That point I will speak of later on. It may tend to the advantage of the timberless districts of Canterbury that they should be able to get this timber, and it might lead to some traffic in that direction. As to the legal meaning of this section 18, the arbitrators will have to deal with that; and we say that, when the details come before the arbitrators, that it will be seen that we have not offended against the provisions of that section in any respect. There are two provisoes: "Provided that such option shall not be exercisable so as to in any way interfere with *bonâ fide* mining purposes." The second proviso is, "Provided also that such option shall not be exercisable over lands the timber on which shall in the opinion of the

Governor be or be likely to be required for sawmilling industries in existence at the date when the Queen shall consent to the exercise of such option by the company, or where such timber shall be or be likely at any time to be required for holders of timber licenses or miners' rights respectively or for mining purposes."

Sir C. LILLEY: Would not that apply for the future as well as the present?

Sir R. Stout: No doubt. We have to look upon the sawmills as not going to end; and we must set aside sufficient timber for them. We have a right to keep it back; and the company are not likely to buy all this. They have got about six million acres of land to select from, and why do not they select? Surely it cannot be suggested that the small reserves we have made under 450,000 acres can affect the company injuriously. Some of it, of course, may; but it is childish to suggest that they will affect the company unduly, or that it will be injured in consequence. Take the Buller reserves. On all those reserves there have been miners working for thirty years. From the Nine-mile Peg to Charleston there have been miners working along the beach. They have a little bit of land, and they pick the beach over for gold, or they might take up a block of land in order to get gold out of it. They do very well, and some have been there more than twenty years. In fact, in all the districts there have been gold-miners at work for the last thirty years.

Mr. Hutchison: There is no timber on the beach.

Sir R. Stout: There is no timber along these reserves of any use for sawmilling purposes; and I do not think there is a single sawmill there; neither do I think that the timber in the Buller Reserves referred to is of any value whatever. Now I come to section 33: "We refused to allow people to buy land." Under section 33, I think it will be found that the only persons refused were those who wished to purchase land on mining reserves. There was one mentioned by my learned friend at Tadmor. As to that, it is a pity the Government did not allow the people to buy that land, because if they bought once they would not like to buy a second time, as the land there is very poor and barren. I said that Tadmor was outside the boundary, and I am told that I was correct.

Mr. Hutchison: Not correct by the map.

Sir R. Stout: Tadmor is not marked there as on the boundary. It is marked on the boundary of the B 1 map. I am speaking from my own personal recollections. I understand that some of the land is inside and some outside the boundary.

Mr. Hutchison: None of our applications were outside.

Sir R. Stout: As to this land, I understand that my friend's suggestion is that the land is on the western side of the main range. As to that, to talk about a main range in Otago or Nelson is, I submit, ridiculous. The contract talks about the main range between Westland and Nelson, and anybody who knows anything about land would at once read that main range as the main range of the Southern Alps; but what happens in the Middle Island is this: When you leave Canterbury and get into Otago the mountains almost stretch out in a series of stars, with valleys between the ranges. I lived in Otago more than thirty years, and never heard of any one range being called a main range, because the main range runs along the coast, and as soon as it gets into Canterbury it stretches out into various ranges and runs on right up to the West Coast, where the mountains are sheer down to the water's edge, and run up to 6,000ft. and 7,000ft. In Nelson, practically, the range is broken in the same way. There is no main range. My friend suggests that the main range is different to that stated by the Government. It certainly takes a peculiar course. [Counsel here described from the map the position and trend of the range.] There is no main range. What you might call the main range in Nelson proper is only in the southern part of the Nelson District and the Westland District. If there is a main range there the other ranges are subsidiary. There is one set up like this [indicated] and there are other ranges alongside, of different formation and different everything. To speak of Tadmor as being west of this main range simply means this: that between Tadmor and us there is, I believe, the highest range in the Nelson District. There is only one saddle, I think, on the Arthur Range, and, if one is in the Town of Nelson, you will see lying there, almost always snow-tipped, this range, and this is really the main range. Speaking of the western district and the amount selected there, I do not know how much land was selected at this Tadmor. I suppose it will be found that it was one or two hundred acres, as the land is exceptionally poor about Tadmor—merely birch-covered, and will not grow grass without great trouble; and while the land stretching up from the Buller Valley into parts of Belgrove is exceedingly poor, when you get into Belgrove of course you get into very fine land indeed. My friend made no suggestion that, in regard to anything the Government did in this matter, they did it with any desire to injure the company. They were advised by their experts that this was not a main range, and that the land was not on the western side of the main range. The Government took the advice of their Chief Surveyor, Mr. Percy Smith, who is also a geologist, and on that advice they acted. It cannot be suggested that, in acting on this advice, they were guilty of any charge of fraud or improper action in any degree. My friend gave in a list, under section 33, of applications outside the reserves, and that had been refused, he said. We do not know the details. We want the particulars of those inside the reserves, which, of course, we had the right to refuse; as for those outside the reserves, I am not aware that any were refused. What happened is this: that before there was an agreement come to between the company and the Government as to the mode of application there were many applications made. After the agreement was come to the Government heard no more about it, the fact being that the people did not take up the land.

Mr. Hutchison: They went away.

Sir R. Stout: I am not surprised, and it is a very good thing they went away, because, if they had taken up the land, it would have meant taking up a life of misery. But we get no details about this point. We ask for details in order to see what the applications were that were refused, and how they were refused, and the grounds for their refusal that were given. We are not aware

that any were refused outside the reserves, excepting perhaps one or two sections at Tadmor; and, if there were any, then we shall be very glad to hear what they were. That deals really with the question of mining. I am not going into the timber question on this occasion, or the applications under section 33. I now come to the question of taxation. I might say, however, first of all, before dealing with that question, regarding my remarks upon the agreement I referred to as having been come to between the Government and the company in 1892, as to how applications under section 33 were to be dealt with, that since then there has been no dispute or difficulty between the Government and the company as to any application whatever; and Mr. Scott, who was acting on behalf of the company in making the agreement, said it was quite satisfactory to them, and, so far as the Government are concerned, it has been satisfactory. There has, no doubt, been some difficulty, as I mentioned—a year or two before; but there has been no difficulty latterly, and there is none now. Now I come to the other claims that have been put in—the question of taxation. I really ask the arbitrators, after consideration, to say whether all these claims should not be struck out. I press that point, because it really seems to me such a waste of time at this stage that it should be held that there can be anything in these claims. I understood my learned friend to say that this contract limits the power of the colony to pass laws putting on taxation generally. If that be so, then the contract is *ultra vires*, and there is an end to the whole thing; because I deny the right of the Queen or of the Parliament, even by statute, to pass any statute or to make any contract that will limit the future power of Parliament to deal with taxation. It would be entirely *ultra vires* to do so.

Sir B. BURNSIDE: How can it be said that Parliament has no power to pass an Act?

Sir R. Stout: Where the Act can be deemed *ultra vires*? That question was raised in Victoria, when the Courts decided that an Act was *ultra vires*.

Sir C. LILLEY: That is in relation to the Constitution Act?

Hon. E. BLAKE: The question is this: If it is within the authority of the Legislature. You have a Constitution containing certain powers, and if you exceed them the Act is void.

Sir R. Stout: Yes, that is what I say.

Hon. E. BLAKE: The Judges have to compare the higher and fundamental law with the law as passed.

Sir R. Stout: The late Chief Justice Higginbotham thought the Courts of the colony were bound by the Acts of Parliament. Our Courts have held differently. They have held that an Act of Parliament——

Sir B. BURNSIDE: Where you have a Constitution.

Sir R. Stout: We have a written Constitution, and we cannot exceed its powers. There is no power under our Constitution Act by which one Parliament can limit or bar the powers of a succeeding Parliament. Therefore I say, if this contract does limit, it is *ultra vires* and void, and consequently I say that, supposing there was power to limit the power of Parliament by charter, then a charter must show on itself that it was intended to limit the power of Parliament to pass taxation; but there is no such provision in this contract. Burrows on Taxation can be quoted as showing that the exemption from taxation on charter must be expressed—it cannot be implied. See page 113, Burrows's book on taxation, which is the standard book in the United States dealing with the powers of States and Municipalities to pass laws.

Sir B. BURNSIDE: I did not understand the contention to be that there was no power to make an Act.

Sir R. Stout: Dealing with the question of no power, I now come to the next point, which is this: If there is power—that is, if there is a statute passed limiting the power of Parliament, there is no provision in it for giving compensation to those who may be injured—those who are injured by having no rights. That is laid down in an English case, Rex against Pease, and quite recently in the Metropolitan Asylum District against Hill, which is an appeal case. It was a case about erecting an asylum. The question was that it injured the neighbourhood, and was a nuisance, but it was sanctioned by Parliament itself. Even though people are injured, they have no rights. The same thing was laid down and a similar decision obtained in the case of Trueman *versus* the London Railway Company. Therefore, if Parliament passes a law which is an injury to the subject, and if there is no provision in that statute to give the subject compensation, the only remedy the subject has is to appeal to Parliament to give the compensation. No doubt Parliament will under certain circumstances give the compensation. There is no such statute limiting of limitation affecting the Crown. If there were, people might claim hundreds of thousands of pounds because their ancestors were injured by some Act passed long before.

Hon. E. BLAKE: You contend that Parliament would have power to pass a law abrogating this contract?

Sir R. Stout: Yes; in fact, the same power as the Imperial Parliament has.

Sir C. LILLEY: There is no limit in the Constitution in regard to the power of taxation.

Sir R. Stout: No. Therefore I submit, so far as this question of taxation is concerned, it is simply a waste of time to take any notice of this claim. The second point was as to the extension of time. Two or three questions were raised as to that. It was said that we delayed giving the company the concession as to the Abt line over Arthur's Pass, and that we delayed about giving them the Brunner deviation. Well, we were not bound to give it. It was entirely within our option, and we did give it as soon as we got proper reports. The company complain that we had no business to obtain reports as to whether the incline would be as satisfactory as the tunnel. Every one knows that the Government wheels move slowly, and the Government took the precaution of getting opinions of engineers as to whether it was a proper concession to make, and they ultimately made it. To suggest, therefore, that that delay had any injurious effect on the company is, I think, ridiculous, as that part of the line would not have been wanted for years. They made the easier part of the line, which was the only level part, first, where there was hardly any cutting,

and only a small tunnel. Where the line has been made is comparatively level; but they never attempted to deal with the difficult part of the line. The difficult part is that after you leave Jackson's and through the Otira Gorge.

Hon. E. BLAKE: That part has not been built?

Sir R. Stout: No, and never will be for years. They have only finished Jackson's this year, and they are miles away from the Otira.

Hon. E. BLAKE: The deviation has been?

Sir. R. Stout: Yes; that is all on level land. They were allowed to make the line on the side of the lake that was most convenient to them—namely, the eastern side. The reason we objected was because there is a goldfield called Kumara, and also a township called Hokitika, that would have been better served with a railway on the western side of the lake; but we allowed them to make it on the other side on condition that they ran a ferry-boat, which has not been done.

Mr. Hutchison: There is no breach of that agreement suggested.

Sir R. Stout: I am not putting it as a breach, but only showing that the company has got the permission to do it. They say we took too long to come to a conclusion about it.

Hon. E. BLAKE: You say that you had an absolute right to refuse, and that the company cannot complain of how they were dealt with?

Sir R. Stout: No.

Hon. E. BLAKE: The company say they had an absolute right to the concession.

Sir R. Stout: They might say that with regard to the Abt line, but not with regard to the Brunner deviation, because we had to get a special Act of Parliament to authorise it.

Mr. Hutchison: We say we had an absolute right to the Abt incline, and it must have been a reasonable discretion on the part of the Government as to the deviation.

Hon. E. BLAKE: There was no Act about the Brunner deviation?

Mr. Hutchison: Yes.

Hon. E. BLAKE: Do you deny that they could make that deviation without the consent of the Government?

Sir R. Stout: I submit that the statute is binding on that point. The Act authorising the Brunner deviation was passed in September, 1890. It says,—

"Whereas the New Zealand Midland Railway Company (Limited) has requested Her Majesty the Queen to permit a certain deviation from the line of railway mentioned in the contract entered into between Her said Majesty and the said company, bearing date the third day of August, one thousand eight hundred and eighty-eight, and made in accordance with the provisions of 'The Midland Railway Contract Act, 1887': And whereas it is expedient that provision should be made by law authorising such deviation as hereinafter provided, and for such other purposes as in this Act mentioned:

"Be it therefore enacted by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:—

"1. The Short Title of this Act is 'The Midland Railway Contract Act, 1890.'

"2. On its being shown to the satisfaction of the Governor by the said company that the making of the deviation from the line of railway mentioned in the said contract, which is described in the Schedule hereto, will render the railway more efficient for traffic purposes, and also upon the company entering into the contract or contracts mentioned in clause seven of the said contract in respect of that portion of the railway commencing at a point on the Government line at or near Belgrove, and giving security to Her Majesty to the satisfaction of the Governor for the due construction and completion within such period as the Governor may deem reasonable of such portion of such railway, it shall be lawful for the Governor in Council, in the name and on behalf of the Queen, by writing under his hand indorsed upon the said contract, to authorise the said company to make such deviation."

Mr. Hutchison: "Induced by the Government."

Sir R. Stout: That has nothing to do with it. I say we proposed the contract in order that we might have legislative sanction. There is no suggestion that there was any delay in the legislative sanction. It was not long after the Act was passed that the authority was given—about two or three weeks. The Act was passed authorising us to allow the deviation, and no time elapsed that can be suggested as a delay.

Hon. E. BLAKE: You say that the Act indicates that for the purpose of the deviation legislation was necessary?

Sir R. Stout: Yes.

Hon. E. BLAKE: It is not open to us to find whether the legislation was right or wrong?

Sir R. Stout: No. I submit that there is nothing in the contract that could force us to give it to them. I understand that the Government had stated their intention of granting the concession about two weeks before.

Mr. Hutchison: Consent was given on the 7th July, 1891.

Sir R. Stout: The consent was not to be given until the company had complied with the agreement to make the road mentioned in this contract. The point is this: the Government expressed their willingness to carry out this statute as soon as it was passed, and directly the company did their part the Government had to do theirs. Does my friend contend that the company had complied with the conditions in regard to the deviation, or that there was any delay in that compliance? I submit he cannot say that.

Sir B. BURNSIDE: I suppose there is a document giving consent?

Mr. Hutchison: It is dated 7th July, 1891.

Sir R. Stout: The Act says this: "But no such authority as aforesaid shall be given by the Governor unless he is satisfied that the aforesaid company have, by contracts, entered into an obligation with the Corporation of the Grey County to provide the said Corporation with a sum of

not less than two thousand seven hundred pounds to defray the expense of widening the road, bridges, and culverts between the Township of Pounamu and Lake Brunner; and also that the said company will provide and maintain in good and efficient order a steam-boat of sufficient size to ply as a ferry-boat on the said lake, between the terminus of the above-mentioned road on the said lake and the railway-line on the east side of the said lake: And the Council of the Grey County is hereby authorised in the name and on behalf of the said Corporation to make such contracts." It cannot be said that the Governor did anything until he was satisfied, as he had to be satisfied; and I submit that here again there can be no such suggestion as delay. Then, another point was about the Abt line. I understand my friend to say that we had not a right to refuse the Abt line if we liked. What section did he rely on?

Mr. Hutchison: Section 4.

Sir R. Stout: The provision about the Abt line is in section 4 of the contract, and it says, "The company shall not, without the consent of the Governor first had and obtained, deviate from the line of railway as surveyed, or alter any gradients upon the said railway as the same are shown upon the plans of that portion of the said railway from Springfield to Brunnerton, deposited in the office of the Minister for Public Works, marked P.W.D. 11554, 11555, 12007, and 12009, copies whereof have been handed to the company before the execution of these presents: Provided that so much of sheets 45A, 46A, 47A, and 48A of the said plan 11555 as apply to the 'incline line' at Arthur's Pass shall not be deemed to be part of the said plan: Provided also 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 that the incline line when made will be suitable for mineral and other heavy traffic, and in his opinion worked at a satisfactory cost," and so on. Now, how can it be said, in face of that provision, that the Governor was not to take time to get the opinions of the engineers, and to satisfy himself? I submit that there can be no claim for delay in this matter.

Mr. Hutchison: The sheets were really blank.

Sir R. Stout: The company could not construct the incline in substitution without consent. If you could have done it without the Governor's consent, how was it you did not do it? And if you did not do it, how can you complain that he did not agree to it?

Sir C. LILLEY: This seems to be a right under the contract for the Governor to be satisfied.

Sir R. Stout: My friend suggests that the company was not bound to get the consent of the Governor. If so, then it cannot complain of the delay. The point is this: that, when the Governor was asked for his assent, he took the trouble to get the opinion of two eminent engineers, and gave it. The other point, I understand, raised under this head is that the time for the performance of the contract was not of the essence of the contract, and therefore there can be no breach for the non-performance. Well, I submit, on the contrary, that where a contract is for the performance of a certain work within a certain number of years, obviously the contract has to be performed within that time. It is surely peculiar for my friend to say that there are no limits at all. Are the arbitrators to say that ten years is not a reasonable time. I submit that ten years is what the parties agreed upon as reasonable, and that the company and the arbitrators cannot say that it is not reasonable. And I also submit that no conversation between Mr. Burchell and the Agent-General can prevail as to whether an extension of time could be granted or not. But to show that the contract has not been reasonably carried out by them, one has only to look at what they have constructed. They cannot deny that the difficult portions of the contract have never been touched by them. The difficult parts are across the mountain range from Jackson's to Springfield. They have a mountainous country all the way. They have flats about the Waimakiriri Gorge, but even there there are terrific difficulties in the work. At all events, from Reefton to Inangahua Junction the line is level, although there are heavy bridges to make. After that you get into more difficult parts of the country, through the Buller Gorge, the Otira Gorge, and Arthur's Pass; and the company has never attempted to construct those portions, but have simply constructed the easiest portion of the line. The total mileage constructed is thirty-five miles out of the 235 they have to make, and their time is up. The estimated cost is £2,500,000. They say it would have cost more —they say £3,000,000. Suppose it would: £500,000 to £600,000 is all they have spent——

Hon. E. BLAKE: On the works?

Sir R. Stout: On the works proper. Suppose they have spent a fifth of what the line would cost, and have constructed one-third of the line, *pro ratâ* they have spent less than a fifth. But let us assume that they have spent a fifth, and made about a third of the mileage, it is in the easiest country, because we have only to see the Brunner to Jackson's to see that it is the easiest—the only other part would be from Reefton to Inangahua Junction, and there there is heavy bridging—can they say that is anything like a performance of the contract? They can say nothing of the kind. We have done nothing to delay them. There were no mining reserves made at all until they said their finance had given out. How can they say they have attempted to perform the contract they undertook to perform? The other point is this contained in the eighth paragraph about the defamation. I do not know what to say about that; it is so ridiculous to say that any statement made by a Minister of the Crown to a Committee or to a Parliament could be evidence against the Crown. I can only say that the Appropriation Bills of some colonies would have to be very much enlarged if anybody had a right to sue a Minister of the Crown for anything that he did not agree with. But I submit the case I will refer to is conclusive authority on the authority of a special agent—*In re* Devala, 22 Ch. Div., page 593. The head-note says, "A shareholder in a company applied to have his name removed from the register of members on the ground that he had been induced to become a shareholder by a material misrepresentation in a prospectus issued by the company. The only evidence of the untruth of the representation was a statement made by the chairman of the company in a speech addressed by him to a meeting of the shareholders. Held, that this statement

was not admissible evidence against the company, inasmuch as the chairman, in making it, was not acting as the agent of the company in a transaction between them and a third party, but was making a confidential report to his own principal." So here it cannot be said that Mr. Seddon, in making a statement, was acting as agent: he was making a statement to his Parliament—that is, his principal. Mr. Justice Fry says, "The rules which limit the admissibility of evidence of statements not made on oath are somewhat stringent; and the only ground upon which, in my view, this statement could possibly be admitted would be that the chairman was the agent of the company, and that he was making the statement in the course of a transaction with a third party, in which he was acting as the agent of the company, and that it was within the scope of his agency. If that were so, the statement would be admissible against the company. It appears to me, however, that it is not admissible, for it was made by the agent, not in a transaction between the company and a third party, but at a meeting of the company. It is the case of an agent making a report to his own principal; and, in my view, when an agent is making a confidential report to his principal, the report is not admissible in evidence in favour of a third party." If that happens in the case of a chairman of a company, who is supposed to be an executive officer of the company, how much more would it apply where a Minister is supposed to be carrying out a statutory contract, and making a statement about its non-performance to Parliament, which has the supervision and control of all administrative acts of the colony? The inquiry was called by themselves, and made by order of the House. The next point of the case is that my friend says this was a most valuable contract, and that the amount of damages must be looked at from that point of view. I can only say that, if the contract was so valuable as he makes it out to be, it was very strange that, with all the wealth in London, he could not convince financiers of its value. Can he suggest that, if the railway was going to make this large percentage, these mining reserves were going to affect it? The more mining there was the better it would be for the railway, for he would get more settlers. The carriage of coal was not going to affect the railway, and I am not aware that any coal-mines have been taken.

Mr. Hutchison: We were forbidden to touch the land.

Sir R. Stout: The coal-mines open at present are more than sufficient to supply the wants of the colony, and the coal to the East Coast cannot possibly be carried on the railway. As to the Grey coal, I doubt very much whether the railway could compete with sea-carriage. The coal-mines of the Grey are only six or seven miles from the port, and the Government line can take it down the hill to the steamer. The other coal-mines to be opened are only three or four miles from the shipping. I doubt whether they can compete with the shipping. The whole of this part of the North Island must still be served by sea. In the southern portion of this Island there are no coal-mines, and it has to depend on the West Coast and New South Wales. It cannot be suggested that the coal could be carried to Otago. It has its own coal-mines, where it is sold at from 17s. 6d. per ton—all brown coal. There is also some in Southland for use in the industries they have—brown coal, and this railway cannot compete with them. In Canterbury they have brown coal at the Malvern Mine. It is a most sanguine thing for them to say they can serve the whole of the people of Canterbury—some fifty or sixty thousand—with coal from the West Coast; and what would that be for the railway if they did? And we are competing continually with Newcastle, where the coal costs 6s. or 7s. a ton. How can the railway compete with that? Now, as to the timber. It is true that Canterbury is practically treeless, and I admit that the West Coast would give a great deal of timber to Canterbury; but there are other people competing with timber.

Sir C. LILLEY: Do they import hardwood?

Sir R. Stout: Yes, from Tasmania and Australia; but there is always competition in timber with the South. No doubt food products would be carried to the West Coast by railway. I do not say that the railway between the East and West Coast might not pay expenses. I hope it will; but as to any large profit being expected, one has only to see what the New Zealand Government railways pay along large agricultural districts with no ports to compete with and it will be seen that it is entirely too sanguine an outlook altogether which my friend has given expression to. The Nelson end is not likely to pay, and we have a right to complain that we have been placed in a very unfair position by this. They have picked the eyes of the land, and then turn to us and say, "You must take this railway back and give us damages." We know what the bit of railway they have made has paid, as we have had control of it for six months. This is the bit of railway between Reefton and Greymouth. It has to carry the coal and timber for export, and it has to carry all the goods for the mining district of Reefton. It is the most profitable part of the line, and the part first constructed, because it was the easiest and likely to be the most profitable, and the total expenditure on this line amounts to, according to their own figures, about £500,000. Deducting part of the Spooner Range and Springfield, there is from £550,000 to £560,000. But, supposing only £500,000 has been spent on the line we have been working, we find that the total receipts for the six months was £1,569.

Mr. Hutchison: It has been managed very badly then.

Sir R. Stout: It has been managed exceedingly well. We found that the rolling-stock was not in good repair. We are not charging anything for supervision, but only the ordinary expenses for running. All the charges for directors and managers have been kept out. It is only about £3,000 a year, not 1 per cent. for the money invested; it is about 12s. 6d. per cent. And this is the most profitable part of the line, and the easiest, and is running through the most settled district. That is all this most profitable part of the line has paid. But, again, I say that I shall be most pleased to learn that it is a most profitable contract. But if it is likely to be so profitable as my friend points out, why should he not have been able to finance the money in London, where money is so cheap, for this valuable property? I might just say this: that, no doubt, the arbitrators will have to consider how it is that this valuable contract has failed to get the money—to get a million of capital for a three-million job. It was an expensive way to get money. They were apparently

hard up from the commencement, and asking for concession after concession to enable them to finance. I only want to say a word as to getting details with reference to claims under sections 33 and 18. I presume all the reserves are objected to; but, as to section 33, we were not aware of any delay in granting concessions. We have not had the slightest complaint in reference to the selections, and we can only deal with the matter when we get the return of the persons who applied for land. They have had to sell for cash or on deferred payment, and we have to see what terms were made, and what the terms of the deferred payment are to be. That is all we have to do, and to ask them when the people applied to make their selections. As to the negotiations, we are not to blame for the delay. They themselves objected to Mr. Larnach's regulations, and it turned out afterwards, when another Government came in, that it was not in order. Now, one thing more. My friend seemed to imagine that I was "drawing the long bow" about the rainfall on the West Coast. This is a return, ordered by the House of Representatives from the Meteorological Department, of the rainfall at the different stations of the colony. It is from 1866 to 1888. I suppose that they got full up of it after that. The average is from 20in., and in Hokitika it went as high as 54in. in the year. This return is in the blue-book, showing the various diagrams, &c. This is for 1894, and I do not think they have got it since; but the average from 1866 to 1880 was 120in. a year, and that is the driest part of the West Coast—Hokitika. I do not wish the arbitrators to think that in many respects the climate is not enjoyable. The rain is always a warm rain, and as soon as it is over the blue sky is to be seen, and then it is certainly very enjoyable. It is very useful to the miners, because they have always had a supply of water, which has enabled them to get gold. It will be seen, just as I said, that the rainfall in Canterbury from 1864 to 1893 was the lowest in the colony? In Wellington it is 50in. Canterbury is about the driest part of the colony, and in some years it is as low as 14in. I shall not read to the arbitrators what has been put in as our case. That is already put in. As soon as we get further particulars we will put in further answers on our side. There are things in the report of the parliamentary Committee in 1892 which should be referred to, and many of the facts I have stated will be seen from them, and what was said by the counsel for the company in 1892. There is a quotation given from his speech. I ask now, therefore, that, as to clauses 18 and 33 under the contract, my friend should give details. It is impossible for us to continue the case until we know these details. I understand my friend to say that other reserves were made, and very improperly made. I ask the arbitrators to take a note of this, because I submit that, if a person in arbitration makes a statement that leads to the taking of evidence that is not correct, they have to pay the cost of the inquiry. This is a map of the reserves; the yellow is the mining reserves, and the red those exempt from the contract, the coal reserves. I also put in a map showing the——

Mr. Hutchison: Nothing is put in yet except the evidence of the contract.

Sir R. Stout: It is only used as an illustration, subject to proof hereafter.

Sir C. LILLEY: It is in the keeping of the Court.

Sir R. Stout: It shows the land selected, the reserves, and the land open for selection. I again tell them, also, that for these pieces on the top of the range they have not put in any selection at all.

Mr. Hutchison: I have no doubt it will be proved to be substantially correct. As to further particulars, we would like to meet our friend as far as we can. Numbers 2 and 3 are considered as alternative with reference to the timber—that was understood—the first on the assumption that some reserves were properly made, the other paragraph assuming nothing of the kind. With reference to the mining reserves, our contention certainly is that none have been properly made under the contract.

Sir C. LILLEY: The mining reserves?

Mr. Hutchison: Yes. With reference to the timber on the reserves, the intimation we got of "hands off" was dated the 30th October, 1891, from the Minister to the manager.

Sir C. LILLEY: This is a reply, I suppose.

Sir B. BURNSIDE: He is giving particulars.

Mr. Hutchison: Yes, as indicating that we were not allowed to select in the reserves.

Sir R. Stout: None of the reserves?

Mr. Hutchison: That is what I understand [page 23, Appendix of I.-7A, 1892].

Sir B. BURNSIDE: For the purpose of particulars you can make that a statement by putting it on a sheet of paper.

Hon. E. BLAKE: That, in fact, is the refusal you rely on, the general refusal?

Mr. Hutchison: Yes; that is, as to timber on what are called reserves. Then, as to timber on the other lands, we will be glad to give further particulars.

Sir R. Stout: This letter does not mean what my learned friend says.

Mr. Hutchison: I will read it:—

"SIR,— "Re *Timber on Gold-mining Reserves.*

"I am directed by the Minister for Public Works to acknowledge the receipt of your letter of the 13th instant on the subject of timber on gold-mining reserves, in which you state that it is clear that, under the provisions of the contract, the Government is bound to conserve all land or timber over which the company may have the right of selection until such time as the land-grants are fully satisfied, and in which you also give formal notice that the company may require to select the timber on the gold-mining reserves which have lately been or which may hereafter be made.

"In reply, I am to state that if, as the general tenor of your letter would seem to imply, your company contends that the Government is bound to conserve all the timber on the lands now or hereafter to be reserved for gold-mining purposes, so that the same may be available in case the company should at some future time desire to select such timber, the Government entirely dissent from your reading of the contract. The contract provides (as already stated in Hon. Mr. Seddon's telegram of the 1st instant) that it is only open to the company to select such timber *with the*

consent of the Queen: and that it cannot be selected at all if, in the opinion of the Governor, it is or is likely to be required for sawmilling purposes, or for holders of timber licenses, or miners' rights, or for mining purposes.

"As regards your 'formal notice' that the company may require to select this timber, I am to state that the Government cannot admit that it is of any validity, as, for the reasons already stated, the Government does not admit that the company has any legal right to select the timber at all."

Sir R. Stout: That is no selection at all; that is simply talk about what is the meaning of the contract. You cannot put that forward as selection which we refuse.

Mr. Hutchison: We put it forward as an intimation by the Government, and dispensing, as we contend, with subsequent applications for particular areas.

Hon. E. BLAKE: At any rate, you do not set up that you made any particular applications afterwards.

Mr. Hutchison: No. As to the particular reserves we object to, the details are almost ready; and the same remark applies to particulars under clause 33. Now, is it the desire of the Court that we should enter upon evidence, or that we should first file the particulars in the second claim? There will be something to be said, I presume—but not much—on the particulars of the second claim. The chief point for immediate consideration is whether the lands reserved were required for *bonâ fide* mining.

Sir R. Stout: The lands were proclaimed under the Mining Act.

Mr. Hutchison: In reply to the present—the first—reference, my view is that there is no question as to jurisdiction.

Sir C. LILLEY: There might be a variation. If we differ at all we give no reasons for differing on the question; we simply say we do differ, and then our umpire, Mr. Blake, comes in. What I mean to say is this: If we decide on the first point as to the question of jurisdiction, we may still have to consider it on the second, and we may differ on that too, and then the umpire comes in for all purposes. It is no use to decide the question of jurisdiction on the first point and then have to remain here for two months, or one month perhaps, to decide it on the second one.

Mr. Hutchison: We would to-morrow morning refer to the particulars under the second reference, and argue more fully perhaps then the question of jurisdiction. Perhaps it would be convenient meanwhile to go on with the evidence?

Sir C. LILLEY: We cannot go on with evidence until we have this point decided.

Sir B. BURNSIDE: The question of jurisdiction must be raised at the very moment we are dealing with it.

Mr. Hutchison: Would it not be more convenient if we filed the particulars of the first claim, as desired by Sir Robert Stout, and that we should at the same time file and deliver our second claim, and be prepared to-morrow morning to enter on the whole matter?

Sir C. LILLEY: You must get your witnesses here; everything must be in hand. You say the additional particulars are nearly ready?

Mr. Hutchison: Yes.

Sir C. LILLEY: And, then, as to the seizure?

Hon. E. BLAKE: Will you proceed generally, or on the point of jurisdiction?

Mr. Hutchison: Mainly on the question of jurisdiction.

Hon. E. BLAKE: And you will be ready to proceed, Sir Robert?

Sir R. Stout: Yes.

Sir C. LILLEY: You will give all these particulars to-morrow?

Mr. Hutchison: Yes.

The Court adjourned at 2.45 p.m.

THURSDAY, 28TH NOVEMBER, 1895.

The Court sat at 10 a.m.

Mr. Hutchison: My friend Mr. Cooper will deal with this question regarding the second claim under the arbitration and the question of jurisdiction, as indicated yesterday. The Court has the particulars now of our first claim, and a copy has been supplied to the other side.

Sir R. Stout: These particulars are no particulars at all, we say.

Mr. Cooper: May it please the Court: The matters which we propose to open this morning on behalf of the company are those that have arisen since the 14th January, 1895; and although I shall have to go at some length into them I hope I shall not overlap the arguments of my friend yesterday. I shall, no doubt, have incidentally to refer to one or two matters that my friend referred to in his address to the Court yesterday; but I shall mainly deal with matters that have arisen since the 14th January, 1895, and which are not covered by my friend's address. The particulars which have been delivered contain seven sets of grievances, the first and second of which are repetitions of similar grounds of complaint alleged in the first set of particulars delivered by the company. The reason we have inserted them in the particulars in the second arbitration is because there have been upon the same grounds additional acts committed by the Government upon which the company claim they have a right to relief. For instance, in the first paragraph of the additional particulars: "That the undertaking of the company being work to be remunerated in part by land, as provided by clause 16 of the contract, the Queen, contrary to the provisions of the said contract, refused and prevented the exercise by the company of its rights of selection over large areas of land within the authorised area." Since the 14th January, 1895, additional Proclamations have been issued, reserving lands under subclause (*c*) of clause 16 of the contract. There have also been other acts, which I will deal with at length when I come to consider paragraphs 3 and 4 of these amended particulars—acts of

refusal and prevention which the company consider they have a right to claim damages from the Crown in relation to. The second paragraph says, "That the Queen has, in contravention of the contract, permitted and authorised the destruction and the removal of timber on lands available for selection, and thereby depreciated the value of such lands." That stands in the same position as my friend opened to the Court yesterday in connection with the timber. There have been acts on the part of the Queen since the 14th January, 1895, which entitled us to claim, in addition to the matters which were not in existence on the 14th January, damages in reference to the timber. I do not propose to take up time in going into the details of that matter, as it has been covered substantially by the argument of my friend in his address of yesterday. I simply mention it in order that the Court may understand why we placed these paragraphs in the second particulars. With reference to paragraph 3,—"That, the company being entitled to select under the provisions of the contract land to the amount of £19,304, and having given notice in that behalf, the Queen, by the Minister for Public Works, on or about the 20th day of April, 1895, refused to allow the company to exercise its rights,"—that is an entirely new grievance—one which has arisen since the 14th January, 1895, and upon which we shall submit very strongly to the Court that there is an absolute breach of contract on the part of the Queen, entitling the company to claim substantial damages—damages, at any rate, equal to the amount mentioned in clause 3, and, according to the view of the case we shall place before the arbitrators, exceeding the £19,000 mentioned in that clause.

Sir R. Stout: You say that the arbitrators are appointed to consider that?

Mr. Cooper: I say they are appointed to consider all the differences and disputes which have arisen since the 14th January up to the seizure in December.

Sir R. Stout: I say that was some time after the first appointment.

Mr. Cooper: I am dealing with the second appointment. The position of the company is that the second appointment covers all the grievances which the company has sustained since the 14th January. That is, perhaps, anticipating matters which I shall submit as essential to my argument and to these particulars. I do not propose to go into the transactions at all prior to the 14th January. The fourth paragraph says, "That, the company being entitled to select lands, the Queen, under agreement with the company, having sold certain such lands, being those described in the B 1 map as 'Nelson Towns, Reefton' (196 sections in number), and having received the proceeds thereof (the particulars of which have been refused to the company), has, in contravention of the contract, refused to pay over the same to the company." That is also what we claim to be a distinct breach of contract on the part of the Crown, arising since the 14th January, under circumstances which I shall submit to the Court later on. The next paragraph is, "That, the company being entitled to have the titles to other lands already selected issued under the provisions of the said contract, the Queen has, in contravention of the contract, refused to complete and issue such titles." That is also another distinct breach of contract, arising since the 14th January. Paragraph 6, "That the Queen, having agreed to refer to arbitration a question as to the boundaries of B 1 Block 65, which had been selected and dealt with by the company, has refused to proceed to such arbitration, whereby the company has been prevented from completing the sale of the said B 1 Block, and has suffered great loss and damage," is also a distinct and separate grievance which is within the province of the arbitrators to decide. It entitles us to come into Court and claim substantial damages from the Crown. I will open evidence on that when I come to consider that claim in detail. The last clause is in reference to the seizure of the railway: "That the Queen, on the 25th day of May, 1895, in contravention of the contract, and without any due and proper cause, took possession and assumed the management of the railway then in the possession of the company, and wrongfully converted the same to her own use." I should say, in reference to clauses 3, 4, 5, and 6, that, as I understand the case for the Crown, the Crown will say that they were entitled to either rescind the contract or to treat the contract as rescinded some time in March, 1895, and therefore they were entitled to refuse to the company all benefits which would have accrued to the company since March, 1895, or which had already accrued, or were vested in the company subsequent to the 14th January. I take it that is the position which the Crown will ultimately take up, and I shall deal with that position at length.

Sir C. LILLEY: I understand they deny the jurisdiction of the arbitrators?

Mr. Cooper: I will discuss that later on, when I come to consider the details. I think my friend's argument will be simply this: that, as the contract has gone, with it has gone the powers of the arbitrators.

Sir C. LILLEY: Is it necessary for us to go any further when we find we have no jurisdiction?

Mr. Cooper: If you find you have none you will not go any further.

Sir C. LILLEY: Is it necessary for the Crown to deny all the other particulars in regard to the other proceedings? They say only that you cannot touch these.

Mr. Cooper: I understand the Crown to say that the contract has gone, and that the arbitration clause is a creature of the contract, therefore the arbitrators' powers are destroyed altogether. I understand my friend's argument practically to amount to that. Before I discuss the issues it is due to the Court I should open the facts so far as the additional causes of action are concerned. I shall not take very long, and then I shall at once grapple with the question of jurisdiction.

Sir R. Stout: I do not know if it is necessary for me to raise the point I raised at the opening of the arbitration under the second head, that the second appointment was to deal only with the seizing of the line. You have now lugged in other things besides the seizing.

Mr. Cooper: The reference is general.

Sir R. Stout: If you will read it you will see.

Hon. E. BLAKE: It is absolutely general; it does not even refer to the seizure.

Sir R. Stout: The one I have got deals with the seizure.

Mr. Cooper: I will take Sir Charles Lilley's own appointment.

Sir R. Stout: I am looking at the notice of the arbitration, as we are bound by that.

Hon. E. BLAKE: I was looking at your notice.

Sir C. LILLEY: The notice of the arbitration is the foundation for the proceedings.

Sir B. BURNSIDE: The notice says that possession has been taken, and that the Government have acted illegally.

Sir R. Stout: In consequence of the seizure?

Mr. Cooper: In consequence of the seizure, no doubt, but not limited to the seizure.

Sir R. Stout: If you will read on, you will see that damages are claimed in consequence of the seizure; but there is no hint of those things now stated in the instrument at all. However, I only mention it. I shall deal with it hereafter. The notice is the foundation and root of the arbitration.

Sir C. LILLEY: Yes; you had before given us the notice under which this proceeding is started.

Sir R. Stout: They ought to have done all that.

Sir C. LILLEY: You leave them to make their own case.

Sir R. Stout: There is none. I understood the Court had adopted Mr. Gully's affidavit.

Hon. E. BLAKE: Both appointments are general.

Sir R. Stout: The notice we got, and what we acted on, is indicated in Mr. Gully's affidavit.

Mr. Cooper: However, we claim that the notice was general, and we also claim that the appointments are general.

Sir R. Stout: The notice is the root.

Sir C. LILLEY: Yes; I should say so, to my idea.

Mr. Cooper: In the meantime, I will open the facts on paragraphs 3, 4, 5——

Sir C. LILLEY: You object, Sir Robert Stout, I understand?

Sir R. Stout: I only give notice now.

Sir B. BURNSIDE: What notice do you give?

Sir R. Stout: I say that under the second arbitration the additional notice we got was the appointment of an arbitrator to deal with the seizure of the railway.

Hon. E. BLAKE: Your contention is that the second arbitration is limited to the seizure of the line, and anything consequent on the seizure and not to subsequent acts of the same character as those indicated in the first arbitration?

Sir R. Stout: Yes.

Hon. E. BLAKE: It is a pity to leave them undisposed of.

Sir C. LILLEY: It would be better to wash up the whole matter.

Mr. Cooper: I think it unnecessary now to deal with the question of the scope of the arbitration—as to whether it is limited or not to the seizure of the railway. Later on I shall submit that it is a full and general notice, and brings within it the other grievances that have arisen since the 14th January.

Sir C. LILLEY: Sir Robert contends that it is limited.

Mr. Cooper: He says it is limited, and we will deal with that point later on. Prior to the 20th April, 1895, the company had expended moneys which entitled it to a land-grant to the amount of £19,304. The sum which we were really entitled to was in excess of that sum of £19,000, but it was reduced to that in consequence of a block of land having been selected for the Government and paid for. On the 30th January, 1895, that right was admitted by the Government by a letter, in which there was only a dispute as to some few pounds in the calculation, from the Under-Secretary for Public Works to the company's manager. There was then further correspondence, the Government not disputing the right of the company to select lands, at any rate to the value of £26,066. The only amount in dispute between the Government and the company was £200. There is correspondence between the Government and the company as to what lands they should select. There had been previous correspondence, prior to the 30th January, in which the Government had disputed the right of the company to select a block, in order, I think, that the Government might give a title to some person who desired to purchase it, and the money was to be received from the Government and applied to the reduction of the company's land-grant. That correspondence went on until the difficulties arose. It is necessary that I should read a letter, dated 8th February, 1895, from the Under-Secretary to Mr. Wilson:—

"Public Works Department, Wellington, New Zealand, 8th February, 1895.

"SIR,— "*Midland Railway.—Selection of Land.*

"In reply to your letters of the 15th and 16th ultimo, stating that your company is desirous of selecting Blocks 41 and 60 on B 1 map attached to the Midland Railway contract, containing respectively 7,200 acres, of the estimated value of £10,725, I have now the honour, by direction of the Minister for Public Works, to state that he has no objection to the selection of these blocks by your company, and the same is hereby assented to accordingly.

"I have, &c.,

"H. J. H. BLOW, Under-Secretary for Public Works.

"The General Manager, New Zealand Midland Railway, Christchurch."

There is a distinct agreement on the part of the Government that the company were entitled to select land to the extent of £26,000. The company selected a block, which is valued at £5,400, at the request of the Government, as I have mentioned. The Government wished to sell it, and later on desired that the selection should not be made. That was on the 10th April, 1895. I would ask the Court to bear this in mind, because it is a fortnight after the date on which the Crown claim to have given notice to the company that the contract was determined.

Sir C. LILLEY: What date do you say the Government did give notice of rescission?

Mr. Cooper: 27th March; and on the 10th April, 1895, Mr. Wilson wrote to the Crown as follows:—

"Sir,— "Wellington, 10th April, 1895.

"I am in receipt of a letter, dated 5th ultimo, from the Commissioner of Crown Lands, Christchurch, informing me that the Government have decided not to purchase Block 60, and asking if the company are, under these circumstances, desirous of completing the selection.

"The company made this selection to meet the wishes of the Government, who expressed a wish to purchase the land for settlement, and purposes of close settlement. As the Government have decided not to purchase this land, the company do not wish to complete this selection, and will take other land instead as soon as a decision is come to on the question.

"I have, &c.,

"The Hon. the Minister for Public Works, Wellington." "Robert Wilson.

On the 11th April, 1895, the Government wrote to the company as follows (this shows now the position the Government took up):—

"Public Works Department, Wellington, 11th April, 1895.

"Sir,— "*Midland Railway.—Selection of B1 Blocks 41 and 60.*

"With reference to your letter of the 16th of January last, covering notices intimating your company's desire to select B1 Blocks Nos. 41 and 60, I have now the honour, by direction of the Minister for Public Works, to state that it is not proposed to issue any title to the company in respect of Block 60, on the ground of the company's breach of contract having disentitled it to any further rights, benefits, and privileges thereunder.

"With regard to the preliminary title issued in respect of Block 41, I am to state that this title was issued for the purpose of enabling the Government to acquire the land from the company, as previously arranged, and that the issue of the title must be taken to be without prejudice to the effect of the company's breach of the contract. "I have, &c.,

"H. J. H. Blow, Under-Secretary.

"Robert Wilson, Esq., Engineer-in-Chief and General Manager, New Zealand Midland
"Railway Company, Wellington Club."

On the 17th April, Mr. Wilson wrote to the Minister intimating that the company would select Block 76 in lieu of Block 60, and would select balance of land-grant out of proceeds of sale of Reefton town sections. I will deal with that later on. Then there were further demands made by Mr. Wilson to the Minister. We will put in one, dated 17th April. He says, "On behalf of the New Zealand Midland Railway Company (Limited), I give you notice that the company make a selection of B 1 Block 76, containing 15,200 acres, and of the value of £7,600, under the terms of the contract, and request that the title be issued without delay." And also, by letter of the same date directed to the Minister for Public Works, he says, "On behalf of the New Zealand Midland Railway Company (Limited), I hereby give notice that the company have decided to take the cash as part land-grant, now in the hands of the Receiver-General, and held by him on behalf of the company, being proceeds of the sales of the Reefton town sections." Then, on the 20th April, the Government gave a final notice to the company, by the following letter, that it did not propose to issue any further titles to the company:—

"Public Works Department, Wellington, 20th April, 1895.

"Sir,— "Re *Midland Railway.—Selection of Block 60.*

"I am directed by the Minister for Public Works to acknowledge the receipt of your letter of 10th instant, stating that your company does not wish to proceed further with the selection of the above-mentioned block, and intimating that you will take other lands instead as soon as a decision is come to on the question.

"In reply, I am to state that, as intimated in my letter of the 11th instant, the Government does not propose to issue any further titles to the company under the provisions of the Midland Railway contract, on the ground that the breach of contract by the company has disentitled it to any further rights, benefits, and privileges thereunder.

"I have, &c.,

"Robert Wilson, "H. J. H. Blow, Under-Secretary.
"Engineer-in-Chief and General Manager, New Zealand Midland Railway Company,
"Wellington Club, Wellington."

That letter puts very clearly the position the Government took up, that by virtue of the position they say the company was in subsequent to the 14th January, and of the acts of the Government since that day, by notice claiming the rescission of the contract, and claiming that the company had abandoned the contract, they had forfeited any right or claim to the lands under the contract, or benefits and privileges vested in them, or which were contingent under the contract. And that is the position we dispute here to-day. There was subsequently further correspondence. On the 15th May, Mr. Wilson made another demand to the Government to allow the selection to proceed, and also making a demand for the proceeds of the sale of the Reefton town sections; and a further demand was made on the 31st May.

Sir C. Lilley: There were repeated demands, and a final refusal?

Mr. Cooper: Yes. These letters were not attended to by the Government; and on the 7th July there was a further reply, in which the Government maintained their attitude. Mr. Blow says: "I am directed by the Minister for Public Works to express his regret that, owing to the absence of the Crown Solicitor and myself on the West Coast, your letters of 17th April and 15th and 31st May last, relative to the selection of B1 Block No. 76 in place of B1 Block No. 60, have remained so long unanswered. I am to state, however, that, except for courtesy's sake, no reply to these letters is really necessary, as my letter of 20th April last had already informed you that the Government did not propose to issue any further titles to the company under the provision of the contract, on the ground that the breach of the contract by the company had disentitled it to any further rights, benefits, or privileges thereunder."

Sir C. LILLEY: That is the final refusal.

Mr. Cooper: The final refusal was on the 30th April, if not on the 3rd April. In reference to the grievances alleged in that paragraph, we say, first of all, that the Government were not entitled in law to take the stand they did on the 11th April. We say that they were not entitled to treat the contract as rescinded; that, as a matter of fact and as a matter of law, the contract was never rescinded at all. The contract still exists, and all moneys and rights vested in the company under the contract were moneys and rights the Crown are bound to give to the company, and the withholding of which was a distinct breach of the contract entitling the company to claim damages. The question is a much wider one in favour of the company when we come to consider paragraphs 4 and 5. The Reefton town sections were sections sold under the provisions of the contract with the Government, and the cash received from the sales was paid into the Receiver-General's account upon trust, the company being entitled to take cash as a portion of their selection if they chose to do so. The actual amount paid we do not know, except approximately. I believe the gross amount realised was some £1,400 or £1,500, particulars of which have been refused by the Government. We say we had a right, immediately we had done the work entitling us to select lands, to say, "Give us the money instead of the lands." That was under the contract, and the money was ear-marked. But the Government refused to do so, by letter of the 20th April and subsequent letters, on the ground that the company had not only forfeited the railway, but also the rights collateral to the contract, or arising out of the contract, and was not entitled to receive anything further from the Government in reference thereto. Paragraph 4 only covers a sum of £1,400 or £1,500. But paragraph 5 refers to the titles generally to the lands. We need not at the present time give in detail the actual number of the lots to which titles have been refused, but I am instructed that the Crown has issued very few titles to the company. Lands have been selected and surveyed to the extent of a very large sum of money during the years passed. The practice has been that notice of selection was given by us to the Government, and then a survey was taken, and the Governor had to issue a warrant to the District Land Registrar, and he had to grant a certificate of title under the Land Transfer Act, which is similar to the Torrens system. The company has earned its right to the lands, which have been surveyed and sold, or agreed to be sold, in some instances, and the Crown now says, "We will not give a title to the lands selected before the 17th January, 1895," and have refused to give any titles to lands selected before, although the company had parted with them to third parties. The result has been a disastrous one, because, not only have the company been unable to sell lands which otherwise they would have been entitled to have in the market, but lands which they had agreed to sell, and which had been purchased on agreements, have been withheld, and the purchase-money left unpaid, because the persons said, "The Crown will not give you the title, and therefore we shall not give you the purchase-money." The whole or a large portion of the benefit which the company was entitled to under the provisions of the contract relating to the selection of lands has been destroyed by the action of the Government in claiming, we say illegally, to treat the contract as at an end; and they now say, "We will not do a single thing to complete a title," although the selection may have been agreed to four or five years ago. We shall adduce evidence to show that officers in the Lands Department, on the strength of these refusals, have refused to allow the company to interfere with the titles to the lands. We have to search the registers at Christchurch to verify our particulars, and will give the Crown information of every allotment selected by the company and refused by the Government. Paragraph 6 refers to a matter we complain of which requires a little explanation. The company had selected B 1 Block 65, which consisted of some 3,500 acres, selected as far back as the year 1891. That block had been sold to Sir John Hall at the schedule value of £1 2s. 6d. per acre. I believe when the survey came to be made it was found to be under 3,500 acres. The amount Sir John Hall had undertaken to pay was between £3,900 and £3,950. But a difficulty arose as far back as 1892 in reference to the boundary of that block, whether it should include or exclude the river-bed. The company's right to the block was absolute. The only dispute between the Government and the company was whether one of the boundaries of that block should be the river-bed. That question was definitely referred to arbitration, and there was great delay in connection with it. We say the delay was caused by the Government. However, the Government have now refused to allow that arbitration to proceed, and have withdrawn their arbitrator.

Hon. E. BLAKE: When was that referred?

Mr. Cooper: About the end of 1894. Mr. Wilson writes, on the 31st October, 1894, "I am not aware that there is any specified time for the withdrawal of a selection. However, under the circumstances, arbitration is apparently the only means of dealing with this question, and on the Government nominating their arbitrator the company will do likewise."

Sir B. BURNSIDE: Was that arbitration under deed?

Mr. Cooper: Yes. Mr. Rolleston was appointed by the company, and another gentleman by the Government, but there was no submission.

Sir B. BURNSIDE: If that arbitration was complete, this is also complete, except so far as the submission.

Mr. Cooper: Yes. We invoke this jurisdiction because the Government themselves have revoked the other jurisdiction. A letter from Mr. Stringer, of Christchurch, of 3rd April, 1895, shows the position the Government took up: "I beg to give you notice, on behalf of Her Majesty the Queen, that, as the time for performance of the contract dated the 3rd day of August, 1888, made between Her said Majesty of the one part and the above company of the other part, expired on the 17th day of January, 1895, and that, as the company has failed or refused to perform its obligations thereunder, the said company has broken, abandoned, and rescinded the said contract, and it is not entitled to claim any right, benefit, or privilege thereunder. The proceedings in pursuance of the company's notice to arbitrate must therefore be taken to be subject to and

without prejudice to the above." On the 3rd April Mr. Stringer gave notice that the Queen had, without prejudice to the position that she took up by letter of 3rd April, 1895, appointed John Rennie, Esq., of Doyleston, arbitrator. On the 10th April these arbitrators met. There was an agreement made to appoint Mr. McMillan as umpire, and some difficulty arose about that. Then, later on, the arbitrators were delayed by the Crown giving notice that the time was not ripe for it to sit, and directing it not to sit. The letter of the 7th June was written by the Crown Solicitor to the company: "I have to acknowledge receipt of your letter of the 31st ultimo, in reply to which I have to state that, in view of the steps which the Government have taken under 'The Railways Construction and Land Act, 1881,' they do not intend to proceed with this proposed arbitration. I have, therefore, to inform you that the deed of reference will not be completed, and that the Government will take no further steps in this matter. I have also informed Mr. Rennie to the same effect." We say that the Government were under an obligation to proceed with the arbitration, and that the Government have committed a breach of contract in not allowing the arbitration to proceed, and, consequently, we are entitled to bring the matter before this Court and claim damages, either for the Government refusing to submit to that arbitration or to have it settled by this Court. Mr. Rennie gave notice that he was appointed, but up to this time Mr. Stringer says he has never received any commission.

Mr. Stringer: It has never been issued.

Mr. Cooper: Those are the main facts in connection with these preliminary matters. Now I come to deal with the question of the seizure of the railway, of the position which the Government took up in reference to the company, and, of course, covering also the grounds upon which they rely for the refusals to complete these various matters I have mentioned to the Court. The first intimation that the Government communicated to the company in reference to what I may term the change of position on the part of the Government was by letter of the 27th March, 1895. The position previously was this: The company had served grounds of complaint against the Government, the details of which have been opened by my friend. The arbitrators were appointed; and no demand had been made by the Governor upon the company requiring them to proceed with the construction of the works. The first Court of Arbitration had not met, so that the difficulties had not arisen in reference to the constitution of the Court; and the matters, which were matters of grievance and dispute between the company and the Government, were, I may fairly say, *sub judice*. On the 27th March the Crown served this notice on the general manager:—

"Memorandum for R. Wilson, Esq., General Manager, New Zealand Midland Railway Company (Limited).

"SIR,— "Crown Solicitor's Office, Wellington, 27th March, 1895.

"I beg to give you notice, on behalf of Her Majesty the Queen, that, as the time for performance of the contract dated the 3rd day of August, 1888, made between Her said Majesty on the one part and the above company on the other part, expired on the 17th day of January, 1895, and that, as the company has failed or refused to perform its obligations thereunder, the said company has broken, abandoned, and rescinded the said contract, and is not entitled to claim any right, benefit, or privilege thereunder.

"The proceedings in pursuance of the company's notice to arbitrate must therefore be taken to be subject to and without prejudice to the above. "I am, &c.,

"HUGH GULLY,
"Crown Solicitor."

Then followed on that letter a letter of the 28th March, intimating that the Crown had appointed Sir Charles Lilley as its arbitrator. Mr. Gully then asked for particulars of the claim, and says: "As indicated in my letter of yesterday's date, all proceedings in reference to the arbitration must be taken to be without prejudice to the contention that the company are barred by their own breaches and non-performance of its provisions." Then, there was a reply to that by Mr. Wilson, in which he declined to take the view that Mr. Gully took, and intimated that Mr. Hutchison would receive any documents required to be served on the company in Wellington. And then there was a further demand for particulars. I draw the attention of the Court to this position: that this is the only notice with reference to the seizure of the railway, or authorising the seizure; it is the only notice given by the Government by which the Government claim in any way that they have rescinded the contract, or that any other party has done so. We have not to deal with any other notice, and therefore we have not the position to consider: that the Government claim that they have the right to rescind the contract, but that the position is that the company by its acts and deeds has abandoned and thereby rescinded the contract. That is the position the Government take.

Hon. E. BLAKE: Read the words.

Mr. Cooper:—

"Memorandum for R. Wilson, Esq., General Manager, New Zealand Midland Railway Company (Limited).

"SIR,— "Crown Solicitor's Office, Wellington, 27th March, 1895.

"I beg to give you notice, on behalf of Her Majesty the Queen, that, as the time for the performance of the contract dated the 3rd day of August, 1888, made between Her said Majesty of the one part and the above company of the other part, expired on the 17th day of January, 1895, and that, as the company has failed or refused to perform its obligations thereunder, the said company has broken, abandoned, and rescinded the said contract, and is not entitled to claim any right, benefit, or privilege thereunder.

"The proceedings in pursuance of the company's notice to arbitrate must therefore be taken to be subject to and without prejudice to the above. "I have, &c.,

"HUGH GULLY,
"Crown Solicitor."

Now, before I refer to the legal view, I will deal with the actual fact of the seizure.

Sir R. Stout: It is not disputed.

Mr. Cooper: No. It was on the 25th May. I quite believe they would have done it on the Queen's birthday, but from loyalty held their hands. It was actually seized on the 25th May, and the seizure is not disputed. It was an actual taking possession by the Government of the works, and placing men in charge of the company's property, and taking possession of the railway-stations, and of the company's plans, &c.

Sir C. LILLEY: As far as they could, by all outward acts, to indicate a seizure.

Mr. Cooper: Yes; they had a show of physical force, but the company did not requre it to be exercised. The first position we take is this: that the question whether or not any right on the part of the Government arose to take this step is a question to be determined by the arbitrators. The question also whether or not the company had committed a breach of contract, and whether, by that breach of contract, the contract is at an end, is a very mixed question of law and fact, to be also determined by the arbitrators, and it cannot be satisfactorily determined until the whole of the evidence in this case is placed before this Court, when the Court will, as judges of fact, apply the law to the position of the parties. I say the question of jurisdiction is a question of law and fact.

Sir C. LILLEY: And therefore cannot be determined until the facts are heard.

Mr. Cooper: Yes; but of course we have to lay our facts before the Court as fully as possible, in order to assist the Court to a decision. I shall have to refer to the contract with some detail as to the contractual position of the parties from the first. Now, this contract differs in some most important respects from an ordinary building contract or an ordinary contract for the construction of works. It differs in this important feature: that there is no clause in the contract which entitles the Crown to rescind their contract; there is no clause in this contract which entitles the Governor to say, "You are not progressing with this contract to my satisfaction," or that entitles any other person to say, "It is not being proceeded with to the satisfaction of an engineer," or "that an act has been committed of breach and we will put an end to the contract." There usually is such a provision, but it has been left out here, and consequently was not within the contemplation of the parties—that one or the other of them should be entitled to rescind the contract. Under the Railways Construction and Land Act of 1881 there is nothing to entitle the Crown to rescind the contract; and therefore the Crown's contention, as it seems to me, must narrow itself down to this: that the company have brought themselves into the position in which one party can say, "You have abandoned this contract, you have intimated that you do not intend to claim any benefit under it. You have treated it as at an end by the position you have taken up, and therefore the Government has done right in taking it from you."

Sir B. BURNSIDE: On the first point we have the evidence before us, on the second we have it also; on the third you say there must be evidence of the intention to rescind?

Mr. Cooper: It is a matter of fact, and it is a question for a jury to determine. In a case of this kind has there been such an intimation on the part of the company that they were not only not able to proceed with the works, but intended to throw up all the benefits of the contract. Has there been such an intimation to the other contracting party that it is entitled to say, "By your agreement, by your conduct on the one part, you have treated this contract as one which shall from this time have no further existence?" It is quite clear, I submit, that the Crown has no right to rescind the contract, as there is no provision in the contract for rescission. When the conduct of the other parties to the contract amounts to a breach of contract, the right of the party complaining in this instance is not to rescind the contract, but to proceed in an action for damages. I do not dispute that they could file a counter-claim. It would be for damages sustained by reason of a breach on the part of the company. In other words, if the acts of the company—if there has been, which we deny, a practical breach on the part of the company—then, unless it goes to the destruction of the contract *in toto*, there is no right to treat it as abandoned or rescinded. There are obligations on both sides in this contract, and I would refer your Honours to one or two authorities. The first case is Franklyn *v.* Miller (4 Adolphus and Ellis, 599). In that case the declaration stated that the defendant, being indebted to certain persons, agreed to repay the plaintiff the amount of all accounts he should settle for the defendant, and also to pay the plaintiff £1 per week on stated quarter-days till the debts were fully settled. The claim was for money so paid. The plea alleged that the £1 per week had not been paid. It was held by the Court that the plea was bad, as being at most only a partial failure of performance, and that this did not entitle the defendant to rescind the contract. The notice of the 27th March on the part of the Crown claims that the company rescinded the contract; yet I take it that the Crown say that they themselves have treated that failure of performance which they claim to have been committed by the company as a breach of the contract, and claim that they themselves have therefore put an end to the contract, because it cannot be suggested that the company on their part have rescinded it. In the case I have quoted there were obligations on both sides. The plaintiff said, "You have not performed your obligations; you have not paid me back the money I have paid to these creditors." The defendant replied. "No, I have not done that; but you on your part have not paid the £1 per week you promised to pay, and therefore the contract is at an end, because you have failed to carry out your contract." That was held to be bad in law. Lord Denman said, "It is clear the defendant had no right to treat the contract as rescinded"; and Mr. Justice Littledale said, "It is a clearly recognised principle that if there is only a partial failure of performance by one party to a contract, for which there may be a compensation in damages, the contract is not put an end to." So here I submit that there are no dependent conditions; there are no mutual dependent covenants, though there is no doubt an obligation on the part of the company that they would complete the railway within a certain time. I will deal with that matter a little later on. It is not a mutual covenant in the sense of being precedent to the

performance of their contract. There are certain obligations entered into by the Crown on the side of the Government, and obligations of the company on the other side. It is not a case of a contract to build a railway for another; they were making the line for themselves, on certain inducements held out to them by the Government which caused them to enter into the contract, consequently it is a very different case from that of mutual covenants and conditions, each one dependent on the other. The colony might be able perhaps to claim specific damages if the company had failed to carry out their contract. The other side might say, "You said you would on your own account place a railway in this colony at such a price, and you have not done so, and now we claim damages for your breach of covenant to the colony." I submit the Crown would not have the right to say, "You have not completed it in a certain time, therefore the contract is at an end on the 17th January, 1895, or on any day beyond it. As you have not completed the contract in the given time, therefore it is at an end," unless there is a distinct provision that such a default will rescind the contract. Lord Coleridge says, in Freeth *v.* Burr (L.R. 2 C.P., 208): "I think it may be taken that the first result of the decision is that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract." Then, there is the case of the Mersey Steel and Iron Company *v.* Naylor (English Law Reports, 9, Q. B. Division, 648). Sir George Jessell lays down what I submit to the Court will be the true proposition to be considered in a case of this kind. After referring to the proposition of Lord Coleridge above stated, he says, "That makes it a question of evidence; you must consider the nature of the breach, the circumstances under which the breach occurred, and then see whether that" (he means rescission) "is the result of it."

Sir B. BURNSIDE: Is it quoted from Lord Coleridge or Justice Coleridge.

Mr. Cooper: Lord Coleridge. That makes it a question of evidence. "You must consider the nature of the breach, and then say what is the result of it." I would adopt that principle as the one which I submit is applicable to this case. It is a question of evidence whether the acts and conduct of the parties evince an intention no longer to be bound by the contract, not a breach of contract, because the breach must be anterior to the cause which is relied on as a rescission; and the question determined in the Mersey case was whether there was such a position taken up by one of the contracting parties as would entitle a jury to say that that party had thrown that contract over, and had abandoned everything connected with it.

Sir B. BURNSIDE: Is there not a distinction between abandonment and rescinding?

Mr. Cooper: Yes; rescinding is a misnomer. It can only apply where a party is entitled to say, "I rescind a contract because I was induced to enter upon it by misrepresentation or fraud."

Sir B. BURNSIDE: That would not rescind; it is an allegation that it never existed at all.

Mr. Cooper: That is what rescind means.

Sir B. BURNSIDE: It means that it was in existence.

Mr. Cooper: De facto.

Sir B. BURNSIDE: And also *de jure.*

Mr. Cooper: I understand it is the true doctrine of contract that you cannot rescind unless you can restore the party to the former position; the term "rescission" is rather a misnomer. No doubt it means the right of the party on one side to treat the contract as voidable or not according as he chooses. The cases I am referring to now are numerous. Supposing the Government had said, "We give you notice that this contract is rescinded because you are in default." That is really what the Government have done, for they have chosen to say to the other party, "We have given you notice that you have abandoned the contract, and we therefore treat it as rescinded." It is absurd to say they (the company) have rescinded the contract. They say you have abandoned the contract, and therefore we give you notice of rescission. In the case of Hunt *v.* Silk (5 East, 449) the principle is laid down by Lord Ellenborough and Mr. Justice Lawrence that a contract partially performed cannot be rescinded by one party for the default of another unless both parties can be put *in statu quo* as before the contract; and Mr. Justice Le Blanc says, "Plaintiff voluntarily elected to go on upon the contract after the defendant had made the default of which he now wishes to avail himself in destruction of the contract."

Sir C. LILLEY: That is a waiver; is there nothing here to show the power?

Mr Cooper: I think I shall be able to show very strongly from the acts of the parties and of the Crown that we are in a position to say, under section 123, that there has been no wilful or unnecessary delay or breach of contract. Mr. Justice Le Blanc says, "The parties cannot be put in the same position they were in before, because the plaintiff has had an occupation of the premises under the agreements." Then, there is a very strong case, Jonassohn *v.* Young (32, L.J. Q. Bench, p. 385). There there was a partial breach on the plaintiff's part. There was no stipulation in the contract there of any right to rescind, or any stipulation that time was to be the essence of the contract. The contract was one by which the plaintiff agreed to sell, and the defendant to purchase, gas coals, which the defendant was to take in his own vessels at quantities of 500 tons per month. The plaintiff sued for breach, and the defendant pleaded that plaintiff had broken his contract by delivering coal which was not gas coal, and detaining the defendant's vessels an unreasonable time, and it was held that this was no answer to the declaration, and, upon the ground that time was not stated to be of the essence of the contract, that there was no stipulation in the contract—no condition in the contract which would entitle one party to rescission for breach of the provisions of the contract by the other party, and on the ground also that the contract by the plaintiff was not one which could be put an end to by one party for the default of the other, but that the defendant could maintain an action for damages. Here, if the Government file a counter-claim for damages by reason of delay by the company to complete this railway within the contract time, we meet them on that ground, and we would, I think, be able to satisfy the arbitrators that the Government would not be entitled to claim any damages, or, if any damages, merely nominal damages. Then, I would refer the Court to the case Simpson *v.* Crippin (Law Reports, 8 Queen's

Bench, page 14). This is a very strong case indeed: "The defendants agreed to supply the plaintiffs with from 6,000 to 8,000 tons of coal, to be delivered into the plaintiffs' wagons at the defendants' collieries, in equal monthly quantities during the period of twelve months, at 5s. 6d. a ton. During the first month the plaintiffs sent wagons to receive 158 tons. Immediately after the first month had expired, the defendants informed the plaintiffs that, as the plaintiffs had taken only 158 tons, the defendants would annul the contract. The plaintiffs refused to allow the contract to be annulled, but the defendants declined to deliver any more coal. Held, that the breach by the plaintiffs in taking less than the stipulated quantity during the first month did not entitle the defendants to rescind the contract." I should point out that the contract was a time contract. A certain quantity of coal was to be delivered in twelve months, to be taken in monthly deliveries, which would amount, as you will see, to 500 or 600 tons a month. At the very outset the plaintiffs only offered to take 158 tons instead of 500 or 600 tons, and so the defendants claimed that they were entitled to say, "This contract is abandoned. By your failure to send sufficient wagons you have shown an intention not to perform the contract, which will have to be rescinded." Mr. Justice Blackburn says, "It cannot be denied that the plaintiffs were bound in every month to send wagons capable of carrying at least 500 tons, and that by failing to perform this term they have committed a breach of the contract; and the question is, whether by this breach the contract was determined. The defendants contended that the sending of a sufficient number of wagons by the plaintiffs to receive the coal was a condition precedent to the continuance of the contract, and they rely upon the terms of the letter of the 1st August. No sufficient reason has been urged why damages would not be a compensation for the breach by the plaintiffs, and why the defendants should be at liberty to annul the contract; but it is said that Hoare *v.* Rennie is in point, and that we ought not to go counter to the decision of a Court of co-ordinate jurisdiction. It is, however, difficult to understand upon what principle Hoare *v.* Rennie was decided. If the principle upon which that case was decided is that wherever a plaintiff has broken his contract first he cannot sue for any subsequent breach committed by the defendant, the decision would be opposed to the authority of many other cases. I prefer to follow Pordage *v.* Cole. No reason has been pointed out why the defendants should not have delivered the stipulated quantity of coal during each of the months after July, although the plaintiffs in that month failed to accept the number of tons contracted for. Hoare *v.* Rennie was questioned in Jonassohn *v.* Young." Mr. Justice Lush says, "I am of opinion that the rule should be discharged. I cannot understand the judgments in Hoare *v.* Rennie. The Court must have interpreted the contract in that case as if time were of its essence. There are no words here which import such a condition. If the parties intended that a breach of this kind should put an end to the contract, they ought to have provided for it by express stipulation." Now, there are numerous other authorities, which I do not propose to trouble your Honours with, which deal with this question. There is one case, however, which has some bearing upon the position of the parties. I may mention it now, although I shall refer to it more in detail upon another branch of my argument. It is the case of Walker *v.* the North-western Railway Company (Law Reports 1, Common Pleas Division). In that case it was held that, where there was a stipulation in the contract that the employer had the right to determine the contract if the works were not completed within the contract time, he might exercise that right before the expiration of the contract-time, but it was too late to exercise it after that time had expired. In that case there was an obligation to complete the contract. It was for the construction of a dock. There was a contract entered into by the plaintiff with the London North-western Railway Company to construct a dock for the sum of £114,000. They were under an obligation to complete that dock within a specific time, and there was power on the part of the company, if the contract was not completed within the time limited by the contract, to enter into possession of the works and determine the contract. The contract was not completed within the time, but the company did not, either on that date or before that date, enter upon the works and determine the contract, and it was held to be too late to do so afterwards. It was contended that it must be carried into effect within the contract-time. This is the short note:—

"WALKER AND ANOTHER *v.* THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

"*Building Contract—Interpretation of Contract—Penalty for Delay—Notice to avoid the Contract—Forfeiture of Implements and Materials.*

"A building contract, by which the plaintiffs contracted with the defendants to construct a dock and other works in connection therewith, provided as follows: 'Should the contractor fail to proceed in the execution of the works in the manner and at the rate of progress required by the engineer, or to maintain the said works as hereinafter mentioned to the satisfaction of the engineer, his contract shall, at the option of the company, but not otherwise, be considered void, as far as relates to the works or maintenance remaining to be done; and all sums of money that may be due to the contractor, together with all materials and implements in his possession, and all sums named as penalties for the non-fulfilment of the contract, shall be forfeited to the company, and the amount shall be considered as ascertained damages for breach of contract.' The contract provided that 'the whole of the works should be entirely completed on or before the 31st day of August, 1873.' The works were not completed by that date.

"There were other clauses in the contract in the following terms:—

"'If the contractors shall not complete the said works within the period limited for the purpose, or if they shall become bankrupt, or if from any cause whatever (not arising from any acts done, or omitted to be done, by the said company contrary to the true intent and meaning of these presents) they shall be delayed or prevented in the completion of the said works according to the specification, it shall be lawful for the company, without any previous notice, to take the works entirely or in part out of their hands, and to employ any other contractor to complete the same.

"'Should the engineer be at any time dissatisfied with the nature or mode of proceeding with, or at the rate of progress or maintenance of, the works, or any part thereof, he shall have full power to procure and make use of all labour and materials from the money that may then be due, or that may become due, to the contractor; but it is hereby expressly declared that the possession of this power by the engineer shall not in any degree relieve the contractor from his obligation to proceed in the execution of and complete the works with the requisite expedition, or to maintain them, as hereinafter mentioned.'

"On the 22nd January, 1874, and consequently after the time fixed by the contract for completion of the works, the defendants gave notice to the plaintiffs to avoid the contract for completion of the works. The defendants gave notice to the plaintiffs to avoid the contract, and thereupon took possession of the works and of the materials and implements of the plaintiffs.

"*Held*, That, upon the true construction of the contract, the clause above set forth with reference to the avoidance of the contract and the forfeiture of the contractor's implements and materials could only be enforced before the time originally fixed for completion of the works had expired."

I am going to use this case in another part of my argument. Although the contract here fixes the date at the 17th January, 1895, for the completion of the works, section 123 of "The Railways Construction and Land Act, 1881," contains these words: "In the event of any unreasonable or inexcusable delay by the company in the prosecution of the works." That means the delay must have been inexcusable. However, I shall deal with that later on, when I discuss the meaning of the statute. Of course, there is subsection (2) of the same section, which says, "If the company shall, in the opinion of the Governor, commit or suffer a wilful breach," &c. But I may say I have quoted these authorities for the purpose of supporting the position I have taken up, that even though the company has not completed this work within the time apparently limited by the contract, that does not amount to an abandonment of the contract, nor to any act on the part of the company which would entitle the Government to treat the contract as rescinded. At the utmost, it would only amount to a breach of contract on the part of the company entitling the Crown to maintain an action for damages, or to put in a set-off or counter-claim before this Arbitration Court for any damages which this colony may have sustained by reason of the breach of contract. Therefore the contract remains, and if the contract remains, then the arbitration has full force and effect, and this Court has the fullest possible jurisdiction.

Hon. E. BLAKE: What you say is that simple non-performance does not amount to abandonment or rescission?

Mr. Cooper: I say, the issue to be left to a jury would be, "Have the plaintiffs, by their acts, intimated that they intended no longer to be bound by this contract?" That is the issue, not "Have they committed a breach?" because the breach is always anterior to the discussion of the effect of that breach. It is the preliminary step in the matter. Now, on this point I say the contract remains. That is the position I am taking up now, before I go to the next branch of the case. We have to consider the acts of the parties in dealing with this question of mixed law and fact. We have to consider the acts of the parties both up to and subsequent to the 14th January. I shall not deal at any length with the acts of the parties prior to the 14th January, but I shall have to refer, in discussing the matter, to the question of whether there has been any unreasonable or inexcusable delay, or whether there has been any wilful breach of the contract. I shall have to refer also to some matters opened by my friend yesterday on that point. But since the 14th January it is not claimed that there was any breach of the contract prior to the 14th January on the part of the company.

Sir R. Stout: We say you wholly abandoned the construction, and stated to us that you could not and would not construct the line.

Hon. E. BLAKE: You say, then, that the breach complained was non-completion before the 17th?

Mr. Cooper: I understand my friend claims the contract was abandoned. Now, let us see whether the Government treated that contract as abandoned. That is a question very material to the issue. I do not know whether the Court has before it a list of Proclamations which were made, but we shall find that the Government refused to treat this contract as an abandoned contract. I understood from an interjection from Sir Robert that he treated this contract as abandoned as early as 1892—or, at any rate, long prior to January, 1895. Now, we find that in the year 1893 there were no less than ten Proclamations issued under the authority of the contract which the Crown now says was at an end.

Sir R. Stout: I said you abandoned it. We did not treat it as abandoned: that is a different thing.

Mr. Cooper: Either the contract exists or it does not exist. If the contract was abandoned, as my friend says, prior to 1895 or 1893, it was abandoned for all purposes, and did not exist at all. If it existed for one purpose it existed for the other purpose. However, the Government did not treat it as abandoned, because in 1893 they issued ten Proclamations, every one of which recites the existence of this contract. In 1894 they issued fifteen or sixteen Proclamations, every one of which recites the existence of this contract. In 1895 also they treated the contract as an existing, living contract. They said, in fact, "This contract is a living contract on the 7th February, 1895." They argue now that the contract was dead two years before. Now, since the 14th January, 1895, how can it be said that anything has occurred on the part of the company which would show that the company claimed or led the Government to believe the contract was at an end? On the contrary, everything that has been done since the 14th January was purported to be done under the contract. The step taken to appoint this Arbitration Court was done under the contract. The claims made for the selection of lands, the admission of the Government—in February, I think—to the right of selection, the promise of the Government that they would select lands, which promise was repeated on the 11th April, 1895, were all referable to the contract, and were all on the understanding that the contract was in existence

and not put an end to. I am dealing now with our acts, and I say all the steps we have taken since 1892 have been taken under this contract, have been taken under the idea that it was to be treated as an existing contract, and that our rights and liabilities were to be determined, if necessary, under it. I submit, therefore, it is abundantly clear, both in fact and in law, that the contract exists to this day, and therefore that clause 47 is an existing clause in an existing contract. If that be so, of course there is an end to the question of jurisdiction : and that brings me to the second point. I submit that the company have the right to ask this Arbitration Court to determine the question whether or not there has been a valid seizure of the railway by the Government. I take it that my friend's argument will be this: he will say, assuming the Court has jurisdiction, yet such jurisdiction is excluded in reference to the question of the seizure of the railway, and is excluded by the terms of "The Railways Construction and Land Act, 1881." He hinted at that position the other day. Well, we meet him upon that. It is necessary to make a somewhat critical examination of clause 47 of the contract, which says, "It is hereby declared and agreed that, if at any time hereafter any dispute, difference, or question shall arise touching the construction, meaning, or effect of these presents," and so on. Now, one question which the arbitrators are entitled to consider under the jurisdiction as vested in them under clause 47 is touching the construction, meaning, or effect of the deed, or of any clause or thing contained therein. One very important question which would arise touching the construction, meaning, or effect of these presents will be this: Have we the right under this contract to say to the Arbitration Court, "The grievance we complain of in reference to the seizure of the railway is a matter which arises touching the construction, meaning, or effect of these presents, or the rights or liabilities of either of the said parties under these presents." I submit that clearly it is, and that the Governor had no right under the Act to seize the railway. It is true it says in clause 123 of the Act that the Governor has certain powers, but that has been interpreted in the contract by clause 48, which says, "It is also declared and agreed that these presents and everything herein contained shall be read and construed subject to the provisions of the said Act and the principal Act, except where the same are hereby expressly modified pursuant to any Act amending the said Act, it being hereby declared that, as enacted by "The Midland Railway Contract Act, 1887," these presents shall be and are intended to operate as a substitute for the original contract." Now, let us see whether the provisions of section 124 are affected by this contract. Section 123 contains power on the part of the Governor to seize; section 124 contains a remedy. I submit that that remedy is excluded by the terms of the contract; secondly, I submit that if that remedy still exists, it is optional on the part of the company to take that or to ask the Arbitration Court to determine. But I submit first of all that the remedy that is provided by section 124 is excluded by the contract. I have already pointed out that the questions arising touching the construction, meaning, or effect of these presents are expressly the subject of arbitration; secondly, the rights and liabilities of either party are expressly the subject of arbitration; thirdly, the other questions of arbitration "in relation to the premises" are also expressly subjects of arbitration. Then we find that we are prohibited from taking any legal proceedings by the terms of the contract, because we find in clause 47 the words, "and also that no action or legal proceedings shall be commenced or prosecuted by either of the said parties hereto against the other of them touching any of the said matters in difference, unless the party to be made defendant to such action or proceedings shall have refused or neglected to refer such matters to arbitration pursuant to the provisions hereinbefore contained, or unless the time limited for making such award as aforesaid shall have expired." So that clause 47 is not only an enabling clause, enabling us to go to arbitration, but also a restrictive clause preventing us going to any other Court. I submit that, had we gone upon this seizure of the railway to the Supreme Court in a summary way and asked the Judge to set aside the action of the Governor, we should have been met by this arbitration clause, and the Crown would have said, "You have no right to institute any legal proceedings in reference to this contract, or to the rights and liabilities of the parties under it, except you have first exhausted your remedy by arbitration." Therefore I submit we are excluded from the provisions of section 124 by the express terms of clause 47 of the contract. It cannot be disputed—at least, I should think not—that the question of the right of the Governor to seize this railway is a question which undoubedly affects the rights and liabilities of the parties to the contract. I do not think it can be disputed at all that it is a question which must arise touching the construction, meaning, or effect of the contract between the parties; and, if it is either one or other of those two meanings, it is expressly the subject of arbitration; and, if it is not either one or the other, it is a question that must arise in relation to the premises, because the right of the company to construct this railway at all is determined by the contract—the liability of the company in reference to the construction of this railway is determined by the contract—and the question whether or not there has been wilful, unreasonable, or inexcusable delay on the part of the company in constructing the railway can only be answered by a reference to the terms of the contract. The very question which is in issue between the parties, and which is one ground upon which the Government claims to have been entitled to seize this railway, is a question arising upon the terms of this contract, as to whether there has been a wilful breach of the contract. Therefore I submit it is abundantly clear that the parties themselves have set up this "domestic forum" for the purpose of excluding the jurisdiction of the Courts of law, and restricting the remedies and rights of the parties enforcing the remedies to the tribunal which they have chosen under the contract, and now set up under clause 47. That the question whether or not there was a right to determine the contract is one which under such clause is proper to be determined by arbitration is, I submit, decided by the case of Willesford against Watson, the case which was mentioned on Monday last (8 Chancery Appeals, page 473): "The lease of a mine contained an agreement to refer disputes between the lessors and three lessees to arbitrators or their umpire pursuant to the provisions of 'The Common-law Procedure Act,

1854.' The lessee sank a shaft, and through the shaft drew minerals from an adjoining mine. The lessors filed a bill to restrain the lessees from so doing. Two of the three lessees applied for an order to stay proceedings in the suit, and that the matter might be referred to arbitration. Held, on the construction of the lease, that the Court would not decide, but would leave it to the arbitrators to decide whether the matters in dispute between the parties were within the agreement to refer." Lord Selborne says, "We all agree that the Vice-Chancellor has come to a right conclusion in this case. The whole argument depended really upon the construction of the lease and of the Act of Parliament. With respect to the lease one cannot but be struck with these two points: First, that it contains as absolute a contract as the law would permit these parties to agree *inter se* that such questions as are included in the agreement shall be referred to arbitration." At one time it was considered, no doubt, illegal to upset the jurisdiction of the law Courts by any agreement to refer matters in dispute to arbitration. In the case of Scott *v.* Avery it was decided that there might be such an agreement, although even then it was a matter of doubt, and remained so until some cases quite recently, whether persons could by agreement between themselves oust the Courts of their jurisdiction. However, I do not think that question will arise here—that is, the question suggested to Lord Selborne—because we are able to invoke my friend's argument upon that point. But when he says this is a statutory contract—if it is a statutory contract—then, according to Sir Robert Stout, it has the force of a statute.

Sir R. Stout: There was a distinction drawn: that the setting up of a forum would not oust the ordinary Courts if this was going to arbitration, or whatever precedent was threatened. That is to say, the ordinary Courts were "seized" until the arbitration. Now there is an Arbitration Court.

Mr. Cooper: No doubt,—which determines this question.

Hon. E. BLAKE: That is not contested.

Sir R. Stout: I do not contest it; but I think it is not within the purview of this Court to allow that question to enter there.

Mr. Cooper: Lord Selborne says, "Then, what is it that they are to refer to arbitration? It struck me throughout that the endeavour of the appellants has been to require this Court to do the very thing which the arbitrators ought to do—that is to say, to look into the whole matter, to construe the instrument, and to decide whether the thing which is complained of is inside or outside of the agreement." Let us consider this position. Supposing Sir Robert Stout were to move the Supreme Court for a prohibition in order to restrict this Arbitration Court from further proceedings in this reference: what would my friend ask the Court to do? To grant an order prohibiting the Arbitration Court from determining the questions arising touching the construction, meaning, or effect of the contract. That is exactly what what was asked of the Court of Chancery in Willesford and Watson, as the Lord Chancellor says, "The appellant has required this Court to do the very thing which the arbitrators ought to do—that is to say, to look into the whole matter, to construe the instrument, and to decide whether the thing which is complained of is inside or outside of the agreement." In this case one clause of the agreement was, that the parties had a right to refer all matters with reference to the construction of the agreement to the decision of the Court. This was the reference: "'Touching any dues or moneys payable or retainable under the presents'—that, no doubt, is something provided expressly for in the agreement; secondly, 'or the price to be paid for any engine, machine, or apparatus taken by the lessors, their heirs or assigns, in pursuance of the agreement in that behalf hereinbefore contained.' That, again, is a thing which is within the provisions of the lease; thirdly, 'or touching these presents, or any clause or matter or thing herein contained, or the construction hereof.' Whenever, therefore, there is a dispute between the parties as to whether the instrument, according to its true construction, does or does not warrant the particular thing to be done, they have agreed that that particular thing shall be referred. Surely, then, it would be extravagant to say that if the Court thinks that, according to the true construction of the instrument, the thing ought not to be done, therefore it is not to be referred. . . . It appears to me, therefore, that there is no reason to doubt that the present controversy is within the terms of the agreement of reference, or that the arbitrator would have as large powers as arbitrators can have to do justice under it." That was a decision of the Court of Appeal, comprised of the Lord Chancellor, Lord Justice James, and Lord Justice Mellish. I submit, then, as the first step in the argument, that the contract is in existence, and that the first step, at any rate, exists entitling the arbitrators to proceed. That is one aspect of the question which is submitted to them by the company on the one side and by the Crown on the other; and I contend that the Governor is justified, under clause 42, in taking possession of this railway.

Sir B. BURNSIDE: Justified under the contract?

Mr. Cooper: No, he could not seize under the contract.

Sir B. BURNSIDE: You have the Act—why seize the railway?

Mr. Cooper: I understand he could not.

Hon. E. BLAKE: I understand the view you take is that the Act is for certain purposes incorporated with the contract, and that the power to seize is in the part that is incorporated. You claim that the power for reviewing the seizure is either eliminated or is a double provision.

Mr. Cooper: Yes, my first argument is that it is eliminated; but, if not, then secondly I argue that it is optional. I shall submit, then, that clause 47 does not restrict us to arbitration, but that we have an option.

Hon. E. BLAKE: As to the suggestion of elimination, would you claim that the act of seizure is put in the hands of the Governor under the second subsection of the clause relating to the power to seize?

Mr. Cooper: I propose to deal with it in that way, because of the general statement in clause 124 of the principal Act. The opinion of the Governor is not final, and in support of the argument proposed by me it is clear by the terms of the Act that his decision can be reviewed.

Hon. E. BLAKE: I do not take the hypothesis that section 124 was eliminated. You suggest a tribunal.

Mr. Cooper: I should argue that the powers which are contained in section 124 are transferred to the arbitrators, and that all the powers of a Court of common law have been transferred to arbitrators; to use Sir Robert Stout's expression, they are suspended from the inception of this arbitration, and are vested for the time being in the arbitrators. I submit also, as a question which arises directly in the case,—the rights or liabilities of the parties. It is in the disjunctive; it is not a question arising as touching the question of construction alone, but the rights and liabilities of the parties; and I say this seizing is a direct question touching the rights and liabilities of the company on the one hand, and the Crown on the other, and therefore it comes within the purview of section 47. Lord Selborne, in his reference to the case I have quoted, makes this remark: "Then, all that having been said, these words are superadded to the whole: 'or touching the rights, duties, or liabilities of either party in connection with the premises.'" The words in this contract are, "under these presents"; and they are as quite as full as the words "in connection with the premises." Lord Selborne goes on to say, "Now those words 'in connection' evidently are apt to include, and I think must have been intentionally used to include, everything relating to the demised property and the use of it, even things which might arise out of collateral matters." The words used in the reference were, I think, "or touching the rights, duties, or liabilities of either party in connection with the premises"; and Lord Selborne says that those words not only include matters which arise directly in relation to the property, but questions which arise out of collateral matters between the parties. Of course they must have some reference to the subject-matter of the contract. I submit that the authority I have quoted is analogous to this clause, and shows clearly that the arbitrators have a right not only to consider the preliminary matter, but also whether or not they will entertain consideration of the power of the Government to seize the railway, and to enter into that question and to determine whether the Governor rightly exercised that power.

Sir C. LILLEY: It states in the notice of claim that the exercise was improper, or that was the effect of the Governor's action.

Mr. Cooper: There is the matter of seizure to consider.

Sir R. Stout: Could you order him to give it up?

Mr. Cooper: We say it will have the effect I mention.

Sir C. LILLEY: You think, if the jurisdiction is there, it does not matter what the consequences are.

Mr. Cooper: Yes; we are entitled to treat this matter as a question in difference.

Hon. E. BLAKE: Mr. Cooper proposes that the general powers given by section 124 are transferred, and therefore the arbitrators could do anything the Supreme Court could do.

Sir R. Stout: The Supreme Court has not been referred to.

Hon. E. BLAKE: I am only stating the argument.

Mr. Cooper: We regard the seizure as a matter in question in relation to the rights and liabilities of the parties.

Sir R. Stout: You claim damages.

Mr. Cooper: No doubt; but by doing so we do not restrict the jurisdiction of the arbitrators.

Sir B. BURNSIDE: But under any circumstances the power of the arbitrators to touch questions of vested and actual property is doubtful.

Sir C. LILLEY: The Governor has power to vest the railway in the Queen. He has power at a certain time to do certain things, and that is power to vest it in the Queen. How can we question it, and on what ground has any Court of law a different power?

Mr. Cooper: The seizure of the railway?

Sir C. LILLEY: The second seizure absolutely vested the property in the Queen.

Mr. Cooper: It does not. I shall deal with that.

Sir B. BURNSIDE: I take it the property is not transferred to the Queen yet. I did not understand that to be the case. I understood Mr. Hutchison to say that during the time the railway had been under construction the land upon which it is now situated had been from time to time purchased by private individuals. Is there any of it Crown land which has been acquired under this agreement?

Mr. Cooper: Not acquired under the agreement, but purchased under it. That is to say, that Government gave the Crown lands——

Sir B. BURNSIDE: When I say "acquired" I do not mean "taking" it.

Hon. E. BLAKE: That is, ceding the right away.

Mr. Cooper: Yes. What other land we wanted had to be taken under the Public Works Act.

Hon. E. BLAKE: That is, they issued the title to these people, and not to the company?

Sir R. Stout: It is not usual to issue titles. The company take it by Proclamation.

Sir B. BURNSIDE: And on proclaiming, you simply change the title of the real estate?

Hon. E. BLAKE: That is to say, it was the statute-law of the colony, and this statute-law is indicated in the Proclamations you issue?

Sir R. Stout: That is what happens; all our railways are proclaimed in that form.

Sir B. BURNSIDE: I understand that unless there is a Court especially constituted to confer the title by Proclamation it must be by patent. It is a question whether or not it has been a trespass upon land belonging to somebody else and an entry upon land. Admitted that the title of it is in the Crown, it is a matter which may be of some importance in the eventual dealing with the railway; and I ask whether all the land upon which this railway runs, or at least the contract railway is to run, is fee-simple, and is now under the Crown or under the company.

Mr. Cooper: Not the whole, but a portion of it is in the company.

Sir B. BURNSIDE: And some of it is in possession of the Crown.

Sir R. Stout: We claim that everything is in possession of the Government.

Sir B. BURNSIDE: I understand, with reference to the property, that some of it is assumed to be land purchased by the company, and some of it is land which the Crown intended to give, or was to give, as the case might be.

Sir R. Stout: We do not want to raise any question about the title. The way our railways are generally made is by Proclamation. Even where land is taken from private individuals we can take it by Proclamation. We do not need an Act.

Hon. E. BLAKE: You allege there is a statute of convenience—namely, by Proclamation—and that it has been used in this case. Therefore the sole right is vested in the company, and the land is at present only taken possession of by the Crown.

Mr. Cooper: Yes.

Sir B. BURNSIDE: Therefore I understand the right to convey the land from the Crown to the company is exercised in these Proclamations.

Sir R. Stout: In cases where there is any doubt it is intimated that as soon as the company is in a proper position on the land it gets its contract lands.

Sir B. BURNSIDE: That is conceded all round.

Sir C. LILLEY: The land goes into the possession of your company for the purpose of making a line—the line.

Mr. Cooper: Wherever the line passes through Crown lands a Proclamation was made by which the company was put in a position to make surveys, and so on.

Sir B. BURNSIDE: And that gives the company the right to take the land irrespective whether the Crown conveyed it at all.

Mr. Cooper: We acted on the contract in reference to Crown lands.

Sir R. Stout: Section 11 of the contract gives them the land.

Mr. Cooper: Before I pass from this case of Willesford *v.* Watson, I would refer to another part of the case. Lord Selborne says, on page 479, "So, if there were a contemporaneous collateral agreement, having an equitable force, which added something to or took something away from the rights of either party, I cannot but think that these words, 'or touching the rights, duties, and liabilities of either party in connection with the premises,' would perfectly authorise the arbitrator, and, indeed, make it his duty to take all those matters into account in order to see what were their mutual rights and liabilities in respect of the demised property at the time when the question arose." I submit, in dealing with this branch of the subject, that there is the very fullest jurisdiction on the part of the arbitrators to entertain and decide not only the jurisdiction, but I go further, and say they have a duty to entertain and decide all questions which directly or indirectly arises out of the contract entered into between the company and the Queen. The first position I take is that clause 47 restricts our remedies to an Arbitration Court. I submit that practically there is very little doubt that that is the case; but, even if that were not the case, then I submit that clause 124 of "The Railways Construction and Land Act, 1881," is optional. The words, "If the Governor shall exercise the powers, the company may apply to the Supreme Court as hereinafter provided," I submit, do not exclude the jurisdiction of another Court, and do not exclude the jurisdiction of the arbitrators. They are concurrent, and we have the option. We can either go to the arbitrators or go to the Court.

Sir B. Burnside: Go to both?

Mr. Cooper: I prefer to take it that we cannot go to both. We could elect which to go to; but we have exercised our election, we go to the arbitrators. There is one authority which has not been referred to in particular on this question, where, under the Common Law Procedure Act, power was given to a husband to join his wife in an action for a wrong done. The words were, "may join," and it was there held that the words were permissive only, and did not compel such joinder. The case I was referring to in reference to the word "may" is Brockbank *v.* The Whitehaven Junction Railway Company (31, Law Journal, Exchequer, page 349), where the principle is laid down as I have stated, and the Court held that in such a statute these words only gave an option, and that they were not imperative. It is an option with power to consolidate certain claims. Maxwell, at page 294, says, "When a statute enacts that a plaintiff may sue in one action for injury done to his wife as well as to himself, it confers a privilege or license which the donee may exercise or not at his pleasure, having only his own convenience or interests to consult, and the word 'may' is then plainly permissive only."

Sir C. Lilley: The word "may" does not mean "shall."

Mr. Cooper: In many instances the word "may" has been held to mean "shall," as in the adjudication of a bankrupt, for instance, but not in such a case as this. Before I pass from this question I would refer to sections 125 and 126. The position we take is this: The very foundation of the Governor's right to seize is that there has been an unreasonable or inexcusable delay. As to the effect of these words I will deal later on.

Hon. E. BLAKE: Or a wilful breach of contract.

Mr. Cooper: I will deal first with the unreasonable or inexcusable delay in doing any of the matters covered by clause 1, and, secondly, with the contention that there has been a wilful breach of contract. The Governor may, assuming that these conditions, or either set of conditions, exist, seize the railway. But if these conditions do not exist, then the proper tribunal, whether the arbitrators or the Court, can determine the question whether or not there has been an unreasonable or inexcusable delay, or whether or not there has been a wilful breach of contract; and that tribunal can make any award it likes under the premises—"The Judge may, in such manner as he sees fit, make an order, which order shall be binding upon the Governor and the company." He can make any order he likes.

Hon. E. BLAKE: You argue that the power is not limited to the declaration?

Mr. Cooper: No; he can order the Governor to pay damages for the seizure.

Sir R. Stout: Can he order him to buy the line?

Mr. Cooper: He can order him to pay damages. At any rate, I do not think we need go into that at present. Sections 125 and 126, I submit to the Court, would only apply in the event of the seizure being held to be lawful, and therefore we need not trouble ourselves about that.

Sir B. BURNSIDE: Held to be lawful or not contested.

Mr. Cooper: Yes.

Sir C. LILLEY: You think the remedies are concurrent, and you are not compelled to take either?

Mr. Cooper: I say we are taking every proper step to protest against the seizure, and that we are before the proper Court. It is true that we have never been into the Supreme Court—first, because we consider we have no right to go into the Supreme Court, and secondly, that we have a right to come here. We want the arbitrators to hear the whole of the evidence, according to the agreement between the parties. I think I am right in suggesting that clauses 125 and 126 cannot affect this matter at all, but only arise when the seizure is a rightful seizure or a seizure uncontested. I come now to the meaning of "wilful breach of the contract" in connection with the "unreasonable and inexcusable delay" as far as affects subsection (1), and its effects on subsection (2). Section 2 of section 123 reads, "suffer any wilful breach of the contract." This leads me to deal to some extent with the facts of the case. First of all, assuming that the contract was not determined, and that the arbitrators have jurisdiction, which I submit they have, I then come to the question of how the Court is to deal with the seizure of the railway, and that brings me to the most important provision of the Railways Construction and Land Act of 1881, and the contract. Section 123 of that Act, as I showed this morning, provides for the seizure of the line under certain sets of circumstances—first, if there has been any unreasonable or inexcusable delay in the prosecution of the work or in the using the line for the purposes of traffic; and, under subsection (2), if there has, in the opinion of the Governor, been a wilful breach of any contract. The Government claim to have forfeited the line under all the powers conferred on the Governor by these two subsections: that is the meaning of the notice, as I take it. I think we have their notice before the seizure in the affidavit of Mr. Gully. I take the letter of the Government of the 27th March to be the probable foundation of their subsequent steps. Notice is given to the company that the Government will treat the contract as one that has been broken, abandoned, and rescinded. The seizure took place on the 25th May, 1895, and Mr. Blow on the same day wrote on behalf of the Government, and served the following letter upon the manager of the railway—I presume it would be the traffic manager:—

"SIR,— "Railway Department, Greymouth, 25th May, 1895.

"Possession having been taken by His Excellency the Governor of the several lines of railway mentioned in the Midland Railway contract, I have now to formally notify to you that the said lines of railway will henceforth be under the control and management of the Minister for Railways.

"It is not the intention of the Minister at present to make any change in your position, or that of the staff employed under you in the working of the railways. All the servants of the company so employed will have the option of entering the service of the Government at their present salaries, and upon the terms applicable to the railway employés of the Crown.

"The District Railway Manager at Greymouth will assume the local control of the lines, and for the future you will kindly take your instructions from him, and forward to him all accounts and correspondence which you have hitherto forwarded to your superior officers under the company.

"All moneys earned and received on and after Monday next must be paid into the credit of the Public Account at the Bank of New Zealand.

"I have, &c.,
"H. J. H. BLOW, Under-Secretary.

"D. Wallace, Esq., Traffic Manager, New Zealand Midland Railway, Stillwater."

That was served upon the manager. Precedent to that was the Governor's warrant. The Governor's warrant sets out the ground upon which the railway is seized, and is dated the 13th May, and directed to John Thomson, Esq., Greymouth, in the Colony of New Zealand, Resident Engineer. It makes our case very much clearer, because the Governor presented the claim under section 123; but there is a very important feature in connection with it. I will read the warrant in full, because I will submit that it will clear up a good deal of difficulty in connection with the matter, showing that, although there was a threat that the Governor would exercise his powers under section 123——

Hon. E. BLAKE: When you refer to that, do you mean the general warrant?

Mr. Cooper: Yes, the warrant, I take it, is his authority for the seizure. Whatever took place before was under the authority of the warrant. The warrant is as follows:—

"To John Thomson, Esquire, of Greymouth, in the Colony of New Zealand, Resident Engineer.

"WHEREAS under and in pursuance of the provisions of 'The Railways Construction and Land Act, 1881,' and of 'The East and West Coast (Middle Island) and Nelson Railway and Railways Construction Act, 1884,' and of 'The Midland Railway Contract Act, 1887,' and of all other powers and authorities them thereunto enabling, the New Zealand Midland Railway Company (Limited) did, by deed made the 3rd day of August, 1888, between Her Majesty the Queen of the one part and the said company of the other part, contract and agree within the term of ten years, to be computed from the 17th day of January, 1885, to construct and completely finish a line of railway so as to connect at Springfield, in the Provincial District of Canterbury, with the New Zealand Government railway already constructed and having its terminus there; and at Brunnerton, in the Provincial District of Westland, with the Government railway already constructed and connecting Brunnerton with the Town of Greymouth; and also a further line of railway, from a point on the first-mentioned line of railway at or near Brunnerton aforesaid, by way of Reefton, in the Provincial District of

Nelson, to a point at or near Belgrove in the said district, so as to connect therewith the Government railway already constructed, and leading thence to the City of Nelson, in manner and upon the terms and conditions set out in the said deed, and which two several lines are in the said deed and hereafter in this instrument referred to as 'the said railway': And whereas the contract time for the construction and completion of the said railway expired on the 17th day of January, 1895, but only a small portion of the said railway-line had then been constructed: And whereas therefore there has been unreasonable and inexcusable delay by the company in the prosecution of the works connected with the said railway: And whereas in my opinion the said company has committed and suffered a wilful breach of such contract: Now, therefore, I, David, Earl of Glasgow, the Governor of the Colony of New Zealand, in pursuance and exercise of the powers in that behalf vested in me under the various Acts hereinbefore mentioned, and particularly in pursuance and exercise of the powers conferred upon me by section 123 of 'The Railways Construction and Land Act, 1881,' and of all other powers in that behalf me thereunto enabling, do hereby take possession and assume the management of the said railway; and do hereby authorise and empower you the said John Thomson to take possession and assume such management on my behalf and on behalf of her said Majesty the Queen.

"Given under my hand, at Auckland, this 13th day of May, 1895.

"GLASGOW, Governor."

I should submit that the wilful breach of contract is no case of unreasonable and inexcusable delay. I submit that the Governor has treated what he supposes to be unreasonable and inexcusable delay as a wilful breach of contract.

Hon. E. BLAKE: That is with respect to the non-completion.

Mr. Cooper: Yes; it says, "whereas," &c., "therefore there has been," &c. I submit that really means, "the said company has therefore," &c.

Sir C. LILLEY: You cannot do that.

Mr. Cooper: I am only submitting what I contend would be the reasonable contention of the warrant.

Hon. E. BLAKE: You say it therefore controls the wilful breach?

Mr. Cooper: Yes. However, we are prepared to meet the Crown upon both grounds; but I think we may fairly say that the Governor considered that what was, in his opinion, unreasonable and inexcusable delay, was the wilful breach of the contract, and he therefore took possession of the line.

Sir C. LILLEY: That the delay constituted the wilful breach of the contract?

Mr. Cooper: That is the way I should put it. It is for the Court to deal with the question.

Sir B. BURNSIDE: "Whereas the contract time for the completion of the contract has expired, and whereas, therefore, unreasonable delay," &c.

Mr. Cooper: Yes; consequently there was a wilful breach of the contract. However, we are quite prepared to meet it on both points. That is the view I submit in the meantime to the Court. Now, dealing with the two questions which are therefore raised, I do not propose to overlay my arguments this morning. This Court has power to revise and to review the decision of the Governor.

Sir C. LILLEY: You have a right to appeal to the Judge.

Mr. Cooper: But there is no time-limit to that.

Hon. E. BLAKE: I think three months was the time within which you take your right.

Mr. Cooper: I do not think there is any limit. The parties may apply to the Supreme Court; but the limit is at the end of twelve months, under section 126. After fifteen months have expired it is quite clear there is no power of appeal to the Supreme Court.

Hon. E. BLAKE: But your position after the twelve months—that is worth considering: how is it arrived?

Mr. Cooper: I shall take the matter in branches. The first thing to be considered is that the Governor has no power under subsection (1) to be the judge of any delay. He, no doubt, forms his conclusion, and if he chooses to act under subsection (1) the parties are in no sense bound by the expression of his opinion. He asserts that there was such delay, and therefore takes action. In subsection (2), however, there is the exercise of some jurisdiction in arriving at some decision before exercising his power.

Sir C. LILLEY: What is the time for appealing from any such decision?

Mr. Cooper: Ordinarily the Statute of Limitations would apply—six years.

Sir C. LILLEY: From a single judgment?

Mr. Cooper: Twelve months. In an interlocutory judgment, twenty days, unless the order of the Judge is final and conclusive.

Sir C. LILLEY: Time is not necessarily mentioned in the statute?

Mr. Cooper: I should say time would be measured by the previous clause—126.

Sir B. BURNSIDE: Section 124 says it gives to the Supreme Court power.

Sir C. LILLEY: It is a very hard matter to deal with.

Hon. E. BLAKE: If you acted before you acted properly only; but you do not contest it Sir Robert Stout.

Sir R. Stout: No.

Mr. Cooper: We submit it is the other way. I would, in founding my argument, refer to the contention I submitted to the Court this morning, under section 47 of the contract—whatever powers existed in the Supreme Court were transferred to the arbitrators, and that the arbitrators can act, in determining this question, with as full if not fuller powers as the Court under section 124. What were the powers of the Supreme Court? It could inquire whether there had been unreasonable or inexcusable delay, and also whether there had been a wilful breach of contract. It was therefore quite clear that the decision of the Governor was not intended to be final. The two points of wilful and unreasonable delay, and whether it was a wilful breach of the contract, I submit the Court

can only determine on the whole of the evidence—the acts of the parties, the circumstances which initiated this contract, circumstances of conduct on both sides under the contract brought into existence, and the position of the parties in fact as well as in law on the 25th May, 1895, or, at any rate, the 25th March, 1895, because the wilful and unreasonable delay is before all fact of intention. The intention is, I submit, governed by the acts of the parties. It is not a question of law, but of pure fact—whether there was inexcusable delay, whether it was such as would come within the definition of being entirely without reason, and whether there has been unjustifiable delay. I submit that "unjustifiable" is whether there has been such a concatenation of circumstances in this case as would justify any Court having jurisdiction to determine and say, "Your delay in not carrying out this railway has been without excuse, without any excuse at all. It is inexcusable." Not has there been a delay, one which unexplained would be inexcusable, but has there been such a delay that when the whole explanation and the whole of the circumstances connected with it, the acts and conduct of the parties from the commencement of the contract until the time of the execution under the power of seizure were settled—such a delay as would, in the opinion of a reasonable man, be utterly inexcusable and entirely unreasonable? Under the second branch, I submit also, the intention comes in. Not whether there has been a breach of contract which has inflicted damage upon the opposite party, but whether there has been a wilful breach of contract; and I submit that circumstances, coupled with the action of the Government, arose and prevented us from being able to continue this contract—circumstances that the company could not control, and being such as to render the conduct of the company the reverse of wilful. I submit a wilful must be a deliberate breach of contract between the company and the Queen. I think those two questions are bound up together, because, if there was no unreasonable delay or inexcusable delay, I think the arbitrators should come to the conclusion that there was no wilful breach of contract. It would not follow that it would have been a wilful breach of contract; in other words, if we can show that the delay is reasonable and excusable, then we are perforce entitled to argue from these circumstances, and to say that the breach of contract which technically followed was reasonable and excusable under the circumstances, and not a wilful breach of contract. I shall therefore have to refer to some of the circumstances mentioned by Mr. Hutchison yesterday, and, whatever may be the doubt in the minds of the Court as to whether evidence of matters anterior or immediately precedent to this contract is admissible on other grounds, it certainly is admissible on this ground. On the first arbitration, I submit, there is no question as to what is inexcusable and want of excuse. I want to make myself perfectly clear, and to set forth the position we shall seek to maintain—that we are entitled to go into the evidence in order to rebut the position the Crown has taken up—that there is no unreasonable or inexcusable delay. We are entitled to go into the whole of the evidence surrounding the making of this contract, and the evidence which shows the acts and conduct of the parties since the contract. The rules of law which prohibit the introduction of any evidence tending to vary or to alter a written document does not apply when you have to consider the question of intention and the question of excuse.

Sir R. Stout: The intention of whom?

Mr. Cooper: The intention of the company. What this tribunal now has to do is to try to gather, from the acts and circumstances surrounding the situation, whether it was the intention of the company when they took the balance of the term to complete only a small portion of the line; and all this evidence, I submit, is clearly admissible. I therefore propose to submit the facts we intend to prove.

Sir B. BURNSIDE: I understand you to say that the fact that the railway was not completed in the time was not evidence of wilful delay.

Mr. Cooper: Certainly not, because that is one—and only one—of the circumstances entitling the Governor to seize. The other is, because of unreasonable and inexcusable delay.

Hon. E. BLAKE: Have you any authorities to submit in proof of this proposition advanced?

Mr. Cooper: In determining it, the Court must take the facts and circumstances into consideration.

Hon. E. BLAKE: Facts as applied to the contract?

Mr. Cooper: Yes.

Hon. E. BLAKE: You are suggesting a proper view of the facts as anterior to this case?

Mr. Cooper: I suggest you can only explain and determine properly the position of the parties by taking the whole of the circumstances of the case into consideration. It is part of the *res gestæ*. I say the *res gestæ*—the matter in dispute—which is to be determined by this Court is the question of unreasonable and inexcusable delay in carrying out the contract. Anything which explains that delay is part of the *res gestæ*, whether it was anterior to the contract or whether it was subsequent to or during the progress of the contract: it is motive that we have to consider now. I would say, also, that we are entitled to introduce this evidence not simply upon the broad principle——

Hon. E. BLAKE: You draw a distinction between "delay" and "wilful and inexcusable delay."

Mr. Cooper: Yes, anything which will excuse delay—I do not care when it arose, or whether it arose twenty years ago, it would be part of the *res gestæ*, though it would not be of very much value if it arose so far back as that. I also draw attention to this position: that the contract itself refers to matters anterior to the contract, and we are entitled to go into these matters in determining the question of unreasonable delay. The contract carries us back——

Sir B. BURNSIDE: I should like to direct attention to this: The Act of 1881 says, "The Governor shall have and may exercise the powers hereinafter set forth in the cases therein provided for: (1.) In the event of any unreasonable or inexcusable delay by the company in the prosecution of the work connected with any railway."

Mr. Cooper: I was going to refer to that myself in connection with my argument.

Sir B. BURNSIDE: And it goes on afterwards to say, "after the completion of the said works."

Mr. Cooper: That, of course, does not arise, as it never has been completed. The question is,

What was the excuse? Let me put it in a concrete form. What excuse have the company for the delay in the prosecution of the works? Now, that is a question which cannot be determined by the words of the contract. It must be determined by the acts of the parties, and what took place. I submit it is quite clear that we are entitled, in order to justify delay in the prosecution of the works, to show what took place before the actual signing of the contract, as well as what took place after the signing of the contract. For instance, to take the evidence my friend opened yesterday—and which was opened without prejudice to Sir Robert Stout's objection to its introduction—that Sir Dillon Bell, who was Agent-General, and who we shall prove was the representative of the colony in this matter, told the company and the company's representatives that there was no necessity—though there was an obligation to do so under the contract—to complete the work in ten years, and that the Government did not intend to insist on the performance of the completion of the railway within ten years. Supposing the company acted upon that representation, and in consequence failed to complete the railway within ten years, that would be clearly a ground to show that we had excuse for delay, because we were acting upon a representation made to us by the agent of the Government in reference to the very question upon which the Government afterwards claimed to seize the railway. The Government say, "You did not prosecute these works with due speed"—I am now putting the case in a broad form. The answer is, first, "You yourself repeatedly told us that it was not necessary to prosecute these works with due speed." That evidence would be clearly part of the *res gestæ*. So that our delay was not without reason, inasmuch as the Government held out this reason why we should delay. The Government themselves said, "You need not consider yourselves bound by the strict term of ten years from 1885. Three and a half years of that term have gone by. It is unreasonable to expect you to complete this railway within six and a half years; therefore you must do the best you can. If you do not complete it within ten years your delay in non-completion is excusable, because we understand you cannot do it." And that is the representation held out by Sir Dillon Bell in London, and which I submit is admissible. That is anterior to the signature of the contract, although, of course, the agreement between the parties exists before the contract is signed. I take it the contract is only evidence of the consensus of mind of the parties. The only ground upon which it can be urged that we cannot introduce the evidence is the rule that parol evidence cannot be given to add to or vary a certain contract required to be in writing; but that rule does not apply here, for the evidence is of facts collateral to the contract, and, in explaining the motives and reasons for non-prosecution or non-completion of the works, clearly every circumstance which affords ground for showing that the action of the company was not unreasonable or without excuse is admissible in a Court of law. Now let me also refer the Court to this position: that it was quite clear that this contract was intended to be in one sense a continuation of a prior contract. The words used are "substitution for a prior contract"; and therefore it is, I submit, perfectly open to us to go into all the circumstances which were in existence at the time this contract was signed in order to explain the then position of the railway, and in order to explain and show what quantity of work they had undertaken; in order, in short, to show better the position of the company and the position of the Government in relation to the company. It is not strictly a new contract; it is a new contract, no doubt, in one sense, but it is not a contract entered into by the Government with the company under which the company say, "We will complete this railway in six and a half years." This contract relates back to the statute of 1884—"The East and West Coast (Middle Island) and Nelson Railway Construction Act, 1884." It relates back to the Chrystall contract of 1886, and to the assignment of that contract in 1886 or 1887 to the company, and to the negotiations which took place between the company resulting in this contract, and to the provisions of the old contract, and to the statute which was the foundation of that old contract. This contract, I submit, brings within its scope all the circumstances which enable us to explain the delay—every circumstance which had its origin subsequent to the passing of the Act of 1884. I would put it as boldly and broadly as that. Now, it was never, I submit, in the contemplation of the parties that this contract should be completed by January, 1895. That is a matter which I submit the Court will have to consider and determine. It was quite clear when this contract was entered into both parties recognised—the company on the one side and the Crown on the other—that it was an impossibility to perform the contract within the time nominally stated in such contract. We have the Act of 1881, which clearly implies a set of circumstances under which a contract might not be completed within the contract time; and we have a set of circumstances which entitles the company to relief, and which will justify the company in saying that the power of seizure given in the first subsection of section 123 has not arisen. The section, I submit, quite contemplates not simply delay in the prosecution of the works, but in the carrying-out of the works, which may be reasonable and excusable. It quite contemplates the particular position which we claim in the present case—that the time for the completion of the works may have expired, that the works may have been prosecuted but that they may not have been completed, and that in the prosecution there has been no unreasonable or inexcusable delay. It contemplates the other position also—that in the prosecution of the work there has been unreasonable and inexcusable delay; and the manner in which one or other of these propositions must be dealt with must, I submit, rest entirely on questions of fact. Now, I shall not weary the Court by going again over the circumstances narrated by my friend, except so far as they are directly applicable to the question upon which I am now addressing your Honours. Let me gather them into a short form, and place succinctly before the Court the points upon which we rely. First, we say that under the Chrystall contract there was an obligation on the part of the syndicate to carry out and complete this railway within ten years from the 17th January, 1885. I am not quite sure whether I am quite accurate in saying that there was a provision in the Chrystall contract for the extension of time—there may or may not have been. It is quite clear, as shown by negotiations between the Crown and the company subsequent to 1885, that the Chrystall syndicate were unable to carry out the railway, and therefore it was necessary that they should seek other assistance. They sought

the assistance of the Midland Railway Company, and the primary step was taken in the assignment of the Chrystall contract to them in the year 1886, on the 20th of April, and the company was registered on the 30th of April, 1886.

Sir C. LILLEY: I see there is in the original contract a provision for the extension of time.

Mr. Cooper: Yes; that is set out in the contract. In the contract of 1885 it says, "The contractors shall and will with all convenient speed, and within the term of ten years, computed from the date of these presents, or within such further time after the expiration of that period as may be allowed in that behalf under these presents," and so on. Therefore, even under the original contract it was admitted that the extension of time might be necessary, and there was a provision for the allowance of it if it was considered by both parties to be essential. Well, the company came into existence in 1886, and, on the assignment of the Chrystall contract, it was found necessary to obtain what my friend Sir Robert Stout calls "terms and concessions." We say it was necessary to obtain additional powers and rights, and a further amplification of the Chrystall contract. Both sides were dissatisfied, so I am instructed, with the alternative selection of lands.

Sir R. Stout: On the contrary.

Mr. Cooper: At any rate, the Government recognised, and I think it will be proved, that the alteration was quite as much for the benefit of the Government as for the company. It will be found that this was necessary for both parties. During these negotiations the work was to a very great extent suspended to the knowledge of the Government, and that this was so will be found by a reference to the contract of 1888. Three and a half years had elapsed since the time when the period of ten years would commence to run. The obligation in the contract of 1888 as to the preliminary expenditure of money was under clause 6. Three and a half years had expired. In clause 6 there was a period of twelve months mentioned, or six months from August, 1888, to 31st December, 1888. That would mean that on the 31st December, 1888, four years of the contract time had expired, and yet all that the company bound themselves to do within that four years was to expend a sum of £150,000, and even then it was evidently contemplated that it might be necessary to extend the time for the expenditure of that small sum of money. According to the contention of the Crown, by 1888 this railway ought to have been half completed. Nearly half the time had gone by, yet we find that, so far as the prosecution of the works was concerned, the parties only contemplated that by the end of 1888 a small portion of the works should be completed. The clause is, "The company will, before the 31st day of December, 1888, or within such extended period after the expiration of that date as may be allowed under the powers hereinafter contained, expend a sum of not less than £150,000 in the construction and execution of permanent works on the said railway." Let me point this out to the Court, as showing that Sir Dillon Bell's representation to Mr. Burchell was founded upon a true appreciation of the position. The Chrystall contract was made on the 17th of January, 1885. There is exactly the same provision in it for the expenditure of £150,000, and the time within which that £150,000 was to be expended would expire on the 15th of January, 1887. It was clearly, then, within the contemplation of the parties in August, 1888, that this work had not been begun, and it really seems as if the clause relating to ten years is a mistake.

Sir B. BURNSIDE: You are not asking us to adopt that view?

Mr. Cooper: No, but I am wishing to show that it was clearly not within the contemplation of either party that these works should be completed within the contract time.

Hon. E. BLAKE: It says "within ten years" in the contract.

Sir B. BURNSIDE: That being in the original contract, that term had been passed over without objection for two years.

Mr. Cooper: Let me draw your attention to clause 5 of the original contract, which says, "The contractor will, within two years from the date of this contract, or within such extended period after the expiration of such two years as may be allowed under the powers hereinafter contained, expend a sum of not less than £150,000 in the construction and execution of permanent works under its provisions on the said railway; such works to be of a character, in the opinion of the engineer, that will enable some complete section or sections of the railway to be fit for traffic as early as possible thereafter." Now, what was the position in August, 1888? A very small portion of that sum of £150,000 had been expended, and therefore the time within which the very first expenditure of moneys in connection with this railway was to be made obligatory was extended until the end of December, 1888. The words in section 6 of the present contract are practically the same: "The company will, before the thirty-first day of December, one thousand eight hundred and eighty-eight, or within such extended period after the expiration of that date as may be allowed under the powers hereinafter contained, expend a sum of not less than one hundred and fifty thousand pounds in the construction and execution of permanent works on the said railway, such works to be of a character, in the opinion of the Engineer, that will enable some complete section or sections of the said railway to be fit for traffic as early as possible." I gather, therefore, from the contract itself, without going into any outside evidence, that it was perfectly clear that both parties considered the impossibility of making any substantial progress with this railway before the expiration of very nearly one-half of the term, inasmuch as the railway was to cost £2,500,000, as the parliamentary papers show (the actual certified cost is £2,800,000), within a period, if we limit it strictly to the terms of the contract of 1888, of six and a half years; whereas by the contract of 1888 they were only under an obligation to spend £150,000 before the end of four years. At the very start, therefore, there was not only the representation of Sir Dillon Bell that the term of ten years was not intended to be the absolute period within which the railway should be completed, and that it was recognised that the company could not complete it within that time, but we have by the contract itself the obligation on the part of the company to execute something like one-twentieth portion of the work within one-half of the contract time, and that the position of the company was such that it could not do any more. The company was only formed in 1886——

Mr. BLAKE: They were only a syndicate intended to make a bargain with somebody else, as far as I can see.

Mr. Cooper: No doubt; and if the company had started in January, 1885, and had been in progress for the three years and a half precedent to August, 1888, it would have been reasonable to have said, "You shall finish the work within contract time." But what had to be done after the formation of this company, and after entering into the contract, was to prepare the necessary works. I am not quite sure whether the line had been properly surveyed. They had to let contracts, and to arrange for finance: this was in contemplation of the parties. They had to take all the initiatory steps, which were important, and which would take a great amount of time in starting a work of this description. All that takes time; and, when the contract time had expired, I say that circumstance alone, which is gathered from the contract itself, gives us the information to begin with upon which we can build a structure of abundant excuse for the delay which has taken place. I think we may fairly infer this: that at that time the company desired to carry out their work as fast and as satisfactorily as possible, and the colony wished those works to be carried out properly and as expeditiously as possible, but that neither party at all believed or considered that those works could be carried out within the strict limit of time in the contract; and I think that position went on for some time. Then we come to the question as to the delay. From the outset we started with a handicap of nearly one-half the contract time, as that time had elapsed. Next we come to the position of the acts of the parties since then. We are able to adduce evidence—and we are quite prepared to meet my friend in his opposition to the introduction of this evidence—we are able to adduce evidence showing the position of the parties anterior to the contract. The position of the parties at the time the contract was made, and the representations of the Government, were such that the contract was neither expected to be performed, nor was it contemplated that it should be performed, within the period of ten years. In determining the question of "wilful, unreasonable, or inexcusable delay" since the date of the contract, I say, without hesitation, that I do not think my friend will venture to assert that we are not entitled to place in evidence the whole of the questions which have arisen since the date of that contract, in order to show that there has not been an "unreasonable, wilful, or inexcusable delay." I submit this evidence to show how we were hampered by the Government, and how our finance was affected and crippled——

Sir C. LILLEY: You have to show that in connection with the finance.

Mr. Cooper: That is my contention, and we shall have a very clear case when we come to deal with the evidence in regard to excuse. When that evidence is led I say we shall have a right to go into the whole of the surrounding and collateral circumstances arising out of the relationships between the parties and out of the representations that one party made to the other, in order to show the difficulties, delays, and obstructions that were placed in the way of the company by the Government. Of course, it is a matter of proof, and we have a free hand to bring in to our assistance every fact which will tend to show that our delay was not without excuse. Now, I do not propose, in dealing with this branch of the case——

Sir B. BURNSIDE: You can adduce proof of it?

Mr. Cooper: Yes.

Sir R. Stout: What do you propose to adduce?

Mr. Cooper: I will simply state the broad proposition, that the evidence which we will adduce will be sufficient proof of the matters which have to be determined by the Court. I do not think it would be right for me at the present time, and after the elaborate opening of my friend, to go fully into all these matters again. I should state that the first ground of our excuse is the delay which took place before the contract was signed. I am going to suggest at this stage that the Government was responsible for the delay that arose in obtaining the increased finance: I suggest that as a second ground, and as a reasonable excuse. At any rate, it is a matter to be weighed by the Court in determining whether we have been guilty of inexcusable delay. If we can show that through the course of events over which we had no control we were unable to obtain primarily sufficient funds to prosecute this undertaking and to enable the company to complete the contract within the contract time, then I submit that we have shown excusable delay. The words "inexcusable delay" do not mean that the actual excuse—or, rather, the presence of the excuse—must be caused by the Crown. It does not mean that in order to bring ourselves within the meaning of that term I must show that the basis of our excuse must rest on some wrongful act of the Crown. I submit that it would be quite sufficient if, for instance, that our engineering chief, who had our plans and everything in his possession, had gone down at sea, necessitating the drawing-up of further plans, which would have taken twelve months to do. It would have been quite sufficient to have adduced that fact as a reason why we could not proceed with the prosecution of the work, and it would have been a sufficient ground of excuse for the delay. In such a case we would have lost, by the act of God, the very foundations upon which we based our contracts, and we would have to take, say, a couple of years' time to produce that material again. That would excuse us from the delay; so I submit that it is a question of evidence, a question to be weighed subsequently by the Court; and I submit it is perfectly legitimate for us to say we anticipated when we formed this company that within a reasonably short time, and at a reasonable and small expense, we should be able to raise sufficient funds to carry out the work. A crisis occurred: the financial market was disturbed—we could not get our funds; and when we got them we had to pay a large amount for the money. That excused us on our part, because we were not able to carry on our work without the money, and it was contemplated by the Crown that we should finance and borrow money in that way. It was an excusable delay. I submit we are entitled to produce evidence to show that the delay which arose in obtaining a sufficient sum of money to enable us to enter into the vigorous prosecution of these works was through circumstances over which we had no control. We do not say upon this head that those

circumstances were brought about by the action of the Government, but we do say that they were not brought about by any wrongful conduct on our part. Now, we also submit that we are entitled to bring to our aid, in considering the question of excuse or want of reasonable delay, all the circumstances we have submitted already to this Court—that the Government have committed, on their part, a breach of the contract. We are entitled to show the circumstances which would justify the financial public in saying that the actions of the Government so interfered with the probable success or otherwise of this contract that we held our hands until we saw how things were going to eventuate. I submit we are entitled to bring to our assistance, whatever our cause of action may be, the action of Parliament in depreciating the value of our lands by the system of graduated taxation. Whatever cause of action that might give us as a distinct breach of contract, we are entitled to include that circumstance as a reason for the difficulties that were placed in the way of the company in obtaining the necessary funds for the prosecution of the work. We are entitled to show that the very security which was set apart by the Crown, under our contract and under the schedule of specific values, was reduced in value very considerably by the introduction subsequently of the altered system of taxation. Whether we are entitled to recover damages for that reduction is another matter; but I submit that we are entitled to introduce that evidence as a matter of excuse in connection with the delay which took place in the prosecution of this work. I submit we are entitled to call to our assistance again the action of the Government in respect to these Proclamations regarding the land-grants—whether they were *bona fide* or otherwise. If they were not *bonâ fide*, then we have, as Sir Robert Stout stated yesterday, a direct breach of contract; and if *bona fide*, then we are entitled to show that the action of the Government in issuing these Proclamations crippled the company effectually, and rendered it difficult for it in this position to enter on to the reasonable prosecution of the work, or to complete the work within the contract time. We are entitled to call to our assistance the obstructive action of the Government in connection with our titles. Whatever damages we might be able to claim in connection with any wrongful act on the part of the Government in withholding those titles and interfering with the right of the company to properly deal with lands which they were entitled to select, it must have had, and did have, an exceedingly detrimental effect upon the power of the company to carry out the contract. We are entitled to bring all these circumstances into evidence, and to ask for the consideration of the Court upon them. In short, I submit, in answer to my friend's challenge as to how we were affected by the action of the Government, that we are entitled to show that those actions constituted not only a breach of contract, but impeded our operations and interfered with our power to borrow for the carrying-on of these works. We do not say that the Government physically placed any obstacle in our way, but we do say that the Government have from the outset shown a determination, which has been carried on up to the very day of the Court sitting here, to obstruct the company from first to last, and to throw difficulties in the way of the company in the carrying-out of their works. Why, the very act of seizure—perhaps I may be departing a little from my line of argument—could have been contemplated with no other purpose in view than to cripple the company in conducting these arbitration proceedings. The very fact that the Government suddenly stepped in without any reason and seized this railway, and so destroyed the company's power of raising money on the line itself, is only one of a series of acts which started practically during 1888, and culminated in the objection of my friends that the Arbitration Court could not sit to hear these grievances.

Sir R. Stout: Damages for that also!

Mr. Cooper: I am only answering your challenge as to how the acts of the Government obstructed us, and I repeat that the Government is obstructing us and throwing obstacles in our way at the present time. Intimately connected, therefore, with the question of unreasonable and inexcusable delay is the question of wilful breach of contract. It is quite clear, as I submitted to the Court a short time since, that the decision of the Governor is not final. We are brought out of the category of the cases mentioned by my friend—those building cases in which the third party may be a servant in the sense of an architect, engineer, or surveyor. Such a case, where an extension of time is to be granted, or the opinion of an architect or surveyor is to bind both parties, is quite outside the category of this case, because it is not contemplated that the opinion of the Governor is full and final, and it is contemplated by the statute that his act should be reviewed.

Sir R. Stout: I did not refer to that argument, but I referred to the question of the proclamation of the reserves.

Mr. Cooper: The very foundation of those cases is that there is no ultimate Court of Appeal. The arbitrator is the master of the situation, and his decision, unless it is found on fraud, or he is in collusion with one or other of the parties, is a conclusive decision. My submission to this Court is that you gentlemen are the Judges. We do not dispute that your decision of this question is to be final and conclusive. I may refer, of course, to clause 47 as showing that it was quite clear that, except in one instance, the remedies of the parties were to be taken under the arbitration clauses—in one instance only: "Provided also that nothing herein contained, excepting the provision of clause 44, shall be deemed to control or interfere with any provision or arbitration contained in the said Act or the principal Act." Now, the only power of arbitration in the said Act or principal Act is in reference to the settlement of the amount which the Governor should pay for the railway if he elects to purchase. That is the question which has been reserved, and which has been taken out of the arbitration provision.

Sir C. LILLEY: That is another power of arbitration.

Mr. Cooper: But the effect is this: that the very fact that it was considered necessary to introduce that proviso destroying the jurisdiction of the arbitrators under the arbitration clause in relation to fixing the amount which should be paid by the Governor in the event of his electing to purchase the railway—the very fact that it was considered necessary to introduce that proviso, I submit, is a strong argument that all the other remedies which except under that clause 44 the

parties would have had are restricted and controlled by clause 47. The proviso is, "nothing herein contained excepting the provision of clause 44."

Hon. E. BLAKE: It seems to be indicated that there are certain other provisions for arbitration contained in the principal Act, which says they are not interfered with by this particular provision for arbitration.

Mr. Cooper: The only provision for arbitration contained in the statutes is the provision relating to the purchase of the railway. There is nothing else, and it cannot be suggested that the clause extends to other matters.

Sir R. Stout: What clause do you refer to?

Mr. Cooper: The proviso, clause 47.

Hon. E. BLAKE: Is the construction of your argument that this reference to a Judge is to be taken as equal to a provision for adjudication?

Mr. Cooper: I say it is not arbitration, and if it had been intended that the Judge's power to determine this question of the seizure of the railway should be saved under this contract they would never have introduced such a proviso. That is the point, and I submit it as a feature in the case. It is a strong argument, I submit, of the general intention. The proviso to clause 44 simply says that in the event of the purchase of the railway you shall not get your 5 or 10 per cent. which is provided by the Government Railways Construction Act in addition to the then value of the railway (you get, say, 5 or 10 per cent. added to the assessed cost of the line), but you shall get in lieu of it interest on your debentures. Now we come to the next question, Has there been a wilful breach of contract? Of course, a great deal of the argument on this point is of necessity covered by the arguments dealing with the question of unreasonable and inexcusable delay; but before I come to deal with the question of wilful breach of contract, I may be permitted to refer to one or two clauses in the deed itself. Of course we are not asking the Court to rectify this deed, but I think it may be fairly considered that there is material in this deed which shows that it is within the contemplation of the parties that this contract could not be completed within the ten years referred to under that very clause 44. It is contemplated in that clause that the construction shall take until 31st July, 1897. That is my reading of it. "In the event of the purchase of the said railway by the Queen or on her behalf in accordance with the Acts relating thereto, such a sum shall be included in the price to be paid for such purchase as is equal to the amount which may have been actually paid to the shareholders or debenture-holders of the company as interest during construction for the period ending the 31st day of July, 1897." It is a very strange thing that date should have been introduced if it was not within the contemplation of the parties that the period of construction should at any rate continue until 31st July, 1897.

Sir C. LILLEY: Are those ten years for the completion of the purchase?

Mr. Cooper: I am referring to the date to which the interest of the debenture-holders shall be paid. The clause continues: "the rate not to exceed an average of 4 per cent. per annum, except in the case of shares or debentures representing £500,000 in amount of capital first raised, in regard to which the rate shall be 5 per cent. The total amount of such interest to be added to the price of the said railway shall not exceed the sum of £400,000." I think I might fairly take up this position, that if this Court thinks that there has not been any unreasonable or inexcusable delay their finding must of necessity carry with it that there has not been any wilful breach of contract. There may have been a breach of contract; but we submit that, if we take into consideration the circumstances of the parties, there has not been even a breach of contract; but if that breach of contract has been caused by circumstances which afford a reasonable excuse for the delay which has taken place, then of necessity it negatives the question of wilful breach of contract.

Hon. E. BLAKE: You say there has been no breach; but, if there has been any breach, there was a reasonable excuse for it, and, therefore, it was not wilful.

Mr. Cooper: I submit that the words "wilful breach of contract" mean that there must be such a breach as shows entire disregard by one of the parties of its contractual obligations. The word "wilful" implies an intention regardless of consequences to break the contract, and does not mean the breaking of that contract unintentionally—it does not mean a breaking of it forced upon one of the parties by circumstances over which that party had no control. By way of illustration I might refer to the power of re-entry in the case of a lease in consequence of non-payment of rent. One of the parties may break the covenant, but if it has not been "wilful" the Court will relieve; and, in reference to the Midland Railway, the circumstances have been such that the failure to comply with this covenant has not been wilful. Such an illustration applies in this case. The question is not whether there has been a breach, but whether that breach or failure has been the wilful and deliberate act of one of the contracting parties; and I submit that we have established the position that we have excuse for our delay, which carries with it the negative of wilfulness on the part of the company, if any breach of contract has been committed.

Hon. E. BLAKE: You have some authorities on the meaning of "wilful"?

Mr. Cooper: I submit that "wilful" does not mean a mere breach. It might be a technical breach: that would not be wilful. If we have committed a breach of contract, it has been forced upon us by circumstances over which we had no control—by circumstances which were in great part the result of what, we submit, were a serious breach of contract on the part of the Government themselves, or the result of an obstructive policy on the part of the Government, resulting in crippling the energies of the company, and rendering it impossible for it to go on.

Sir B. BURNSIDE: A wilful breach of contract is, you say, an intentional act on the part of the company to break the contract?

Mr. Cooper: Yes.

Sir R. Stout: That is too wide.

Mr. Cooper: I am quite satisfied with that definition. I would rather add, that the words, "without excuse," mean it must be an intentional breach of contract which could not be excused.

Sir B. BURNSIDE: Is not the seizure an excuse?

Mr. Cooper: That is a question of fact. I submit questions of law do not enter into the case at all; and that, if this case was being tried by a jury, the question to be submitted would be, "Had a wilful breach of contract been committed?" And the fact would have to be proved in evidence that this breach of contract which has been committed is intentional and inexcusable. I say there must be wilfulness.

Hon. E. BLAKE: A deliberate piece of neglect, and with the knowledge that it is a breach.

Mr. Cooper: Supposing I was upon the Wellington wharf and a cart come behind me, and I had to jump over the wharf to avoid it, is that to be held to be a deliberate act because I have got to do it to avoid being crushed? It cannot be said that I wilfully attempted to drown myself. What I wish to enforce is that an unintentional act—an act you are compelled to take, which is forced upon you——

Sir B. BURNSIDE: The meaning of the word "wilful" surely does not require explanation.

Mr. Cooper: I submit not. I have submitted to the Court mainly now the reasons upon which we rely for the Court's intervention in this matter. I will gather them up in a few observations. First, I have submitted that there has been no rescission of the contract, and that the contract still exists. Now, I would like to add in reference to that, which is the initiatory stage of the jurisdiction, that the Government cannot affirm and disaffirm at the same time. We say that they have done certain acts since the 14th January which affects their position. In dealing with the first point—the question of rescission, which underlies the want of jurisdiction—we say a contract either exists in the whole, or is destroyed in the whole. If we find one party affirming a contract, and the other party also affirming a contract, it exists for all purposes. I have already pointed out to the Court that, after the 14th January, 1895, distinct acts were done by the Government under this contract. For instance, Proclamations were made which the Government ought to have made, if the contract was at an end, under the Mining Act. They chose to make them under the powers contained in the contract. That is an act of affirmation. Then, they agreed to selections by the company of lands to which the company were entitled. That was an act of affirmation recognising the contract. It is true that some weeks afterwards they disaffirmed their acts and refused to allow us to go on with our selections. The very act of seizing the railway was an affirmation of the contract, and could only have been exercised on the ground that there was an existing contract between the parties authorising one of them to take steps against the other; and I also submit that no contract can be rescinded by one party where the consideration for that contract has been partly performed. The case my friend quoted—the Victorian case, *in re* Higgins, 11 Victorian Law Reports, 140—and which I took to be the foundation of his argument that the jurisdiction of the Court had gone, is a very different case to this one. In the first place there was a distinct and definite power of rescission given in the contract itself. The power is, "It shall also be lawful for the Engineer-in-Chief at any time to call upon the contractor by notice in writing to engage such number of mechanics as the Engineer-in-Chief may, in his opinion, consider necessary to push forward the progress of the work; and, if the contractor shall fail to carry out such instructions, the Engineer-in-Chief shall have full power to declare such neglect to be a wilful breach of the contract." Then, there is power on the part of the Board if, in the opinion of the Engineer-in-Chief, the contractor shall fail to make sufficient progress with the contract, to absolutely determine the contract, enter on the works, and forfeit materials, plant, and all benefits of the contract to the Board. With that power included in the contract, the Court decided that, as the contractor had failed to prosecute the works in accordance with the contract, and the Board had consequently determined the contract, the power to arbitrate, and the jurisdiction of the arbitrator, had been determined. Of course, one can quite understand that decision. There was no collusion between the Engineer-in-Chief or the Railway Commissioners, or the Railway Board with whom the contract was made, and the powers of which were taken over by the Railway Commissioners, and arbitration was claimed by the contractor after the contract was put an end to. The arbitrators sat and made their award under the contract, which had been determined before submission. We do not dispute the authority of that case at all; but I submit that it is a very different one to the present one. The second point which we submit is this: that if the contract has not been determined, then the arbitrators sit, and sit with the jurisdiction of the Supreme Court transferred to them by the contract, with all the powers of the Supreme Court, and they can enforce all remedies except the remedy excepted by the last proviso in section 47. If that is so, then it is within the jurisdiction of the arbitrators to determine the question of unreasonable and inexcusable delay and also to revise the action and opinion of the Governor with reference to the alleged wilful breach of contract, and to say that the facts justify the contention that there has been no unreasonable and inexcusable delay and no wilful breach of the contract. Then, if that be so, a wrongful act has been committed by the Queen and Governor in seizing the railway, and the arbitrators have power to make such an award as may to them seem proper.

Sir C. LILLEY: To restore the position?

Mr. Cooper: It seems to me that the arbitrators would have power to restore the position and to do all things that would be reasonable.

Sir B. BURNSIDE: Which is the interpretation clause?

Mr. Cooper: It is in the contract of 1888.

Sir B. BURNSIDE: The contract says the word "Governor" shall have the same meaning as in the Interpretation Act of 1878.

Mr. Cooper: The Act of 1878 says, "'Governor,' 'Governor-in-Chief,' and Lieutenant-Governor,' mean the Governor of the colony, and include the person for the time being lawfully administering the Government of New Zealand." In this instance, the Governor did not act in Council. It was the Government of the day.

Sir B. BURNSIDE: Is there anything in the contract which says the Governor may seize the railway, or that will apply to the relations between the Governor and the company?

Mr. Cooper: There is nothing stated definitely in the contract in reference to the Governor's power to seize.

Sir B. BURNSIDE: Nothing authorising it?

Mr. Cooper: No.

Sir B. BURNSIDE: But there is matter relating to it?

Mr. Cooper: No, nothing whatever.

Hon. E. BLAKE: I do not see that the seizure has any operation in settling anything, unless after the seizure the company makes default in paying its accounts. Things go on. Then, in case of subsequent default in paying money, the power is optional. The Governor may take possession and complete the railway, or may restore possession to the company. That sort of thing might go on for ever if the company pays.

Sir B. BURNSIDE: The Governor may take possession, if he sees fit, on giving six months' notice to the company, under clause 43.

Mr. Cooper: I submit that the meaning of that clause is that the Governor may, if he chooses, instead of taking possession, elect to purchase, and then the amount to be ascertained as the value of the railway shall be ascertained and determined by arbitration under "The Railways Construction and Land Act, 1881." I submit that this would show that the contract is not in any sense put an end to. He can say, "I will take possession of the railway," or he can say, "You have committed such a breach of the contract that I shall elect to purchase the railway."

Hon. E. BLAKE: The mere act of taking possession does not put an end to the contract.

Mr. Cooper: Just so, that clause can be invoked in aid of the position we take, that the contract still exists. I have already pointed out that the provisions under clause 47 absolutely prohibit us from going into a Court of law, and there is a similar provision in the Arbitration Act of 1890. Clause 4 of "The Arbitration Act, 1890," makes a submission to arbitration irrevocable in the case of disputes or difficulties which may arise. We have therefore a complete submission here which by the contract is irrevocable; and, therefore, this Court has the fullest jurisdiction to inquire into and adjudicate upon every question which has arisen and now exists in difference between the parties, either arising out of the contract, or, on the authority of Willeston *v.* Watson, collateral to the contract. I will now refer to the question of damages. I may say a few words in reference to the second arbitration. We practically claim the same amount under this arbitration as we do under the former one. The total amount claimed is £1,817,900. There is an addition of £233,000, which has arisen in this way: In arriving at the amount of the first arbitration an amount of £100,000 is deducted for the value of the railway as it existed on the 14th of January. We no longer have our railway. We may have the right to ask the Government to give it back, but we have lost it for the time being since it was seized. In the meantime we have not got it, and have not the power of earning the money it was bringing in, some £4,000 a year, even according to the Government estimate.

Sir R. Stout: It was only £3,000.

Mr. Cooper: The Government's receipts were for the winter season. We claim £130,000 on account of the refusal of the Crown to allow us to take lands we had earned, and in consequence of the refusal of the Crown to settle the question in dispute between Sir John Hall and the company, and the general refusal of the Crown to complete our titles. It is almost impossible to say what damage the company has suffered by that, inasmuch as we have been placed in this position: that we can neither use our lands, give titles for lands, nor enforce agreements for the sale of those lands already earned, so that practically we have lost a very large portion of the previous selections by the company. Of course all these matters will be estimated amounts, but they will be capable of proof later on. I am afraid I have taken up a considerable portion of your Honour's time, but it was my duty to the company to open the question of this arbitration at some length. I hope, however, that I have not wearied the Court in giving the particulars of the case upon which we rely, and placing the grounds before the arbitrators upon which we ask for an award.

Sir R. Stout: In reference to these new particulars given, I have to say that the first two paragraphs are copies of what were handed in before in the first reference, and that they are really too vague, and give us no information whatever. I therefore submit that it is making a fool of us to say that we can deal with an important case like this on details which would not be considered sufficient in a police Court. As to the third paragraph: "That the company being entitled to select under the provisions of the contract land to the amount of £19,304, and having given notice in that behalf, the Queen, by the Minister for Public Works, on or about the 20th day of April, 1895, refused to allow the company to exercise its rights," the reason of that is that we have refused to admit that the contract has existed after our notice of March. If we had allowed the company to select lands afterwards we should have the point of waiver raised. The next paragraph says: "That the company being entitled to select lands, the Queen, under agreement with the company, having sold certain such lands, being those described in the B 1 map as 'Nelson Towns: Reefton' (196 sections in number), and having received the proceeds thereof (the particulars of which have been refused to the company) has in contravention of the contract refused to pay over the same to the company." We hold certain moneys, and decline to pay them over on the ground that if an account were taken the company would be found to be owing us more than we owe them. Next: "That the company being entitled to have the titles to other lands already selected issued, under the provisions of the said contract, the Queen has, in contravention of the contract, refused to complete and issue such titles." The Government has refused to do anything since March; we admit that.

Sir B. BURNSIDE: With regard to the list of moneys, you claim to hold them?

Sir R. Stout: Yes. We have a cross-claim against them far in excess. Then, as to the 6th clause in the claim, "That the Queen having agreed to refer to arbitration a question as to the

boundaries of B 1 Block 65 (which had been selected and dealt with by the company) has refused to proceed to such arbitration, whereby the company has been prevented from completing the sale of the said B 1 Block, and has suffered great loss and damage." That is the most extraordinary contention I have ever heard of. I apprehend that if they have appointed an arbitrator under the contract they need not care whether we have appointed one or not. It is surely a most extraordinary thing to say that they claim damages before this Court because their case is not going to another Arbitration Court. This is the most novel form of damage I ever heard of. I am not surprised now that they should claim damage on the ground that we held back the contract because they were not notified at the time. The contract was agreed to on the 3rd August, in London, and it was signed a week after it arrived in New Zealand, and this as a ground of damage is in keeping with the other ground I have just mentioned. It is a wonder they have not raised as another ground of damage that we have not agreed to the question of jurisdiction here. It just shows the straits in which my friends are placed. The next ground of claim is, "That the Queen, on the 25th day of May, 1895, in contravention of the contract and without any due or proper cause, took possession and assumed the management of the railway then in possession of the company, and wrongfully converted the same to her own use." As to that, I had to deal with it on the jurisdiction point, and I shall deal with it now. I might say first, in dealing with this question of damages for not giving the lands and so on, that a point of great importance will at once arise on this. This is a contract to give a land-grant to a company. That contract is sanctioned by the Legislature, and it will have to be admitted by the other side that the Queen can make a contract to give land or give money without the sanction of the Legislature. That has been held on many occasions in our Courts. This, however, is a special contract to give land for the construction of a railway. Can a Minister, by refusing to give the land, entitle the company to sue the Government and get money? If so, it is practically repealing a statute. We will suppose that the Minister refused to give the land the company were entitled to: can it be thought for a moment that they can get behind the Legislature and get money out of the State by appealing to a Board of Arbitrators and claiming damages for the non-giving of the land? That is making a new contract, of which the Legislature has no knowledge and which has never been sanctioned. The position is this: Can a person who makes a contract with the Government by virtue of a statute in which he is to get land as the only payment for the making of a line, go before arbitrators and say, "No, I am entitled now to get cash." That is varying the whole contract, and is the position in which we are placed. It means the setting aside of a statute of the Legislature, and it means, whether the act was rightly or wrongly done by the Minister, allowing the company cash for the construction of the line, when the Legislature says it shall not get cash, but land.

Sir B. BURNSIDE: Does it say so?

Sir R. Stout: It says the company shall get land; it does not say they shall get cash. I say the company has no right to get cash. Whether they have the right to ask that the arbitrators shall award land is another thing; but, so far as this money-claim goes I deny that the arbitrators have the right to give it.

Hon. E. BLAKE: Our power is not limited in respect of the purchase to the giving of land.

Sir R. Stout: Not money; not to award damages for not giving the land. Otherwise the contract would be a new contract given by the arbitrators, to which the Legislature had never given its consent.

Hon. E. BLAKE: How do you mean? If a man contracts to give me gold I am not bound to get gold only.

Sir. R. Stout: I am dealing with this thing as from the terms of the deed. The contract of the Government is to give land.

Hon. E. BLAKE: You treat this as a contract with the Government.

Sir R. Stout: With the colony—the Queen. The Queen is the principal in law, and the name only that can be used in judicial actions.

Sir B. BURNSIDE: I have been trying to get at that all along.

Sir R. Stout: It has been laid down in Hearne's "Government of England."

Sir B. BURNSIDE: I wanted to know if that was understood in a personal sense, or virtually only the name in which the contract was entered into between the company and the Government of New Zealand.

Sir R. Stout: No doubt, it is the Government of the Queen in New Zealand. Next, I come to this point in reference to the seizure, and I want first to deal with the law points raised as to the breach of the contract, and how a contract can be ended if there is a breach. Now, I submit that my friend was inaccurate in saying that the word "rescission" can only be properly applied to the kind of contracts set aside on the ground of misrepresentation. The word "rescission" is only applied in Courts, both here and in America, in cases where the action of the party is such as to enforce the other side to say that he does not intend to perform his contract. In such case the other side may say: "Your conduct is such that we shall not act any longer in the contract." The case of Frankton and Miller really turned on the pleadings, but there are late cases showing conclusively that if the action of a seller of goods is such that he is not complying with his contract, then the buyer may say: "Although you have supplied part, you have not complied with the contract and it is at an end." The class of cases showing that is Voweles and Shand (Law Reports, 2 Appeal Cases), and it cites the well-known case of Withers *v.* Reynolds. It begins at page 455 (L.R. 2 App. Cas.). The case was as to two contracts for the sale of 300 tons of Madras rice, which were made in London. The declaration stated that the plaintiffs should sell and deliver to the defendants, and the defendants should buy and accept from the plaintiffs, . . . Madras rice, to be shipped at Madras or coast for the port of London, during the months of March $\frac{\text{and}}{\text{or}}$ April, 1874, about 300 tons, per "Rajah of Cochin," at, &c., for "fair pinky." The prompt was to be "one month from br aking bulk." There was another contract for the same number of tons, expressed in the same

form of words, the particulars of shipment to be declared when received. Plaintiffs alleged the arrival of the vessel, and the refusal to accept. The defence was, *inter alia*, that it had not been shipped in the months of March or April, but earlier. Held that the contract had not been complied with, and that though the contract was in part performed in March. The defendants here said they would not perform their part of the contract because the plaintiffs had not completed theirs. Practically, therefore, the non-compliance with these conditions disentitled the plaintiffs to insist upon the defendants' performance of their promise. Then, my friend recited the case from the case of the Court of Appeal—the Mersey-Naylor case. The decision is one of the House of Lords, reported in Law Reports 9, Appeal Cases, 434. There is, perhaps, nothing better to illustrate the principle of law than to quote Lord Blackburn, at page 442: "I, myself, have no doubt that Withers *v.* Reynolds correctly lays down the law to this extent, that where there is a contract which is to be performed in future, if one of the parties has said to the other in effect, 'If you go on and perform your side of the contract I will not perform mine,'—in Withers *v.* Reynolds it was, 'You may bring your straw, but I will not pay you upon delivery, as under the contract I ought to do; I will always keep one bundle of straw in hand, so as to have a check upon you,'—that in effect amounts to saying, 'I will not perform the contract.' In that case the other party may say, 'You have given me distinct notice that you will not perform the contract. I will not wait until you have broken it, but I will treat you as having put an end to the contract, and, if, necessary, I will sue you for damages; but, at all events, I will not go on with the contract.'" So it was laid down, not only in the law of England but in the Supreme Court of the United States, where all these cases are referred to. (Nodrington *v.* Wright, 115 United States Reports, page 188.) It is a very able judgment, and the point is put exceedingly well in the judgment of the Court, delivered by Justice Gray. He points to the insufficient performance, and founds it on that and says, as to the Mersey case and the other (page 210), "That the failure of the buyer to pay for the first instalment of the goods upon delivery does not, under the circumstances, evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract, and to decline to make further deliveries under it." I point this out to show the reason of not being entitled to rescind the sale by reason of the other party, and therefore the words "to rescind" are not wrong words to use. There are other cases to the same effect; and the principle of law really is this: If there has been such action on the part of one of the parties to the contract as to show to the other party that he does not intend to carry it out, that he cannot carry it out, and never intends to carry it out, then the other party can say, "I am not going any longer to keep this contract between us; our relationship has come to an end." I do not say what the rights may be, but this other party has the power to say so. Now, my friend says we have no excuse, and have no right to do that. It appears in evidence that about one-fifth of the contract has been finished. In six years they had finished one-fifth, and, by working at the same rate of speed, the contract will be finally finished in 1921. That is what they call reasonable time to construct the railway. They would need twenty-six years to finish the rest of the contract. We shall show, dealing with this also, that practically there has been an abandonment of the contract. As to that, we have only to take the evidence. Then they came and asked the Government for more concessions. The evidence is conclusive that their own accredited agent came to the Government and to Parliament, and said they were not going on with the main part of the contract, which we consider the most important part of it—namely, the railway from Reefton to Belgrove. If one takes the whole of this contract, he will see why I am right in calling it the most important part. The aim of the Government has been to get a through line from one end of the island to the other, that the North Island should be connected with the southern one. There has been a great contest as to how that should be done. One party said it should be *viâ* the East Coast, between the Kaikoura Mountains and the sea, and it was contained in our statute that the route should be *via* the Waiau and Reefton, through the Cannibal Gorge. But the point has always been that Nelson and the other parts should be connected with the other island, so that people could travel from one end to the other, merely crossing the straits. In construing this clause, I have made this proposition clear: I submit that the case will show that if one party to a contract acts so as to show that it has no intention to fulfil that contract, and cannot fulfil it, and if he has taken so long to do it that he cannot within a reasonable time do so—if one party to the contract so acts, the other party has a right to say, "You have shown an intention on your part not to complete your bargain, and the partnership between us has expired." I shall not weary the arbitrators by citing so many cases; but I have stated those which are recognised by the law of England. Then, we have a statement made in 1892, when they came asking concessions from the Government, and the witness was asked by the Chairman of the Committee—

"Are we to assume, Mr. Wilson, that the meaning of the new arrangement you propose in this letter of yours (No. 7) is that the connection between Reefton and Belgrove is not to be completed?—Not to be gone on with at present. Subject to further negotiations, it is to be completed.

"Do you mean to say that the company is still prepared to bind itself to complete it at some future date to be agreed upon?—It must be under the conditions offered in the first letter, in which you see the company offer to do that; but the guarantee would have to be increased to 3½ per cent., and the amount of the guarantee would have to be increased to £2,900,000."

Then, there are other parts:—

"What is the length proposed to be left undone?—Between Reefton and Belgrove?

"Yes?—About seventy odd miles.

"You have several modifications on the original contract with regard to the mining reserves. Have you got the original contract of August, 1885?—I have not got it with me, but that could be easily procured."

Then, in another part there are references. There is a question asked about the Nelson end (Question 433). The company asks to be relieved of the Nelson end, and the answer is, "We are willing to be relieved, or, under certain conditions, to finish it."

"435. You see no chance of modifying your proposals?—Not in regard to the Nelson end."

Now, what does all that show? There is the speech of Mr. Bell showing that they could not finance. That was in 1892. Now, what took place in 1894? In 1892 there was a declaration by one of the parties to the contract that "We cannot complete this main part of the line from Nelson to Reefton. We do not contemplate doing it. If you accept our proposels, we will do so, but not otherwise." The reason is obvious. They had selected all the available land, Mr. Wilson says. They could not get any land on the other side for settlement. Mr. Wilson admits they had them all pegged out—all the good land—and they had come to the end of their tether, and they wanted the Government to give them debentures guaranteed at 3½ per cent. Then, the question comes before the parliamentary Committee in 1894. It is again asked, "Is it the intention of the company really to finish this line from Reefton to Belgrove?"

Mr Hutchison: We will call evidence on that point.

Sir R. Stout: I am only dealing slightly with our evidence, so as to show the nature of the refusal, and that would come within the nature of the case I have mentioned. I will only give this:—

"Do you think the company ever had any intention of completing the original contract?—Undoubtedly, until the question of traffic was gone into closely.

"If it had been gone into closely, would the company not have entered into the original contract?—No.

"I wish to ask how they could make it appear that they wished it to be understood that the Government or the House of Parliament never intended that portion of the line gone on with?—It shows the company could have gone on with the east and west line without the Reefton–Belgrove portion.

"On the face of it, does it not show that the company had no idea of ever completing that portion of the line?—The company were prepared to go on with the line subject to the proposal of the Government——"

The proposal of the company being that the Government should give a guarantee of £250,000, and, if the Government did not accept these proposals, the company could not go on. The company are not prepared to submit any proposals with reference to the Reefton–Belgrove portion of the line until the east and west line is finished. And then the Parliament passes a series of resolutions in 1894, which were that Parliament would give further concessions—new concessions—if the company showed to Parliament, or to the Government, that they were prepared to finish the Reefton and Belgrove line. On the 2nd October, 1893, that resolution was passed. The House said they were prepared to do so in lieu of the land-grant. This is the point: that these modifications of the contract were to be made on the condition only that the company is in a position to raise the necessary capital to complete the railway-works in the contract. The company wrote to us on the 22nd October, 1894 (letter from McDonell to the Premier): "At the same time, I am instructed to point out that it is not in the power of my directors to satisfy the Government that they are, or will be, in a position to complete that portion of the line from Belgrove to Reefton which resolution 'D' appears to them to include. To comply with the terms set forth in the resolution, my directors are convinced that nothing short of an absolute guarantee of interest by the Government would suffice."

Hon. E. BLAKE: There were two propositions—first a proposition as to the basis, and second, if it were constructed, to make some modifications in respect to the construction of the remainder.

Sir R. Stout: That is so. They would not even go on with the remainder until the guarantee was given. Now, what is the position of this matter dealing with the question of our seizure of the line? This is the question: This offer was made a year before we put an end to the contract by seizing the line. They had not spent £1 on the line for a year; they had done nothing towards constructing the line.

Sir B. BURNSIDE: Where do we find that?

Sir R. Stout: We will prove that. That is the position, and that is the reason we claim that they have given us notice of abandonment, and can practically do nothing. I have not, as the Court will see, opened the evidence at length, but am only stating it generally. We say, "You have told us that you do not intend, in fact, to complete the contract; you have told us that you cannot complete; you have performed not even a third of the contract in six years; you will want twenty-six years to complete the balance; you have no finances, and cannot do it; we have a right to step in and say you can do nothing." Since March my friend cannot contend that we have done anything to treat the contract as in existence. That is why we have refused to complete the title to them or to pay cash for the Reefton Section.

Sir B. BURNSIDE: You say they have forfeited their contention by ceasing to work.

Hon. E. BLAKE: You spoke, in opening, of indicating an abandonment, and putting you in the position of saying, "You have abandoned and put an end to the contract." But after that you did act.

Sir R. Stout: I will meet that by saying that it is true that, after they stated in 1892 that they did not intend to complete, the negotiations took place in 1893. In 1894 they also said they would not complete. Now, this was a continuous breach. It is true we did not step in. We waited twelve months, during which they did nothing. They did no construction works in the twelve months immediately preceding our notice. It cannot be said that, because we wait and do not take advantage of their first expressed intention, that will deprive us from stepping in and saying there is a continuous breach. You have not only done nothing, but have said expressly

you will do nothing. That brings you within the statute as to inexcusable delay. That would bring in this position: that, if we had relied on their apparent intention to abandon, they might have said, "We have kept men working all the time, and therefore there is no unreasonable delay in the works." After we have waited, and there has been no construction of the works, now we step in on the two grounds, first that you have shown your intention of abandoning the work and of not completing the contract, and also that it is unreasonable delay that you have spent no money for twelve months before the seizure. Now I come to the question as to the jurisdiction of the arbitrators. To test this question under sections 1, 2, 3, 4, 5, and 6 of the Act—and in dealing with that I have to say that we raised the question, not that we were afraid that the facts are against us, but that we must see that we keep within the four corners of the statute. We are not like private individuals, and the Government would be open to censure if it were not to see that these Acts were complied with. I again repeat that we are not afraid that this delay and this notice of abandonment have not been reasonable for anybody to decide; but, to carry out the statutes of our colony, we must raise this point: that the statutes of the colony have declared the tribunal to be a Judge of the Supreme Court of New Zealand, and it must be a Judge. Now, what is this statute? The Railway Construction Act is applicable to the contract. My friend has admitted that, and also frankly admitted all these powers exist in the Governor, because section 43 assumes that there may be a seizure under this section. "The Governor shall be entitled to take possession of the line." The only way in which the Governor would be entitled to take possession would be under section 123. The principle of law that we seek to apply is this: that if a statute points out a certain thing, offers a certain right and gives a certain remedy, the statute-given remedy is the only one that can be followed. To take an illustration, it is a common one, and may be illustrated by Dawson's American and English Cases. Here is a statute authorising a railway to be built by the Government. If that statute gives no remedy to the person aggrieved, then the subject has no right; but if the statute provides, as it generally does, compensation, then the only way the person can get compensation is by proceeding under the special statute for compensation. The person cannot go to the Court and sue for damages; he must pursue the remedy provided in the statute, as pointed out in dealing with the case. We have many authorities to cite in support of this.

Hon. E. BLAKE: I did not understand Mr. Cooper to controvert that. I understood him to say that he did not apply it to this deed. That would be the single remedy. I may shortly state that it is not controverted.

Sir B. BURNSIDE: Does it necessarily exclude the parties from agreeing that there may be another remedy?

Sir R. Stout: If the statute gives a remedy such as is given here—that is, "may claim"—then in such case he must claim by virtue of that statute and in that particular fashion.

Hon. E. BLAKE: May they not agree, notwithstanding that, to create for themselves some other remedy afterwards?

Sir R. Stout: I understood Sir B. Burnside had put it in this way: that, because "may" was in the statute, might they not——

Sir B. BURNSIDE: No; might they not get another jurisdiction. There are cases which might be cited to show that if a remedy is assented to it must be valid. The same words, "may claim," are used in such cases.

Sir R. Stout: As to that, we start with this position: There is a very strong case I might mention which appears in 31, Law Journal, Ex. 349. The only remedy the parties had was to go to a Judge of the Supreme Court. The only question which turns upon that is, has the remedy which appears in the statute been set aside by the contract itself, or added to? I submit that the express words of the contract in section 48 show that it has not been set aside. I begin by stating that, of course, implied repeals will not be favoured, and the only argument my friend wants to use is that there were two remedies laid down, and he will be driven to this: that there is a remedy in the statute, and also a remedy by arbitration. What are the words of the contract in section 48? They are these: "It is also declared and agreed that these presents and everything herein contained shall be read and construed subject to the provisions of the said Act and the principal Act, except where the same are hereby expressly modified pursuant to any Act amending the said Act." Very well, is there not an express modification of section 126. There must have been a declaration that it is modified. It cannot be modified by inference. There is no express declaration. The words are, "expressly modified." It cannot arise by inference, and if expressly modified it is expressly modified pursuant to any Act amending the said Act. I therefore submit that before my friend can say that the contract means that section 124 is set aside he would not only have to show an express provision in the contract itself, but he would have to go further and show an express provision in some statute passed after the principal Act was passed, and he cannot do so. There is no express modification in any of the statutes, nor is there any express modification in the contract itself.

Sir B. BURNSIDE: It says, "the principal Act," which is not "the said Act."

Sir R. Stout: It says, "Subject to the provisions of the said Act and the principal Act, except where the same are hereby expressly modified pursuant to any Act amending the said Act."

Hon. E. BLAKE: This section imports that some subsequent Acts have been passed giving authority in some respect or the other to generally modify the provisions of the old contract or the provisions of the said Act, and then you have to look for the statutory authority.

Sir R. Stout: Yes, that is my contention; and I say there is no express modification provided in any Act. All that is provided is this: that in the Act of 1887 there is a clause saying that the Queen may make a contract similar to the one that has been drafted by the Select Committee. That is all there is power given to do—namely, to made a contract similar to that.

Sir B. BURNSIDE: Without any power to borrow at all?

Sir R. Stout: It does not say so.

Hon. E. BLAKE: Is it clear that you are quite right in applying the word "modified" to pursuant. Suppose, for instance, there was a general power of amendment in your subsequent Act, there might be no express direction to amend in any particular, and yet the general power to amend might be acted upon by an express modification of the Act.

Sir R. Stout: Of course, my contention is there is no express modification.

Hon. E. BLAKE: But you are contending that if there were an express modification it would not be warranted, because, you say, there must be an express power.

Sir R. Stout: Yes; to modify in that particular. In section 3 of "The Midland Railway Contract Act, 1887," the statutory power is as follows: "As soon as conveniently may be after the passing of this Act, the Governor in Council, in the name and on behalf of the Queen, may enter into a contract with the company for the construction, under the said Acts and this Act, of the Midland Railway. Such contract shall, as far as practicable, contain provisions to the same effect as are set forth in or authorised by the said Acts or either of them, or in the original contract, with such additions thereto and modifications thereof as are contained in the draft contract annexed to the Report of the Select Committee hereinbefore mentioned, as the same was finally adopted as aforesaid, or as may be necessary to give full effect thereto." What happened was this, so far as this clause was concerned: The arbitration clause was in the draft contract, and, I believe, has been adopted in this contract without the slightest modification or alteration. That is the position.

Hon. E. BLAKE: Your contention is that you find in the original contract this clause just in the same form as it was in the contract read by the Committee, and therefore there was no power to modify it—in fact, there was no modification, because it is the same thing.

Sir R. Stout: It was in the contract of of 1885, and it was in the contract before the Committee in 1887. It has not been altered at all, and there has been no modification of it; and therefore my friend will have to reply upon this: that this draft contract was an express modification of section 124. Now, I submit that cannot be contended. The point, therefore, about that is this: One has now to look at what are the things that have been referred to the arbitrators to settle. They are these: "If at any time hereafter any dispute, difference, or question shall arise touching the construction, meaning, or effect of these presents, or any clause or thing herein contained." Well, it is not suggested that if the seizure is an acquisition under the contract itself, it is outside the contract. Then you must come to this part: "Or the rights or liabilities of either of the said parties under these presents." Well, "under these presents" may mean that it is under the principal Act. This arises, not strictly under these presents; it is under the principal Act. I submit, then, that clause 47 is not nearly enough to cover the reference to arbitration of the question of the seizure of the line. My friend relies upon it that it would be wide enough by inference. There is no express declaration that it is covered by it, and he wished to show therefore that it arises by inference, and that the language of section 47 is wide enough to cover it. When a person speaks about a thing being expressly declared or provided one understands what that means, because it means on the face of it what it says. It cannot be suggested that such an express provision exists here. I therefore submit that, even reading the words of section 47 in the widest way, they do not cover it, and I submit they cannot even impliedly cover it; and section 48 of the principal Act cannot be modified by this contract, and it was not intended to be modified, except there was a provision in the contract or in a subsequent statute. There is nothing in the subsequent statute about it at all, and I submit there is nothing in the contract itself about it; and that being so, we are driven to this position: that this is a special remedy pointed out by Parliament, and that this special remedy must be followed. It exists by statute only. If it did not exist in this statute they would have had no remedy at all for the seizure; and as it exists in the statute, they cannot complain of what is an Act of the State by the Governor. They must have a statutory remedy for it. The statutory remedy is pointed out, and it is not open to them to come here to arbitration; and they are therefore without remedy except they adopt the one pointed out by the statute and go before the Judges of the Supreme Court. That is what is meant, and the statute shows what is meant. The State took possession. Well, it is just the same, to give an analogous case, as when a landlord wants to exercise the right of entry which he may have by virtue of his lease. Then, if he wants to seize at all he may do so; but our statutes give a right to the tenant to go to a Judge of the Supreme Court and say to that Judge, "True, there may be the right to seize, but there has been no unreasonable delay, or there has been no wilful breach;" and, therefore, the Court will order that upon certain things being done they shall not give up possession. Here my friend seems to assume the Court could order damages. I submit they cannot do anything of the sort. They can only say whether the Government is to give up the line or not. That is the only remedy, and there is no power to give damages. The words in section 124 of the principal Act are these, "The Judge shall, in such manner as he thinks fit, hear and receive evidence either oral or by affidavit as to the matters upon which his decision is sought; and any order made by a Judge shall set forth whether in his opinion the power conferred by the 123rd section was rightly exercised; and every such order shall be final and conclusive on the Governor and the company. In all other respects the procedure and practice in force for the time in the Supreme Court shall apply." He makes an order either allowing or dismissing the application. If he allows the application, then he must set out that the power confered was wrongly exercised; or if he disallows the application, he will set out that it was rightly exercised; and that is the position which is binding on both sides as to the right of seizure. I am not concerned to inquire here as to what will follow afterwards, or whether there is any other remedy open to the parties afterwards by the publication of an Order in Council after that was done, or whether the Crown could be sued for damages even if the Governor were to exercise his authority after the order was made; that is another question.

Sir B. BURNSIDE: You say, "If the Governor was to order the restoration of this property to the owner under that clause of the Act." You do not touch the question of whether the company would not have a right to arbitration against the seizure for the purpose of damages.

Sir R. Stout: I am not raising that question, as it is not before us, and I do not wish to cumber my case with that.

Sir B. BURNSIDE: I was only suggesting it as an analogous argument.

Sir R. Stout: The only point I would urge upon the arbitrators in dealing with the question of jurisdiction is this: that they must be confined by the express words in the statute, and there are none in the statute nor in the contract itself; and they have only section 47 to rely upon. The parties to the contract and the Legislature, by authorising this contract to be entered into, did not repeal the provisions in section 124 or otherwise, and did not give additional remedy to that which was given in section 124. Now, I submit there can be no inference upon that, and no assumption upon that. If you ask for a remedial step you must show that it is an expressly provided remedy; you cannot infer it. How then can it be said, for a moment, that there is power in this section 47 to do what my friend says there is power to do? How can it be suggested that the words "any dispute, difference, or question shall arise touching the construction, meaning, or effect of these presents," and so on; "or if the Queen and the company shall be unable to come to an agreement within the meaning of clause 24 of these presents as to the proportional cost of any section of the said railway to be ascertained as aforesaid, or otherwise howsoever in relation to the premises," &c., then any such dispute shall be referred to arbitration. How can it be said for one moment that this clause in the contemplation of the parties meant that section 124 was to be referred to the arbitrators. I submit that if that had been intended there would have been express provision giving power to the arbitrators to make an order, if a certain thing was arbitrarily done; but there is no suggestion of that, and there is no such clause? How can it be assumed then for one moment that this section 124, and all the powers of the Supreme Court under it, were amended in a section which, I submit, is dealing with other matters. Under this head therefore there was really no power to arbitrate or to send this question to arbitration at all, and consequently the arbitrators have no power to deal with the question of the seizure of the line, nor to make any orders in connection with it one way or the other. They have their remedy, and their remedy is to apply to a Judge of the Supreme Court if they felt that the action of the Governor had been wrongly exercised under the section. I do not wish at present to go into this question my friend raises, about good excuse and so on. It was a very peculiar thing to say that want of money was an excuse for not performing the work. I am afraid that it is a bad excuse. I only know of one case when it was put forward in Court that want of funds was a good excuse for not paying debts. It was the case of a bankrupt who got a cheque-book from the bank, and who thought because every cheque he drew out of his book was not honoured, it was a good excuse to offer to his creditors. He had been ruined and therefore was not able to pay his debts. I submit, therefore, this statement about the want of money is not an excuse. Of course, that would come up if the arbitrators thought fit to hear it. Also those statements made by Sir Dillon Bell prior to entering into the contract, I submit, are irrelevant matter. However, I do not wish to deal with it. Now, there is the suggestion made as to the facts I have opened as to the notice of the company of their intention to abandon the line, and also the fact that they had not done any work for twelve months before the seizure, which I think are indisputable.

Mr. Hutchison: No.

Sir R. Stout: I have opened from the public records of the colony evidence given by Mr. Wilson before the Committee, and as to the fact that they have done no work for twelve months. I do not know whether it would assist the arbitrators in dealing with jurisdiction if they asked for evidence upon that at once. There is one point I have forgotten, and that is whether these other points were opened in the notice of arbitration. I submit there is nothing opened under the second point of arbitration at all but the question of the seizure of the line. The right of the arbitrators to jurisdiction arises on the notice to arbitrate. The notice to arbitrate is as follows:—

"Take notice that the New Zealand Midland Railway Company, Limited, disputes the right of the Governor of the Colony of New Zealand on behalf of Her said Majesty the Queen or otherwise to take possession of or assume the management of the said company's railway, its rolling-stock, or other property of the company, or any part thereof, and maintains that in taking possession of the said railway and other property of the said company, of which possession has lately been taken, you have acted illegally, and that consequently further disputes, differences, and questions, in addition to the disputes and differences which had arisen at the date of the notice to appoint an arbitrator delivered to you by or on behalf of the New Zealand Midland Railway Company, Limited, dated the thirtieth day of November, 1894," have arisen——"

I submit that shows the only dispute is in relation to taking possession, and that on taking possession a secondary further dispute has arisen.

Mr. Hutchison: Will you read the rest of it?

Sir R. Stout: "Touching the construction, meaning, and effect of the contract made and entered into on the 3rd day of August, 1888, between Her Majesty the Queen of the one part, and the said New Zealand Midland Railway Company, Limited, of the other part, and in particular a question as to whether the taking possession of the said railway and other property or any part thereof, and whether or not the assumption of the management of the said railway by you on behalf of the Queen or otherwise was or is lawful and authorised by the said contracts and the Acts therein referred to; and, if not, as to the damages or compensation the said company is entitled to by reason of possession having been taken as aforesaid, or by reason of anything done by you on behalf of Her Majesty the Queen or otherwise in connection therewith, and also as to the footing upon which you on behalf of Her Majesty the Queen or otherwise should account to the said company, and as to when and upon what terms possession of the said railway and property, or any part thereof, ought to be restored to the said company, and generally as to the rights of the said company under the said contracts and Acts in the events which have happened. And further take notice that the New Zealand Midland Railway Company, Limited, desires that all such disputes, differences, and questions be referred to

arbitration in accordance with the provisions of clause 47 of the said contract. And also take notice that the New Zealand Midland Railway Company, Limited, has this day appointed Sir Bruce Lockhart Burnside, Q.C., to be arbitrator for the purpose of such arbitration, and requires you to appoint an arbitrator for the same purpose within three calendar months from the service of this notice; and further, that if you shall refuse or neglect to appoint an arbitrator within the time aforesaid, that the said Sir Bruce Lockhart Burnside will proceed to hear and determine the matters in difference as if he were an arbitrator appointed by both parties for that purpose." That did not arise at all. We were limited to section 7 in the particulars, and it will appear abundantly plain that they are limited by their notice to the question of the seizure of the line and to that alone, and to anything that followed from that seizure. That is the root of their contention, and all these other particulars are not open to them under this arbitration. I think it will be seen my contention on that point is unassailable. I think I heard a suggestion by Mr. Cooper that there had been a waiver by the Government beeause they had issued Proclamations up to February, 1895; but I have already pointed out that there was a continuous breach. There was no waiver. After we gave notice we treated the breach as rescission. It was a continuous breach, but we did not take advantage of it before it was necessary. To give an illustration: take the case of a landlord who might have the right to re-entry when one quarter's rent was due, and suppose the rent ran on and was not paid for the next quarter, and the next quarter, and there came to be three quarters due, could it be said for one moment because that man did not take advantage of the first non-payment of rent, therefore his right of re-entry was gone? And so this breach was continuous. Supposing they made a breach in 1892, and then after 1892 they fulfilled the contract, we do not take advantage of that breach. What happened was this: since the first time they said they were going to do nothing at the Reefton–Nelson end they have done nothing, and it has been a continuous breach on their part since the first notice of intended abandonment. What has happened is this: that they have gone on acting, and the breach has been continuous down to the time we gave notice of resumption in March. There can be no such thing as a "waiver." What we ask you to do is to give us some security that you really intend to fulfil this contract at the Nelson end in February, 1904. You cannot. How then can it be said that we have waived anything, or done anything that would be held to be a waiver of that breach.

Mr. Hutchison: Will the Court permit Mr. Cooper to be heard on the subject of interpretation of clause 48, as my learned friend has referred to it.

Sir R. Stout: I only followed Mr. Cooper.

Sir C. LILLEY: Mr. Cooper treated that.

Mr. Hutchison: He only did it at starting, not knowing that the learned counsel on the other side was going to take it up.

Sir B. BURNSIDE: We will give you ten minutes.

Mr. Cooper: I understand that Sir Robert Stout submitted that clause 48 required that the expressed modification must be expressed in some amending statute, but I suggest that the words do not convey that meaning at all, "excepting where the same are herein expressly modified by the amending statute. Therefore, we have to look at the contract itself to see whether there has been a modification of the provisions of the Railways Construction and Land Act; and, secondly, if there has been such a modification authorised by an amendment of the special Act of 1884.

Sir R. Stout: They received the full grant.

Mr. Hutchison: Under the alternative land-grant system.

Mr. Cooper: This contract is made in accordance with the provisions of the Act of 1887. On referring to that Act we find that the contract which is authorised is the contract which is set out in the draft attached to the report of the Select Committee, on such conditions as are considered necessary to give full effect to it. Now, I submit that section 47 contains an express modification of the provisions of the Act of 1881, and the authority to make that express modification is conferred upon the parties signing this contract by the Act of 1887. My argument is that there is an expressed modification in section 47 by the setting up of a special tribunal to investigate disputes, differences, or questions, which generally arise touching the rights and liabilities of the parties, one difference being in reference to the seizure of the railway. And it is expressly provided that no legal proceedings in reference to any such dispute shall be commenced or prosecuted by either of the contracting parties until they have first referred it to arbitration. I submit that there is no expressed statement in clause 47 prohibiting us from taking any advantage of the provisions of the Act of 1881 until we have first exhausted the remedy provided by this section. Whether it was intended that we were not to take advantage of the provisions of the Act of 1881 may have been left open by the contract. The other point which I would like to mention is this: My friend says it is quite clear that the Legislature and the parties in sealing this contract did not intend that the questions under section 124 of the principal Act should be referred to arbitration, because, he says, the arbitrators have only power to award the money.

Sir R. Stout: I said there was no provision in the arbitration clause to make orders.

Mr. Cooper: Then, what is the force of my friend's argument when he states seriously to this Court that, in connection with our claims for the confiscation of land, the arbitrators have power to order the return of the land?

Sir R. Stout: I did not say that at all.

Mr. Cooper: You did say so.

Sir R. Stout: What I said was this, "You cannot say you can get money in place of land."

Mr. Cooper: As I understand my friend's argument, it is really that this arbitration clause is of no value at all, inasmuch as this Court can only award the money, and, as the Legislature has not voted any money for the purpose of satisfying the award, the arbitrators will be taking upon themselves the duties of the Legislature in making the order—(the law of the question would be that stated in Churchward *v.* the Queen)—consequently we have no remedy.

Sir R. Stout : You have no remedy for getting money for the land.

Mr. Cooper : If it is admitted that we can go to arbitration upon the question of the deprivation of the land, I submit we can also go to arbitration on the question of the deprivation of the railway.

Sir C. LILLEY : Then the speeches are all concluded up to this point ?

Mr. Cooper : Yes.

Sir B. BURNSIDE : All the legal points are urged.

The Court rose at 5.15 p.m.

NOTES.

The report of the utterances of Sir Bruce Burnside and Sir Charles Lilley have not been revised by them.

With the exception of the remarks on pages 1 and 194 of the evidence, no part of the reports of Mr. Blake's utterances has been revised by him.

ADDRESSES (CONCLUDING) BY COUNSEL.

MR. COOPER'S ADDRESS.

THURSDAY, 19TH DECEMBER, 1895.

The Court sat in the Supreme Court Buildings at 2 p.m.

Mr. Cooper: May it please your Honour,—I think we may all congratulate ourselves that we are reaching the last stage of this inquiry, and it will be my duty, as far as I consistently can with the interests intrusted to me, to make my address to the Court as short and concise as possible. I hope I shall not weary your Honour, and I shall endeavour to compress the remarks I have to make into as logical and sequential a compass as I possibly can. It will also be my wish to explain exactly the position the company takes up at the present time, the grounds upon which we ask the Court to award us compensation, and the particulars of the reasons upon which we support those grounds——

Hon. E. BLAKE: Let me say, Mr. Cooper, that I should be very sorry if you omitted a single thing you thought important.

Mr. Cooper: I am not going to omit anything which I think is of importance to the company's case, but I think it is only my duty not to overlay the matter in a manner which would be improper under the circumstances. Perhaps it will be convenient for me to sketch out shortly the system I intend to adopt in addressing the Court. First, I shall make some introductory remarks upon the position of the company at the outset—the scheme upon which this railway was proposed to be constructed, and generally as to the inception of the contract and the surrounding circumstances. I shall not trespass, I hope, upon any of those rules which will prevent me from adducing matters which are irrelevant to the issues or inadmissible under the contract, but I shall endeavour to bring before the Court in these introductory remarks the grounds upon which I shall subsequently base my conclusions. Next, I shall submit to the Court an argument upon the principle upon which damages should be assessed in relation to the breaches we complain of; and then I shall address my remarks to the specific breaches of contract, and what we consider are grievances in relation to the matters mentioned in the first arbitration. I think it will then be convenient to apply those breaches and to seek to show the manner in which the company is entitled to claim compensation in respect of them. Then I shall go to the proceedings in the second arbitration for the purpose of placing as clearly as I can before the Court my views in reference to the company's claim under that second head; and finally I shall bring within a clear compass the conclusions upon the whole matter which I shall endeavour to elaborate during my address to your Honour. I have already addressed the Court at some length in opening the proceeding on the second arbitration, and I referred in my address then, in some detail, to the matters which had arisen prior to the formation of the company, and I shall shortly refer again to those matters. The company was formed for the purpose of taking over a contract which was originally granted under the provisions of the Railways Construction and Land Act of 1881 as amended by subsequent Acts, and for the purpose also of carrying out a subsequent contract entered into by the company with the Government under the authority of the Act of 1887. The first phase I would seek to place before the Court is this: If we examine those statutes we shall find that it was never in the contemplation of the Government in the one instance or of the Chrystall syndicate in the second instance that the railway should of itself be a payable speculation. The Act of 1881 was passed by the Legislature for the purpose of inducing companies to carry out public works in the shape of railway construction which the colony did not intend to carry out, or perhaps could not for want of sufficient funds carry out itself. This was a large public work, and could not of itself, as a railway, either at once or in the immediate future, be reasonably expected to pay a fair interest on the construction. That, I take it, was the original intention of the Act of 1881; and, as an inducement to financial bodies to enter into the construction of public works of that nature, these financial bodies were subsidised by the State under the Act of 1881 by land-grants to the extent of one-third upon the statutory amount which was to be expended on the construction of that public work. Now, at the very outset, I think it is important to bear in mind this feature: that the colony, and the parties who were promoting this East and West Coast Railway (North and South line), considered that the subsidy of one-third provided by the Act of 1881 was insufficient inducement to entitle any financial body to look with favour upon the construction of this particular work; therefore, by a later statute, that percentage was increased to 50 per cent. We have therefore at the outset this indication by the Legislature that, however important a public work the East and West Coast Railway would prove to be in the future, it was a contract which the colony as a colony did not consider they were justified in undertaking, but it was a work which the colony held out to the public at large—to the financial public—as one which they might fairly undertake if they were subsidised to the extent of a 50-per-cent. land-grant upon the cost of construction; and, I think, if we get that clearly into our

minds, a good deal of the apparent difficulty which has been suggested in reference to the non-earning capacity of this railway vanishes; because it was perfectly clear, and the evidence has made it abundantly so, that one of the main inducements—if not the chief inducement—upon which the Chrystall syndicate acted, and upon which latterly the Midland Railway Company acted, was the grant of land. It was not so much the earning-power of the railway in regard to the payment of dividends which the company might have expected to make in the future by the working of the railway as a railway pure and simple, but the value of the large quantity of land, with the possibility of a large increase in its prospective value, which had been granted to them under the Act of 1884. We start, therefore, with the fact that the company was formed for two purposes. The main purpose, no doubt, was to construct the railway; but the purpose which was intimately bound up with that was to earn the land-grant, and to obtain—what might be considered reasonable in the minds of the Legislature, and reasonable in the minds of the company—the prospective values of that land-grant, which values would be in a great measure created by the construction of the railway through the particular line of country within which this particular authorised area was situated. That any company would for a moment have entered upon the undertaking of constructing a railway of this description in a new country such as this without that inducement of the land-grant, I submit, it would be impossible to conceive. Now, that that was the case is abundantly clear, not only from the statutes, but from what took place from the very beginning of the negotiations, and at the outset in reference to entering into the 1888 contract. I am quite sure that your Honour will pardon me if I refer, as I did some weeks ago, to some of the letters which passed in 1886 between Mr. Salt and the Agent-General, and to the letters which have been put in the evidence adduced before the Court by Mr. Burchell and Mr. Salt. I may say that in dealing with this matter I shall not trouble the Court by any lengthy observations; but there are portions of that evidence which I think it is necessary, in the interests of the company, to bring in in some detail before the Court, and this is one portion of it. It is quite clear that the Midland Railway Company were not prepared to take over the Chrystall contract, and it is quite clear that the Government of the colony never contemplated that they would take over the Chrystall contract; but what was agreed upon between the parties was that the Midland Railway Company should be brought into existence not solely, nor even primarily, for the purpose of constructing this railway, but that they should take whatever advantages were conceded to the Chrystall syndicate by the Government of New Zealand, with the addition of certain advantages, or concessions, or variations, settled upon between the Agent-General and Mr. Salt. And, looking at the letter of the 15th April, 1886, we see at once what inducements were principally held out by the Government to the company, and accepted by the company, as the foundation for the contract.

Hon. E. BLAKE: That letter is in the appendix to the statute?

Mr. Cooper: Yes. Of course there were numberless negotiations before. Mr. Salt's letter, after referring to the conversations which had taken place, and stating that it would be better to have the matter put into writing, goes on to say,—

"That the selection of land to be ultimately granted to the company shall be commenced by it as soon as reasonably possible after the assignment to them of the contract, the valuation being of course carried on concurrently. As soon as each block of land is selected and valued it shall at once be set aside by the Government—if that be not already done—in such way as may be agreed upon, so that it shall be held for the sole benefit of the company as soon as earned by them. Notwithstanding any order in which the company may select the lands to be ultimately granted to them, the company shall be entitled to apply for and obtain Crown grants of the various blocks or sections in any order which they may choose."

That is an important feature. This was to be a joint valuation of the land by joint valuers. The fourth stipulation is that the time for the expenditure of the first £150,000 should be extended to a future date. Now, the Agent-General, in reply to that letter, sets out the stipulations and the concessions or the variations upon the Chrystall contract, which he then advised the Government to enter into. The very first—showing the importance of this land-grant—the very first set of stipulations are in reference to the selection of the lands, the valuation of the selection of lands, and the manner in which these lands should be held. Then come the stipulations as to construction and running-powers, time, and deposit, and the assignment of the Chrystall contract, which has to contain the various alterations suggested by the company and approved by Mr. Burchell. As throwing light upon that correspondence, and, again, as showing what was in the minds of the parties at the time, I would refer the Court to Exhibit 122. Mr. Salt writes to Sir F. D. Bell with regard to the sale of land on 15th January, 1887, referring to what Mr. Scott had said:—

"With regard to the sale of land, he tells us that, either by immediate or deferred payments, he can sell more land than he expected, and he has committed himself in writing to the expectation of selling land at the rate of £100,000 per annum for six years. If this is at all accurate we ought to be able to carry out our plan. I have not been idle, but have had further negotiations with respect to the raising of money for the purpose of pushing on the line more rapidly. These negotiations have been tolerably favourable; but I hope you will be able to impress upon the New Zealand Government what I fear Mr. Scott has not done: the absolute necessity of putting the land-grant in such a position—that is, so intelligible and easy—that it can be dealt with on the London market. The two questions that are asked me, and very naturally so, are, first—'Have you got the land?' and, secondly, 'Is the land valuable?' If I can answer these questions in the affirmative, there is every probability of our being able to throw the security into a shape that would be acceptable, but the easy acquisition and the clear position of the land are points absolutely essential, and I wonder this has not struck our friends in New Zealand more forcibly than it has done."

Hon. E. BLAKE: In the exhibit supplied to me only portion of that letter is given. You have read an earlier part of it. As supplied to me it begins with the indication: "I have not been idle."

Mr. Cooper: We shall, of course, have to give you the whole letter.

Hon. E. BLAKE: I observe that throughout an effort has been made to omit what I suppose has been deemed to be irrelevancy.

Mr. Cooper: Yes. Of course, the important portion of this letter is the last two paragraphs. But the first paragraph, with regard to the sale of this land, is also of importance.

Hon. E. BLAKE: That is so, and I should like to see it.

Mr. Cooper: Mr. Gully suggests that it should be treated as in, and then it can be supplied later on.

Hon. E. BLAKE: I hope you will do so as soon as possible, as I do not want any arrears in the exhibits now.

Mr. Cooper: Then, the other letter I wish to refer to is the letter of the 8th August, 1887, from the chairman of the company to the Agent-General. The first point I would ask you to notice in reference to that letter is the statement that the money could be had in any quantity, and that the share-capital and debenture-capital had been promised, and "it was therefore necessary to deal promptly, and after so many months of waiting and working it was a great pleasure to reach a definite point at last." Then there are personal references to Sir Francis Dillon Bell's health, which I need not quote. In the last paragraph but one it is stated, "The Larnach incident has compelled us to be more careful in the drafting of the document and in its provisions than would have been the case if that occurrence had not happened." There are two points in those introductory remarks which I want to bring clearly before the notice of the Court. In 1887 two things had happened. First, the London money-market was in such a condition that Mr. Burchell was in a position to get the whole money required to carry out the company's undertaking. Secondly, the Larnach Proclamation, although it had a disturbing influence for the time being on the market, had been withdrawn. Its disturbing influence had been quieted, and it was hoped that such an incident might not happen again; and Mr. Salt apparently had confidence at that time that the Government and the company would get on satisfactorily together, and that the affair would be a financial success, because it was not simply dependent on the earnings of freights for its existence. It was really coupled with a very large percentage indeed of what was considered to be a very valuable land-grant. Then the contract of 1888 was signed, and the evidence of Mr. Burchell in reference to what took place at that time must, if we consider the position of the company at the time, and the subsequent transactions, and the position of the company at the present day, be considered. That evidence, at page 187 of the printed evidence, Mr. Burchell's evidence, was interrupted by the calling of Mr. Kennedy. It commences at page 184. He refers to the two interviews which took place between himself and Sir Francis Dillon Bell. The first one was immediately prior to the assignment of the Chrystall contract, and the second was at the time the contract of 1888 was settled by himself and the Agent-General. Now, in reference to the first interview of the 16th April, Mr. Burchell says:—

"I took my copy of Mr. Salt's letter and discussed with Sir F. D. Bell the terms on which he would reply to it, so as to see if we could possibly arrive at a satisfactory form. I also had instructions to ask him as to the nature of the bargain the company was making, because at that time the provisional board of directors had not finally made up their minds to take up the assignment of the contract and form the company; and Sir F. D. Bell gave me an assurance, not only as an individual, but as from the Government, that it was a most valuable contract, and one which was desired by the colony, and he said, 'In carrying it out you will have the assistance of the Government and of the colony.'

"32. Upon that, I think, you accepted the Agent-General's letter by yours of the 20th April, 1886?—Yes. We also practically settled this draft together. Sir F. D. Bell kept it back to look at the phraseology, and sent his reply of the 19th April. I communicated it to the provisional directors, and my instructions were—on receipt of the letter from Sir F. D. Bell materially in the form in which I say—to register the company."

I should point out, in passing, that Sir F. D. Bell, in assenting to the assignment of the Chrystall contract, had the authority and was under the direction of the Government of the colony. Then, in answer to yourself later on, he said it was a verbal assurance and not a written one. Then he refers, in a subsequent answer, to the interview between himself and the Agent-General in July, 1888. He said:—

"I had a final interview with the Agent-General about—I cannot say the exact date, but not more than a week before the contract of 1888 was sealed by the company. We had several meetings arranging the forms of the clauses, and this was a final meeting to get exactly the form in which the Agent-General would be able to pass it for the approval of his Government. It was really more for clearing up verbal points than anything else.

"38. Was there any reference then made as to the time within which the company should complete the railway?—Yes; in the draft contract given to Sir F. D. Bell, the time for the completion of the railway was altered from January, 1885, to January, 1888.

"39. The ten years were to run from January, 1888, instead of from 1885?—Yes. Sir F. D. Bell said, 'It must go out, because it will require fresh legislation if you insist upon that; but you need have no apprehension as to that, because so much time has already elapsed that you will be entitled to an extension of time, and the Government will always give an extension when asked for it.'"

That means, I suppose, the alteration must go out. That shows that up to that time, although to some extent confidence in the public mind had been—and I think the evidence is quite clear—shaken by the Larnach incident, it had been restored, at any rate, so far as the directors of the Midland Company were concerned. Both these parties—the Government on the one side and the

company on the other—looked upon this contract as a most valuable one for the colony: by the Government, inasmuch as it was taking the burthen off the colony of forming the railway, and it was, at any rate, demanded by a very large section of the people of this colony; and by the company on the other hand, as they looked upon the advantages and profits to be obtained by the carrying-out of this scheme, as being prospective and considerable in extent, and mainly to be derived from the proper carrying-out of the provisions of the land-grants. What I want to place before the Court is—First, the value of the grants; and, second, the manner in which the company relied on them; and, third, that any confidence which had been shaken by the Larnach incident had been restored, and it was not contemplated or supposed that anything of that kind would arise again. Then, it was quite clear that there was, in 1889, when the first set of debentures were issued——

Hon. E. BLAKE: You are omitting now what you were alluding to. I understood you were alluding to the introduction of the contract.

Mr. Cooper: I was getting a little beyond it: but, prior to the signing of the 1888 contract it has been shown that the guarantee of all money required was available. Before the company determined to carry on the work, any quantity of money was available, and that is also supported by this fact, that, although in 1889 the company had to pay considerably for the issue of the £745,000 debentures, yet it was contemplated that the syndicate who found these debentures, and who, as Mr. Salt said, had the money in the previous instance, were prepared to find the additional £2,200,000.

Hon. E. BLAKE: They might do it if they were satisfied with the result of the first instalment.

Mr. Cooper: And also that, after this, the debentures steadily rose in value till 1892—till the end of 1891—showing that there was at the outset when the contract was first contemplated no difficulty in the company financing for the purpose of carrying out the undertaking. I might also refer your Honour to this position before the contract of 1888 was signed: when the contract was approved by the Agent-General it was contemplated by both parties, the Crown on the one side and the company on the other, that the great bulk of capital with which the company were to construct the railway was really to be borrowed money, borrowed upon debentures, and not to be raised by the shareholders. Now, that seems to me to be placing, as clearly as can be, before the Court the position of the company before the contract was signed. I shall pass at once to the discussion of the principles upon which, assuming that we have established a breach of contract, damages should be assessed.

Hon. E. BLAKE: I should like, if not inconvenient to you, to pass from the reference made in the introduction, and to point out what principles you desire me to consider as established by means of these constructions, which do not flow fairly from them, without any reference to what you said before.

Mr. Cooper: They all flow from it. I say, they all flow fairly from the contract.

Hon. E. BLAKE: I must not look at that. If you say they do not fairly flow from it, you must not speak of them.

Mr. Cooper: I say there is nothing that does not flow from the contract, the evidence is in.

Hon. E. BLAKE: Yes, so far as it is admissible. Is there anything you contend as to the point?

Mr. Cooper: I submit there is nothing.

Hon. E. BLAKE: I think the great bulk of your proposals, perhaps not every one of them, flow from the contract.

Mr. Cooper: I think so; but I thought it was only due to the Court to mention the oral evidence.

Hon. E. BLAKE: If you say any one of them, I have to ask you to show it to me before I can take it.

Mr. Cooper: I do not think in any of these the Court is driven to take or consider the extraneous evidence. If it is, then I submit the evidence is admissible upon the principles I am now going to discuss on the second branch of my argument, which will take up, I am afraid, some little time.

Hon. E. BLAKE: The principles of damage?

Mr. Cooper: Yes; I am assuming, in discussing the principles of damage, that there is a breach of contract.

Hon. E. BLAKE: By the Crown?

Mr. Cooper: Yes. First of all, I would submit to the Court that the true rule may be stated as set forth in "Sutherland on Damages," pages 102 and 103. The leading English case on the scope of recovery for the breach of a contract established two propositions which have been very generally accepted. As expressed by Baron Alderson they are: "Where two parties have made a contract, which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either as arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it. Now, if the special circumstances under which the contract was made were communicated by the plaintiffs to the defendant, and thus known to both parties, the damages resulting from the breach of such contract which they would reasonably contemplate would be the amount of the injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract he, at the most, could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract." It is to be remembered there is no relaxa-

tion of the rule confining the recovery to the damages naturally and proximately resulting from the breach in cases where there are such known special circumstances. Indeed, the same strictness exists to confine the recovery to the immediate consequences. The general principle of compensation is that it should be equal to the injury. It is a rule, based on that principle, that the amount of the benefit which a party to a contract would derive from its performance is the measure of his damages if it be broken. It is a rule of interpretation too that the intention of the parties is to be ascertained from the whole contract, considered in connection with the surrounding circumstances known to them both. If it appears by such circumstances that the contract was entered into, and known by both parties to be entered into, to enable one of them to serve or accomplish a particular purpose, whether to secure special gain or to avoid an anticipated loss, the liability of the other for its violation will be determined and the amount of the damages fixed with reference to the effect of the breach in hindering or defeating that object. The proof of such circumstances makes it manifest that such damages were in the contemplation of the parties. Looking alone at a contract of this character, silent as to the circumstances which were in view, such damages are consequential, and sometimes appear to arise very remotely and collaterally to the undertaking violated. But when the contract is considered in connection with the extrinsic facts, there is established a natural and proximate relation of cause and effect between its breach and the injury to be compensated." I shall seek to show,—and I think I shall satisfy the Court,—that we can prove a very large amount of injury to the company, caused directly by a breach of contract on the part of the Crown, and that we are entitled to recover all damages which are equal to the injury. And so we claim that we are entitled to look at the extrinsic facts——

Hon. E. BLAKE: There, again, I assume that you will show the Court what fact is extrinsic.

Mr. Cooper: One of the extrinsic facts is that the company relied—if the Court holds that it cannot be gathered from the document—relied for its success upon being able to borrow money upon debentures, and to borrow the greater proportion of money upon debentures. That they so stated. That they relied also for its success upon the fair consideration of the position of the company by the Government of the colony, and that there was an assurance——

Hon. E. BLAKE: Would not that be implied?

Mr. Cooper: As I said before——

Hon. E. BLAKE: It is very important that we should not unnecessarily extend the earlier portion of the argument. I want to narrow and confine it if I can properly do so. I want to see any extrinsic facts. You say, "This is extrinsic, and therefore I call upon you to admit it."

Mr. Cooper: I will take this position first: everything I have stated can be gathered from the documents themselves; but, secondly, if there are any one of those matters which are not contained in the documents themselves, but are to be gathered from verbal evidence and the correspondence, those matters are extrinsic facts, and are admissible in consequence of that rule. But I do not contend that your Honour cannot gather everything that I have submitted from the perusal of the documents themselves.

Hon. E. BLAKE: For instance, take the two points you have referred to. You have referred to at least one important point. The other one I should take to be a matter of course. You have referred to the point that the scheme of the company was a scheme to raise their capital in small part by shares, and in large part by debentures. Upon that you are to give the extrinsic facts—upon the evidence that there was to be a double share-holding capital, and also as to evidence of the share-holding prospectus: that the company did contemplate raising its capital to half-a-million. But, after all, that is of little consequence; because according to the views of both parties at that time, £2,800,000 was to be the capital, and half-a-million is a very small proportion of the whole capital of £2,800,000. It therefore being known to the Government then; these facts being known and being apparent. This was a large contract. It appears, at any rate, that they did expect and hope to carry out this contract by borrowing money to a considerable extent—very considerable—but to what extent does not appear; because it does not appear from any facts which you have stated here as to what the Government knew—as to how rapidly they thought they were going to sell the land, and therefore as to what extent they were, in the first instance, calculating upon resorting to their intention to raise money to build the railway. But I should hold that the reasonable interpretation of the whole affair, within the four corners of the contract, was that the company's scheme was to borrow a very considerable sum of money.

Mr. Cooper: Of course they would not be able to get any land-grant at all until they had done work amounting to a very considerable sum. They provided a quarter of a million capital, and although Sir Dillon Bell said he was disappointed, he consented to that.

Hon. E. BLAKE: If he had objected that would make no difference.

Mr. Cooper: If he had objected the matter would not have gone on. He said, "You must raise £500,000." They said, "We cannot raise more than £250,000." He said, "I am disappointed, but I consent."

Hon. E. BLAKE: He assented to the contract.

Mr. Cooper: I will refer to only two cases upon this question, not as to extrinsic evidence so much, but as to the measure of damages. I have referred the Court to Hadley *v.* Baxendale, (9 Exchequer, 353.) I will not go further into that case. Then, we come to a case fifty-three years later, McMahon *v.* Field—that has already been observed upon (Law Reports, 7 Q.B. Division, 597.) I quote that case for this purpose: that according to Hadley *v.* Baxendale the damages which are to be assessed are those which, by an arbitrary rule of law, were considered to be in the contemplation of the parties at the time if a breach of contract were committed; but, as has been well pointed out in the case McMahon *v.* Field, when a contract is entered into the parties never do contemplate a breach of contract. That rule is subject to this extension, an extension which I think is well stated by Lord Justice Cotton, page 597: "It is said that the rule is that the damages to be recoverable should be such as would be fairly in the contemplation of the

parties, at the time the contract was made, as the probable result of a breach of it; but, in my opinion, the parties never contemplate a breach, and the rule should rather be that the damage recoverable is such as is the natural and probable result of the breach of contract." I shall submit later on that we come directly within that principle. The only other case upon this point which I shall trouble the Court with is the case of Hamilton *v.* McGill, a still later case, reported in 12 Law Reports, Ireland, page 202. It is a judgment of the Chief Baron. Referring to the general principle, he says this: "The general intention of the law in giving damages in an action of contract is, as well expressed by Fitzgerald B. in Turner *v.* Midland Great Western Railway Company, 'to place the party complaining, so far as this can be done by money, in the same position as he would have been in if the contract had been performed.' In the well-known case of Hadley *v.* Baxendale it was attempted to lay down a rule for the application of this principle. But (although possibly it may not affect the particular case before us), I must repeat what, in common with other Judges, I have frequently pointed out—that the words in which the rule is there stated are not strictly accurate. Generally, when parties enter into a contract, they do not contemplate its breach, or the probable result of that breach; and I think the rule intended to have been there laid down would have been more accurately expressed by stating that the damages recoverable were 'such as might arise naturally' (*i.e.*, according to the usual course of things) 'from such breach of contract itself, or from such breach committed under circumstances in the contemplation of both parties at the time of the contract.' In other words, that which is required to have been in the contemplation of the parties at the time of the contract is not the probable result of the breach, but the circumstances by reason of which the breach (if there were one) would result in a loss greater than the normal one." I submit that proposition is very applicable to the present case. It was known to both parties that an attempt had been made to proclaim 750,000 acres of land out of this authorised area. It was known, because Mr. Salt communicated it to Sir Dillon Bell, the Agent-General for the colony. It was known that that attempt had seriously shaken confidence in the undertaking; it was known that that confidence had been restored. It was not expected by either the company or the representative of the colony then in London that anything like that incident would be repeated. If anything like that incident were repeated, then I say it was clearly within the contemplation of the parties at the time the contract was made that the repetition of anything which would have the same effect—that any breach of contract, or any wrong arising out of that contract which would have the same effect as the Larnach incident—would be a matter which would probably damn and destroy the company. And therefore I say we come strictly within the principle laid down by the Chief Baron—that it is a matter which must be taken into consideration in determining what the measure of damages is, and the amount the company is entitled to recover. Of course, whether there has been a breach of contract committed, and how that breach was committed, is a matter I shall deal with later on.

Hon. E. BLAKE: And you will also have to deal with this proposition: that the contract was modified—that the contract in respect to which the Larnach Proclamation was issued was modified. You will deal with one aspect, as to whether there was a breach, but you must deal with another: in thus attempting to induce circumstances in the contemplation of the parties into the consideration of the question of damages you will have to show me that no change has taken place in the situation of parties in that aspect of the case.

Mr. Cooper: I shall do that. I am not overlooking that at all. I will now deal with an abstract proposition as to the position of the Crown and the Sovereign power, and I quote an American case in reference to a breach of contract committed by the State. I would refer the Court to a case in the American reports—the judgment of the Supreme Court in Donald *v.* The State (42 American Reports, page 297). The judgment is a very able judgment, delivered by Mr. Justice Earle. He says, at page 279——

Hon. E. BLAKE: In what Court?

Mr. Cooper: The Supreme Court, New York. He says: "It is further claimed that the State cannot, like an individual, be made liable under such a contract for prospective profits. . . The Sovereign power can contract, and has very many occasions to do so. It can build canals and public buildings, and engage in public works; and, in carrying forward its projects, it makes use of the instrumentalities which individuals use for the same purposes. It must be governed by the same rules of common honesty and justice which bind individuals. It is for its interests that its contracts should be binding upon all the parties thereto. . . . There is not one law for the Sovereign and another for the subject." Of course, I shall have an opportunity of hearing Sir Robert Stout later on; but I understood him to lay down the principle that the same rule does not apply to the contracts of the State that would govern the contracts of a private person, and that they can do a great many more things, and cause a great deal more damage without being answerable for damages, unless Parliament chooses to step in, or something of that kind.

Hon. E BLAKE: I rather thought he was directing attention to the provision of the Crown Suits Act—namely, that, if there was any money awarded, no rule should issue until Parliament had an opportunity of voting; and, secondly, that other proposition bearing upon this which I remember him to have advanced was that the liability of the State with reference to land matters was to give land; and therefore what I should award, if I awarded anything, was land.

Mr. Cooper: This case is a good answer to the contention that you should give land.

Hon. E. BLAKE: It depends on the particulars of the contract, of course.

Mr. Cooper: The learned Judge goes on to say, "When the Sovereign engages in business, and the conduct of business enterprises, and contracts with individuals, whenever the contract in any form comes before the Courts the rights and obligations of the contracting parties must be adjusted upon the same principle as if both contracting parties were private persons." That is what practically the colony has done here.

Hon. E. BLAKE: Of course, those are very good general observations; but I may say to you, if you wish to establish anything with reference to the position of the Crown, I would very much rather you got it from English authority, for, as far as I can judge, it is possible to extract anything if you go to State reports. Take that body of judicial exposition, and you can find anything out of it.

Mr. Cooper: The only case which deals with this matter to any extent is the case that Sir Robert Stout has already referred to of Churchward *v.* The Queen. But Churchward *v.* The Queen went simply upon this ground and no other: that there was not a contract, and therefore, as there was not one, the Court would not imply one against the Sovereign. That was really the principle in Churchward *v.* The Queen. If Sir Robert Stout relies on that I shall distinguish between the cases, and reply to that contention. Now, there is the other proposition that I would submit to the Court, and which the Court will find in section 618 of "Sedgwick on Damages." It is a corollary to the present one. It may be shortly stated as this: that where two parties enter into a contract, and one of them does an act which leads to the prevention of the performance by the other of that contract, then the party in an action for breach of that contract can recover upon a *quantum meruit* the amount of money he has expended.

Mr. Gully: Without having rescinded?

Mr. Cooper: Where two parties enter into a contract, and one is prevented in the performance, the party who is injured can sue for a breach of that contract and recover. The measure of damages would be not only the special damages he has sustained, but the *quantum meruit* for the work he has done.

Hon. E. BLAKE: You say he can recover what he spent towards completion and special damages besides?

Mr. Cooper: Yes, special damages, if he can show he sustained them. I will refer your Honour to the actual wording later on. Those being the general principles which I submit are applicable to this case, I will now discuss the question of breaches, because, when I come later on to consider the effect of these breaches, I shall consider how we are entitled to claim special damages and why, and what the amount of those damages should be. Now, in reference to the first arbitration, we practically complain of two principal breaches of contract: the first in respect of the mining reserves, and the second in relation to clause 33. So far as the question of the taxation is concerned, although no doubt the company have some kind of grievance in connection with it, I do not submit that to the Court as any legal ground of grievance.

Hon. E. BLAKE: I am glad to hear you say so.

Mr. Cooper: In reference to the alleged defamatory statements of Ministers, I shall have to make some remarks in dealing with the question of evidence upon the mining reserves; but I do not set them up as a distinct cause of action at all. They are matter of evidence, which I shall ask the Court to consider in dealing with what is really the main breach of contract in connection with the mining reserves, and also in dealing with the question of damage sustained by the company, and the evidence which the Crown has introduced to minimise that damage. But I will deal now with the question of the mining reserves, and I will endeavour to place before the Court the propositions upon which we rely. Now, first of all, we say that none of these reserves were properly made.

Hon. E. BLAKE: It would be very convenient if you could just tell me, in reference to these claims, which ones you are arguing upon. I see you practically agree that No. 8, as a distinct item of claim, or otherwise the piece of evidence on No. 8 and No. 5, are to be eliminated.

Mr. Cooper: Are practically to be eliminated as causes of action.

Hon. E. BLAKE: Of course, you can use the evidence on these subjects, and any part in which they are relevant on any other subject; but they are not causes of action.

Mr. Cooper: No, and I do not submit them as such.

Hon. E. BLAKE: Which number here has to do with your argument on the mining reserves?

Mr. Cooper: Clauses 1 and 3; in fact, 1, 2, and 3 are all connected with mining reserves. Now, clause 4 we claim as a distinct cause of action; but I am not going to rely upon anything connected with the Westland side. What we say is that the Queen has refused to give effect to the request of the company under clause 33 to sell lands within the meaning of that clause.

Hon. E. BLAKE: But, as far as I can judge, 1, 2, and 3 are all that can possibly be said to have regard to the question of mining reserves?

Mr. Cooper: Yes.

Hon. E. BLAKE: And it is upon them we are now.

Mr. Cooper: It is upon them we are now. The first position I would take in reference to those mining reserves is that they were all improperly made. Now, as we stated some days ago—I am not going to make any charge of misconduct against the Ministry in connection with the making of these reserves, but I do charge them with committing a breach of contract—I do charge the Government with exceeding the powers which were given them under that contract; and I say that, if I can substantiate my contention upon that ground, then we have shown a breach of contract; and all we have got to do is to show the damages which flow from that breach of contract; and the first position I would take in reference to that is that practically the Government have not in any sense complied with the provisions of subclause (*c*) of section 16. Now, I shall have to take some little time in analysing that clause. First of all, let me submit this general proposition: that where an exception is contained in a contract that exception shall be construed most favourably to the grantee and most strongly against the grantor; and the authority for that proposition is stated clearly in Bullen *v.* Denning, 5 Barnwell and Cresswell, 842. That was upon a lease, it is true; but the same as any other deed that contained an exception, and the question was whether that exception was to be construed in favour of the grantor or the grantee. Mr. Justice Bailey said, "It is a general rule of construction that where there is any reasonable degree of doubt as to

the meaning of an exception in a lease, the words of the exception being the words of the lessor, are to be construed favourably for the lessee, and against the lessor." Mr. Justice Holroyd says, "Now, it is a rule of construction that where there is a grant, and an exception out of it, the words of the exception are to be considered as the words of the grantor, and to be construed in favour of the grantee." Therefore a reasonable construction can be placed upon this exception having the meaning which I shall submit to the Court. That reasonable construction, I submit, ought to be adopted in favour of the company rather than any other construction in favour of the Crown. First of all, the general scope of the contract is that we shall be entitled to select any land within the limits of the authorised area. That right is limited by certain specific exceptions, and it is for the Crown to bring this clearly within those exceptions. The main exception in this case is in subclause (*c*): "All lands which from time to time, in the opinion of the Governor, are or may be required for *bonâ fide* mining purposes, and the several purposes connected therewith or incidental or conducive thereto, and which lands shall from time to time be set apart and defined by Proclamations to be issued in that behalf; but no more than 10,000 acres shall be so set apart or proclaimed in one block at any one time; and the lands so set apart and proclaimed from time to time shall not in the aggregate exceed 750,000 acres." First, we will take the general meaning of that clause before I proceed to analyse it critically. The general meaning of that clause was that no wholesale Proclamation was to be made, but that Proclamations were to be made of lands only as they were reasonably required, with due regard to the immediate future; but not for the purpose of reserving from the authorised area lands which either the mining population or the Government or the Advisers of the Government considered might perhaps at the end of the next century be necessary for mining purposes. A reasonable meaning has to be placed upon it. I submit the Government have not placed that reasonable meaning upon it—that they have not acted in that spirit, but what they have done has been to determine practically upon a very large quantity of land which they intended to reserve from that area at the one time, and then, as a mere matter of detail, to make these Proclamations at intervals of a few days. They have not complied with the spirit, and I submit they have not complied with the letter, of that section, and in that sense I am going to use the words now, that, without any improper suggestion against the Government, in that sense they have committed a fraud upon the power. A fraud upon the power does not mean necessarily any sinister act upon the part of the person executing that power; it means an act done in excess of that power; and I would refer your Honour to the meaning of the expression as stated in a House of Lords' case—I do not intend to go a bit further than that—the case Portland *v.* Topham, 11 House of Lords' cases, page 31. I say that it is an abuse of the power—that they have exceeded the powers which have been granted to them by the contract. It comes practically within the statement of law laid down by Lord Westbury on page 53.

Hon. E. BLAKE: Was Lord Westbury then Chancellor?

Mr. Cooper: Yes. The only question in that case was the breach of a power of the Duke of Portland to do a certain thing under a settlement, not for any necessarily wrong purpose, but to do something which he claimed under that power. It was held it was a fraud upon the power, and therefore the act was an illegal act, and not justified by the settlement. The Lord Chancellor says,—

"Without further dwelling on the matter, I think we must all feel that the settled principles of the law upon this subject must be upheld—namely, that the donee, the appointer under the power, shall at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object—I mean sinister in the sense of its being beyond the purpose and intent of the power—which he may desire to effect in the exercise of that power."

Hon. E. BLAKE: Of course, it is probably not a relevant consideration, but the question of the proper use of the term "fraud upon the power" would be, to my mind, no answer to the statements there made.

Mr. Cooper: That there was no fraud upon it?

Hon. E. BLAKE: In that case a mistake was made, with no purpose other than that with which the power prescribes or intends. If you do commit an act with any such purpose, you do, in point of law, commit a fraud. Another case might arise in which that word would be very inappropriate, although the result might be just the same. Suppose you were advised that an act you were doing was an act within the power, but yet it was not within the power—yet it would be in excess of the power, and it would be bad. I object to the application of the term "fraud" to any excess which does not involve *mala fides*, or intend to do a thing which you know you ought not to do.

Mr. Cooper: That is exactly the position I take. I do not say the Government, with the intent to carry out any sinister or dishonest object, made these Proclamations, but I say they were badly advised. I submit, in point of law, they had not the right to do it, and in doing it they have committed a breach of contract.

Hon. E. BLAKE: I do not know that the sincerest anxiety to act right justifies a man in acting wrong.

Mr. Cooper: I put the case as high as that. I make no charge against the Advisers of the Government as to their motives, but as to the manner in which they have carried out what they wrongly thought they had the power to do, and I submit we are entitled to recover damages, as they have committed a breach of contract.

Hon. E. BLAKE: In point of law, the Government exceeded their powers?

Mr. Cooper: The Government exceeded their powers. First, I submit, they exceeded their powers in the manner in which the Proclamations were made. Now, I do not want to repeat

myself, but I submit that the plain and reasonable meaning to be placed upon that section is, that those reserves are to be made from time to time as they are required. It is true there are the words "or may be required," "all lands which, in the opinion of the Governor, are or may be required for *bonâ fide* mining purposes," &c., may be set apart. I submit that does not mean that if the Governor, or his Advisers, considered that in a hundred and fifty years from now, or in thirty, or forty, or fifty years from now, this land might be required for mining purposes, they can now set them apart. These words "may be required" must be read, I submit, in conjunction with the words "from time to time," and although I do not submit the Governor is not entitled to look to the immediate future, yet I submit that he is only entitled to look to what is the immediate and reasonable future in connection with making the reserves. That would come rather within the second proposition I am going to submit. I submit now that these Proclamations have not been made from time to time, and I shall have to refer to the evidence upon this point and to the correspondence in reference to these mining reserves, though not at very great length. We may take it, I think, fairly that Mr. Larnach's action was the basis upon which the Government afterwards acted—subsequently to the 1888 contract—in making these reserves—I mean the basis in the minds of the expert advisers of the Crown. What Mr. Larnach considered was necessary in the interests of the colony was to set apart 750,000 acres—a considerable portion of it along the Grey Valley, and a considerable portion of it in Westland; but, finding that he had acted illegally, and that he had no power to do so, the Proclamation was withdrawn. Afterwards, when the Government came to construe the contract of 1888, they followed, as was admitted by Sir Robert Stout, upon the lines of Mr. Larnach's Proclamation. The correspondence shows that, although they did not intend to set apart the whole of the 750,000 acres at once, they did intend to set apart at once a very large portion indeed of it.

Hon. E. BLAKE: You say it was dealing on the lines of Mr. Larnach's policy. They decided in broad and general terms that they would set apart about 750,000 acres, which they followed out by setting apart their first lot of about 75,000 acres, being about one-tenth of the acreage of Mr. Larnach's policy. That the area was to be 750,000 acres is a point I have not settled. It may have been considered to be a great deal too much, and they may have never intended to take the whole of it. If they were going to set apart 75,000 acres, they would probably take 75,000 acres which were included in the Larnach Proclamation.

Mr. Cooper: I have not made myself quite clear. Mr. Larnach's Proclamation was not the foundation, in that sense, of the action of the Government; but they were really actuated by Mr. Larnach's Proclamation, although, later on, they determined they would not set apart the whole area contained in Mr. Larnach's Proclamation. I submit there is a very important letter, dated August, 1892, the one to Mr. Gordon, which says it is true that some of the Proclamations have been issued, but it shows what the intention of the Government was, and the instructions given to Mr. Gordon in reference to it. Mr. Gordon's former letter is dated the 25th February, 1892, and is as follows: "Mr. Eliott,—The plan of the mining reserves is now cut down to come within the 750,000 acres. We have marked the blocks with the original numbers, with the exception of the Maruia, Matakitaki, Mangles, and upper portion of the Buller River. In addition to the red numbers, there are small yellow figures, numbered from 1 consecutively, indicating the manner in which they should be proclaimed. The Hon. Minister of Mines wished to have reserves made up to the extent of 500,000, leaving 250,000 acres as a stand-by, in case of future developments.—(Signed) H. A. GORDON." This letter is referred to in page 292, question 696, of Mr. Gordon's evidence.

Hon. E. BLAKE: That has nothing to do with Larnach's Proclamation.

Mr. Cooper: It does not make special reference to it, but it covers the ground covered by Mr. Larnach's Proclamation.

Hon. E. BLAKE: It covers potentially the 750,000 acres which were authorised to be proclaimed.

Mr. Cooper: Yes; and Mr. Larnach never proclaimed more than that; but this letter follows practically, as the reserves did, the boundaries and lines shown in Mr. Larnach's plan.

Hon. E. BLAKE: Still, I think that there is cogent evidence to show that, in determining all areas that are comprised within the reserves, the Government acted upon separate and independent information—it may have been adequate or inadequate—but still it was information obtained at the time.

Mr. Cooper: No doubt. I do not say that it was intended to proclaim all this quantity at once, but what was determined on was to proclaim that quantity of 250,000 acres, as stated by the Hon. Mr. Seddon in his mining statement of 1891, to take that quantity at once and to proclaim it; and that, practically, is what they did do. We find in Mr. Montgomerie's evidence an indication of the course adopted by the Government. I refer to the evidence on page 300. Mr. Montgomerie, in his cross-examination, says, in answer to myself:—

"15. *Mr. Cooper.*] Can you say how these reserves were laid off?—The Council and others selected the ground throughout the district, and I marked it on the plan in accordance with their wish.

"16. What plan did you mark it on?—There ought to be a plan here.

"17. Then, I understand you marked all the reservations as they were selected by the local bodies on a plan which you submitted to the County Council?—Yes; and the Council forwarded the plan to the Government.

"18. Were those the reserves which were afterwards made?—Yes.

"19. I understand you to say you were District Surveyor at Reefton?—Yes.

"20. What reserves, then, do you speak of—of the whole of them, or of those in the Grey Valley?—They come down to the Arnold.

"21. Tell me what section of reserves you speak of, what eneral system of reserves?—From 51, 53, 54, 59, 61, 62, 63, 65, and 66.

"22. We may take it, to begin with, that that system of reserves, from 51 to 66 inclusive, were all marked out at the same time?—Yes, and more.

"23. On the one plan?—Yes.

"24. Take the next block, from the Grey River downwards—69?—I have been over those since.

"25. Were those dealt with as a system of blocks together?—They were dealt with by the Grey County.

"26. Had you anything to do with it?—No.

"27. What surveyor was it who had to with that lot?—I think Mr. Mueller.

"28. Then, you do not speak to any other system of reserves but those you have just spoken of?—That is all.

"29. Then, although for convenience' sake those reserves were divided into blocks of so many acres, yet they were only one reservation?—That is how I understood it.

"30. Had you anything to do with preparing Proclamations and boundaries?—Only with the western boundary of the whole of the blocks from 51 to 66.

"31. Hon. E. BLAKE,] Do you mean an outline altogether or a boundary on one side?—On one side—the western boundary.

"32. When did you make that?—In 1891; it was after that was forwarded up to the Government.

"33. *Mr. Cooper.*] Then, at the request of the Government, you made a complete western boundary of that system of blocks?—Yes.

"34. And sent that on to the Government?—Yes.

"35. Hon. E. BLAKE.] And this, you think, was in 1891?—I think it was in 1891.

"26. Can you give any idea how long it was after you sent in the plan to the County Council?—I cannot from memory.

"37. *Mr. Cooper.*] Do you know whether the map known as Mr. Larnach's map was the one sent to the County Council?—I am not certain about Larnach's map, but I fancy that was the one."

I submit that was a very considerable indication that Mr. Larnach's map was the map referred to.

Hon. E. BLAKE: I have not been able to satisfy myself what map it was.

Mr. Cooper: Larnach's map has been produced, but we have not been able to identify it, as the map was not in our possession. Mr. Montgomerie says that he fancies it was the map sent to the County Council.

Hon. E. BLAKE: I gathered from the correspondence that it was a map on which they were asked to mark the reserves they thought right. Therefore it might contain an indication that it was the map used for that purpose.

Mr. Cooper: We have not the map, for the simple reason that it has never been produced, although duplicates of it were sent to several County Councils.

Mr. Gully: One map was put in—the Inangahua County map.

Hon. E. BLAKE: The Inangahua map was put in by itself, but it is not evidence that it had the Larnach areas marked on it.

Mr. Gully: Certainly not.

Hon. E. BLAKE: The whole correspondence indicates that these maps were sent to various localities to the extent applicable to those localities.

Mr. Gully: The aggregate marked out, however, was a great deal more than the Larnach Proclamation.

Mr. Cooper: I understand that the Inangahua map has not been put in.

Mr. Gully: You called for it, and it was produced; but you did not make any further use of it.

Mr. Cooper: I wanted the map sent to the County Councils. However, I submit that it is quite sufficient to raise this point: That Mr. Montgomerie was apparently the first one who was selected by the Government for the purpose of marking out these reserves in 1891, and that he marked out a system of reserves; although the evidence shows that they were divided into a number of classes, yet it was practically one system determined on at the one time, and I also submit that the correspondence shows that the reserves were gazetted practically at the same time.

Hon. E. BLAKE: I am with you up to the point of the information being sent to the Government. The Government asked the Inangahua County Council to send them their idea of what land ought to be reserved in the locality. They sent their idea—they sent it in block, so to speak—they gave the whole area on broad lines; and what you have now to do is to prove more clearly what the action of the Government was.

Mr. Cooper: I shall certainly do that. In the correspondence we find this letter, dated the 26th August, 1891:—

"Memorandum for the Surveyor-General.

"IT is intended to reserve about 170,000 acres as mining reserves in the Land District of Nelson out of the area of selection by the Midland Railway Company. These reserves must be made in blocks not exceeding 10,000 acres each. Would you please get the district surveyors to mark off on plans blocks of ground that are actually required to cover the existing gold-workings. This information is urgently required, so that the land may be reserved without delay.—H. A. GORDON, Inspecting Engineer."

Then, there seems to have been some delay, and that delay was caused, no doubt, by the District Surveyor, for we find a memorandum on the 10th November, 1891, from Mr. Eliott to the Surveyor-General, as follows: "As it is desirable to have further areas reserved for gold-mining purposes in terms of the contract with the Midland Railway Company, I shall be obliged by your causing description of land to be reserved to be furnished as soon as possible in terms of Mr. Gordon's memorandum of the 26th August last."

Now, what was done with reference to this? The Surveyor-General forwarded to the Under-Secretary for Mines a description of Blocks 51, 52, 53, 54, and 59. That document is indorsed with the memorandum, "Let Proclamation proceed." Now, this proclamation did proceed.

Hon. E. BLAKE: When was that forwarded?

Mr. Cooper: On the 10th December, 1891. Now, there was a delay——

Hon. E. BLAKE: Is there a date to let it proceed?

Mr. Cooper: Yes; that is on the 18th December, 1891. These Proclamations were made in June, 1892. But I will draw your Honour's attention to some correspondence at that time. They were made one by one with intervals of a week, in June, 1892, but were held over in the meantime until a complete survey might be made of them. In dealing with that system, on the 1st June, 1892, we find a letter from Mr. Flannagan to the Under-Secretary for Mines, forwarding a description of Blocks 59, 54, 53, and 51, with a map illustrating the same.

Hon. E. BLAKE: All but what block?

Mr. Cooper: 52: That has never been proclaimed to this day. There is a foot-note as to the order of precedence in gazetting the blocks. Then, we find a letter from the Under-Secretary for Public Works, dated the 3rd June, 1892, forwarding description of tracings of Blocks 59, 54, 53, and 51, which it is proposed to reserve for mining purposes, and these are to be dealt with as in previous cases. Then those reserves were gazetted, in this order: 59 on June 30, 1892; 54 on July 7, 1892; 53 on July 21; and 51 on July 28, 1892. I am dealing with the system followed in these four reserves, and I say that is not a proper exercise of the power given.

Hon. E. BLAKE: As a matter of fact, are these reserves contiguous?

Mr. Cooper: They are.

Hon. E. BLAKE: You will observe that the limitation is itself limited: "No more than ten thousand acres shall be so set apart or proclaimed in one block at any one time."

Mr. Cooper: They are all contiguous. [Map produced and referred to.] It is all in one block. I submit that these were all set apart at the same time; the descriptions were all prepared at the same time, and instructions to reserve were given at the same time. And the mere fact that the Proclamations carrying the reservations into effect were divided by intervals of a few days does not, I submit, destroy the position we take up, that, instead of the reserves being made one by one, it was one reserve of 40,000 acres that was so taken; and I shall show later on that the same system was adopted in reference to other reserves. No doubt there were individual reserves, such as the 1,700 acres referred to, and there was one at Acre Creek which was found to be out of the block reserved, and which was corrected; but the general system was to take them in the manner which Mr. Montgomerie has fairly and honestly stated.

Hon. E. BLAKE.] If you rely on that argument, I think you will have to show me what was done with the blocks further on.

Mr. Cooper: I think I shall be able to show that the western blocks up to No. 12 were all issued at very short intervals indeed.

Hon. E. BLAKE: You assume that you can show in substance what you now contend, and will continue your argument based upon that?

Mr. Cooper: Yes. If we refer to the contract, I submit that that was not a setting apart from time to time in not more than 10,000 acres at one time, but the setting apart at one time of four blocks of land containing 40,000 acres—that really, for all practical purposes, it was one block of land, and that that was not only contrary to the letter, but absolutely contrary to the spirit of the contract. I have not dealt up to the present with the meaning of the words "*bona fide* mining purposes."

Hon. E. BLAKE: I would ask you to consider the assumption that the Government were convinced, suppose, for example, the 40,000 acres was auriferous, or thought to be auriferous, and was thought to be probably required for mining in the immediate future—which is an elastic phrase and difficult to define—and that the area was the seat of those flourishing gold industries, or such as existed at the time of the old workings, and that the Government, in order to be quite clear on the subject, obtained reports from its officers, and which reports convinced it that these 40,000 acres answered this description of land which might be required for mining purposes: What you contend is that under the letter of the contract they would not fulfil its conditions by reserving at intervals of a week; but you say substantially that that course was evasive, because they ought to have abstained from reserving that portion of the 40,000 acres which might not be required until some future date.

Mr. Cooper: I submit that there must be a separate judgment upon each block, and that that was the safety that the company had—that there should be an independent judgment, not that there should be one judgment over the whole 750,000 acres. The very provisions of the clause provide in the interests of the company that this land is only to be set apart at intervals of time and in quantities not in excess of the areas provided by the contract.

Hon. E. BLAKE: You see it is quite certain that they might set apart at one time some quantities vastly in excess of the 10,000 acres, provided the acreage contiguous was not more than 10,000 acres. Supposing they had made a substantial gap between one portion of these reserves and another, even according to the letter of the contract they could have set apart 10,000 acres here and 10,000 there, leaving some space between. You say there is a provision for the safety of the company?

Mr. Cooper: I think we may fairly argue that the meaning of the word "block" in the contract is not so much the B 1 Block as a block of 10,000 acres.

Hon. E. BLAKE: I do not think it means the B 1 Block. It means one area of land in one place—in one lot.

Mr. Cooper: I say it means that you shall not set apart more than 10,000 acres at one time in one lot.

Hon. E. BLAKE: That you cannot set apart more than one block?

Mr. Cooper: I say you can set apart, say, 25,000 acres, but not at one time.

Hon. E. BLAKE: If the 25,000 acres, making an aggregate of 100,000 acres, were contiguous to one another, so that the general result was to make a block of 100,000 acres, the mere formal wording of the contract would make no difference. But supposing they made the blocks over the whole area, so that they were separate and independent blocks, what is there in the contract to prevent that?

Mr. Cooper: The words "from time to time."

Hon. E. BLAKE: You cannot eliminate the words "in one block."

Mr. Cooper: I submit that it does not arise in the position we are now in.

Hon. E. BLAKE: It arose in argument. You said there was a reason for this construction, and that it was for the safety of the company. It seems to me that a slight modification in the plan adopted would have set you aside in the argument.

Mr. Cooper: I submit that the reasonable meaning of the words is that they should not proclaim at any one time more than one block of land. Practically it means that wherever the lands are situated you must exercise an independent judgment in any one Proclamation.

Hon. E. BLAKE: The more you drive that over the more latitude you allow as to intervals of time.

Mr. Cooper: We have the existence of a system exercised in the setting-aside of reservations all up the Grey Valley with the blocks contiguous to each other, all comprising one harmonious whole, and all taken in batches in reference to the particular system. Take, for instance, the first batch—that goes from one particular place from the Inangahua River up to Landing Creek.

Hon. E. BLAKE: Of course, the little bits excluded were alienated lands.

Mr. Cooper: Yes.

Hon. E. BLAKE: I should have said, if they had proclaimed these different areas—say, two areas—although they are literally coterminous, that they would have been more than one block of 10,000 acres within the meaning of the contract.

Mr. Cooper: I submit that that is done. I submit that the Crown cannot get away from the actual facts of the case.

Hon. E. BLAKE. You say that they ought not to have made up their minds?

Mr. Cooper: They ought not to have made up their minds on that 40,000 acres at the one time. Whatever it may have been, that must have been introduced for some purpose. Now, what purpose was that limitation introduced for? For the protection of the company.

Hon. E. BLAKE: No doubt, in the interest of the company.

Mr. Cooper: And if the interest of the company has been disregarded, then there was a breach of contract.

Hon. E. BLAKE. Not if the interest has been the result of previous violation.

Mr. Cooper; I submit there has been a breach of contract. Why are the words "from time to time" in that clause repeated in two or three different places? "All lands which from time to time, in the opinion of the Governor, are or may be required for *bonâ fide* mining purposes . . . shall from time to time be set apart . . . but no more than 10,000 acres shall be so set apart or proclaimed in one block at any one time; and the lands, so set apart and proclaimed from time to time shall not in the aggregate exceed 750,000 acres."

Hon. E. BLAKE: Yes; there are times and times.

Mr. Cooper: I submit the words govern "required," and therefore it was in order to enable the Governor to proclaim in the future, not to proclaim land which might be required for future purposes, but to make future Proclamations.

Hon. E. BLAKE: Was it not suggested that he was about to make them in one single act?

Mr. Cooper: It was to prevent him from having the power of acting once for all at the same time. The second reference, "from time to time," I submit, governs the words, "to set apart and define," and means that each individual reservation must be one made upon individual evidence, and altogether apart from any prior or subsequent Proclamation. I submit the words "setting apart more than 10,000 acres in any one block," that is, at once, because that is the only limit that we find to the extent of land which we can set apart by Proclamation, prohibits the creation of a general system. If these words had not been there, "any one time," then upon a strict construction of this language he might have set apart the 750,000 acres in two reserves.

Hon. E. BLAKE: Or in one; but the time obliges him, because from time to time requires that he must decide at one time what is required; that is the only protection.

Mr. Cooper: The protection, therefore, is 10,000 acres, and intervals of time.

Hon. E. BLAKE: I point out to you again, it is in one block.

Mr. Cooper: Of course, that may have some reference, although I do not think it has, to some other part of the contract.

Hon. E. BLAKE: I think you are not injuring your client's interest by that suggestion. I have looked very carefully into that. I see it was set up by some of the correspondence.

Mr. Cooper: The evidence shows—I do not think I am misstating it—that these reservations, with the exception of one or two individual ones, were made in these blocks in sets. For instance, all the Westland reservations were practically made—twelve of them—within two or three months.

Hon. E. BLAKE: That is a vague idea, I think; but I do not think it would be convenient to omit it from the illustrations you are using. At another time I will ask you to show me the same things that you are stating.

Mr. Cooper: I will do so, and you will find the notice given by the Government to the company names the systems of blocks; it names not one block, but half a dozen blocks.

Hon. E. BLAKE: They might make up their minds at one time that they should set apart, and proclaim at intervals what they thought were within the meaning of the contract.

Mr. Cooper: I submit that in that they were wrong. I submit that the setting-apart of the blocks does not necessarily mean the Proclamation.

Hon. E. BLAKE: You have not adverted to a curious thing. It is an odd thing that you have land which shall be set apart, and set apart from time to time, but no more than 10,000 acres shall be set apart.

Mr. Cooper: For instance, we find it is in one case conjunctive, and in the other disjunctive. I submit that the determination of the Governor to proclaim these blocks was a "setting apart" of the blocks before the Proclamation.

Hon. E. BLAKE: That will depend upon what the meaning of "setting apart" in the whole of this clause is. "Setting apart" defined by Proclamation, seems to speak of it as one act. "Setting apart" and "Proclamation" again seems to speak of one act. I am inclined to think that it is one act. There is no final decisive act of the Government. The intention to set apart is not a "setting apart." It is an indication of what the Government intended to do.

Mr. Cooper: It showed the land agreed upon; and the mere act of proclaiming is something which followed on the judgment of the Minister, or the judgment of the Governor.

Hon. E. BLAKE: Yes; but the first and only act the Governor does is the only act.

Mr. Cooper: And he is advised upon the material. Of course, the Governor himself has done nothing.

Hon. E. BLAKE: I suppose the Governor has signed the Proclamation; all that the Minister does before that—may it not be fairly said to be in preparation before the giving of that advice. You cannot condemn the Minister because he has got his materials before he is called upon for them.

Mr. Cooper: I submit that what the Minister does is to determine that the whole of these Proclamations are to be made. He determines to make the whole of them, and that it is a mere matter of detail making them week by week. If it was not so, then this clause would be satisfied supposing the whole scheme of the reservations of all the blocks was completed, and the judgment of the Minister upon the whole of these blocks was come to as one act, and the Proclamations were given day by day.

Hon. E. BLAKE: And the advice given to the Crown at intervals.

Mr. Cooper: Yes; of half an hour.

Hon. E. BLAKE: I do not know whether we have got down to the intervals of time, to the week or ten days; it is mere supposition, sometimes a week or a fortnight, and sometimes a longer time.

Mr. Cooper: When we come to that, sometimes it might be gazetted this week, and there might be an interval of two or three months.

Hon. E. BLAKE: As you are discussing it, we will assume it for the moment.

Mr. Cooper: Then an interval would arrive, and there would be another interval. Of course, it is the question to consider whether this is a final act in one sense, although carried into effect by different Proclamations. If there were six or twelve months between such determinations it would have been a different thing altogether.

Hon. E. BLAKE: Your argument is that the making up of the mind of the Minister would have been just as bad.

Mr. Cooper: It is as to the separation of each particular block.

Hon. E. BLAKE: Supposing he made up his mind as to the actual reservation of these particular blocks, and made up his mind at one time and in one act, and then he decides on the contract that that decision cannot be acted upon by Proclamations for more than three months; still, if the vice is in the making up of the judgment, the vice is still there.

Mr Cooper: We complain of two things: the want of independent judgment on each block, and that the effect of the Proclamations, following quickly on each other, was to cause damage. For instance, if there had been an interval of twelve months between each Proclamation that would be an indication, I repeat, that he had not made up his mind.

Hon. E. BLAKE: But we are assuming that he had not made up his mind.

Mr. Cooper: What was done carried the inference that he had made up his mind.

Hon. E. BLAKE: As to the making up of the mind of the Minister, it appears to me that there is nothing decisive in that. The Crown acts only when the Proclamation is made.

Mr. Cooper: The Crown, it is true, acts only in one sense when the Proclamation is made, but, as I submit, in another sense, the Crown acts through the Minister when the Minister makes up his mind to give that advice, and instructs the department to act accordingly.

Hon. E. BLAKE: The Crown is not bound to follow the advice of any particular Minister or to do any particular act.

Mr. Cooper: I say there was, to some extent, a personal obligation on the part of the Governor as to whether he would accept the advice.

Hon. E. BLAKE: More and more it is becoming the place of the Governor, except on very extraordinary occasions, to follow the advice of his Ministers. The theory of the Constitution is that if the Governor chooses to take the grave risk and responsibility of declining to take that advice he is entitled to do so. As I have stated, I think that the first act of the Crown is the Proclamation. Anything else is preliminary to that.

Mr. Cooper: I do not know that I have anything further to say upon that point at the present time. I now come to the next portion of my argument, and, assuming that these Proclamations are sufficient in point of form, though I submit they are not, then I submit they are bad in substance. It has been shown that a great deal of the land was not required for *bona fide* mining purposes. I am aware that in dealing with them we have a considerable mass of evidence.

Hon. E. BLAKE: Let me understand what the position is you are now taking up. Is it upon the proposition that "may be" means "are or may be required"?

Mr. Cooper: Principally upon that. I think we may divide the evidence practically into four classes.

Hon. E. BLAKE: Before you deal with the evidence, if it does not inconvenience you, do you propose at any time, and, if you do, would it be convenient now, to enlarge upon what the meaning is of "are or may be required for mining purposes"?

Mr. Cooper: I propose to deal with that now. I am simply saying, in reference to the evidence, that I do not propose to deal with that in detail. It is in four classes. First we have witnesses who speak to the lands being practically—or a very considerable proportion of the lands being practically—non-auriferous. Then we have a certain number of witnesses who speak of some portions of the land, more or less, being auriferous, though probably non-payable. Then we have a third class of witnesses who apparently speak of the whole of this land being auriferous; and a fourth (a very limited class of witnesses) who speak of a considerable proportion of these lands as being now payable. I am not now referring to the particular workings on the land, or on any individual blocks, but I think we may deduce this from the whole of the evidence: that the great bulk of the land which has been taken by these Proclamations is land which has been taken not for present requirements, but for future requirements.

Hon. E. BLAKE: I think that is not unreasonable.

Mr. Cooper: And that the Governor and the Crown has considered—and practically only considered—in making these Proclamations, a distant and problematical future. We have the fact that this goldfield has been in existence for thirty-five years, and during the whole of that time only some 20,000 acres have been used by the miners. Then, the population has been falling off. The population is very much less now than it was when mining operations were in full swing. Notwithstanding these facts, the Government has taken something like 350,000 or 400,000 acres of land. I desire also to emphasize that mining has been continually improving, so far as efficiency of appliances is concerned, for at least the last twenty years; yet, notwithstanding that, these goldfields have been in a continually declining state. In reference to the question of "from time to time" and the future, I will refer the Court to the case of Whitehouse against the Wolverhampton Railway Company (Law Reports, 5 Exchequer, page 6). Of course there is no doubt that the case which is before your Honour is a unique one. It is very difficult to find any cases exactly like it. We can only find principles established in cases which bear some analogy to the present case, and this is one of them. Under 8 Victoria, chapters 20 and 21, it is enacted that a railway company shall from time to time pay to the owner, lessee, or occupier of mines extending so as to lie on both sides of the railway all such additional expenses and losses as shall be incurred by such owner by reason of the severance of the surface land, &c. And, in case of dispute as to the amount of such losses and expenses, the same shall be settled by arbitration; and in this case it was held that only those future losses which would necessarily be sustained or incurred in working the mines which were capable of being immediately estimated with reasonable certainty could be assessed. I submit that is a very analogous case. It is true we have not got the words "may be incurred," but the words are "shall be." It says that "a railway company shall from time to time pay" all "expenses and losses" that "shall be"—future words—"incurred by the owner." That argument went upon the point that they were future words, and that therefore he was entitled to recover future expenses.

Hon. E. BLAKE: How do you apply that case?

Mr. Cooper: I apply it in this way: It was held that he was entitled to recover future expenses, but that those expenses must be capable of immediate estimation. The judgment was that from time to time——

Hon. E. BLAKE: That is to say, he could not recover damages that were not estimated?

Mr. Cooper: It was held that he could recover damages estimated with reasonable certainty, but looking only to the immediate future.

Hon. E. BLAKE: Certainly, and no more. He could not recover damages that could not be estimated.

Mr. Cooper: I submit that the word "may," in the words "may be required," simply means "shall."

Hon. E. BLAKE: I read it thus: "All lands which from time to time, in the opinion of the Governor, are required for *bona fide* mining purposes, or which from time to time, in the opinion of the Governor, may be required for *bona fide* mining purposes."

Mr. Cooper: No doubt they are future words.

Hon. E. BLAKE: You must begin by finding out first what the extent is of land which, in the opinion of the Governor, is required for *bona fide* mining purposes.

Mr. Cooper: That, I submit, must read "are required" for mining purposes.

Hon. E. BLAKE: It is a question of "his opinion."

Mr. Cooper: I submit he can only look to the immediate future.

Hon. E. BLAKE: I do not know what "immediate future" means in that connection.

Mr. Cooper: I submit he must wait until the occasion arises.

Mr. Stringer: In the meantime you may take it up.

Mr. Cooper: In the meantime you have power to resume it. If that construction is not the correct construction, why did the contract not give him power to immediately set apart 750,000 acres.

Hon. E. BLAKE: Because he was expected to exercise a genuine opinion. As to the present we agree, and as to the future we agree to a certain extent, because you limit to a certain extent the future. The difficulty I feel is limiting the future by the horizon you set up.

Mr. Cooper: I submit that a reasonable meaning is to be given to it, and, if we can find that the Governor has acted upon wrong ground in forming his judgment, then the Court will correct his judgment. That that is so, I submit is shown in another case, the case of Flower against the

London, Brighton, and South Coast Railway Company (2 Drewry and Smale, page 330), where a company had power to take land as they might think necessary for the purposes of a railway: "Held, that an affidavit of the engineer that certain land was and would be required for the purposes of the company was not sufficient; but the purposes must be specified, so that the Court might judge if the land was *bona fide* required." The argument in that case was exactly the position that the Crown must take in this. It was: "The Acts give power to take whatever may be necessary for the purposes of the Acts and the railway. That constitutes the company judges of what they want."

Hon. E. BLAKE: Would you mind reading the powers again.

Mr. Cooper: By "The London, Brighton, and South Coast Railway Act, 1864," under which the railway company was proceeding, it was provided the company might enter upon, take, and use such of the lands delineated and described in the deposited plans and books of reference as they thought necessary for the purposes of that Act." It was held that the Court could judge, and ought to judge, if the land was *bona fide* required. As I say, the argument in that case gives us a good insight into what the position was. It is exactly the argument for the Crown in this case. The Vice-Chancellor, Sir William Page Wood, said that "to give effect to the company's contention would be that no Court of justice would have the power to try the question, whether any premises are fairly and *bona fide* wanted for the purposes of the railway." He held on the evidence that the land was not *bona fide* required, and granted an injunction. I submit that that case goes to show that where a very similar power is contained entitling the company to take what they consider necessary, they must act reasonably, and that in any instance the Court of Chancery has jurisdiction to inquire into the reasons upon which they have acted; and if those reasons show that the purposes for which they claim to take the land are unreasonable—for which the land is not reasonably required—that the Court will interfere; and in this particular instance an injunction was granted. So, I say, here we have all the assistance of the rules of equity as well as those of common law, and the same principles which would have justified a Court of equity in granting an injunction restraining the Governor from proceeding to make reserves in this way ought to apply to this question.

Hon. E. BLAKE: Suppose the Court would only grant the injunction in aid of the execution of the contract, it must be a breach of the contract to grant an injunction.

Mr. Cooper: It would be to restrain proceedings contrary to the contract.

Hon. E. BLAKE: After all, we have to get to whether it is a breach of contract; and for that purpose we have to find the meaning of the contract, and the extent of the words, "the opinion of the Governor."

Mr. Cooper: Although I do not dispute the Governor is entitled to found an opinion, and that if there are reasonable grounds upon which this opinion is based this Court cannot disturb it, yet I submit this Court is entitled to go into the reasons upon which he founded his opinion, for the purpose of seeing whether the Governor has acted reasonably in the exercise of the power given him by that section; otherwise, if that were not so, as stated in this case, the mere *ipse dixit* of the Governor that "in my opinion, this reserve was wanted," whether it was wanted or not, would be a bar to the company raising any question at all.

Hon. E. BLAKE: You put it somewhat in this way: "I construe this contract," you say, "as if these words, 'or may be required,' mean may in the immediate future be required; and I propose to prove to you by indisputable evidence that the Governor did not think they were required in the immediate future—that he did not think they were required in the immediate future, but thought they would be *bona fide* required in the distant future; and he thought he was entitled to reserve for the distant future. I therefore prove to you that he did not exercise that opinion he was limited to the exercise of—namely, to what was required in the immediate future." That is not a reasonable exercise of the opinion, because you put a construction upon the opinion which you prove unquestionably he exceeded. We do not get into the soundness of his opinion at all.

Mr. Cooper: That is exactly what I submit.

Hon. E. BLAKE: It is a very different thing from that which at one time I thought was going to be pressed upon me—namely, that I was to try out the question whether the opinion of the Governor in respect of any particular reserve was right or wrong.

Mr. Cooper: It is clearly evident that the main reason which actuated the Government in making these reserves was the desire to secure this land for the far-distant future.

Hon. E. BLAKE: And you say the legal meaning of this contract is that they had the right to acquire for the immediate future only, and that therefore there was not a *bonâ fide* exercise of opinion.

Mr. Cooper: That is my second point. That word *bonâ fide* must have been introduced for some purpose. It could not be said that it meant that the Governor could look ahead until the next five hundred years for the purpose of determining what the *bonâ fide* mining purposes would be then. It is not for mining purposes he can reserve, but for *bona fide* mining purposes.

Hon. E. BLAKE: Of course, it is reasonable for you to say what you do say, but I cannot give any greater cogency to the words "mining purposes." I think the meaning of the words "for mining purposes," is for *bona fide* mining purposes.

Mr. Cooper: I submit that the words "for *bona fide* mining purposes" are to secure the company. To what extent they secure the company is another thing. If they were omitted, the Governor might say, "I consider 'mining purposes' means 'speculative purposes.'" I contend that *bona fide* mining purposes means the working of the ground, and, therefore, in dealing with the words *bona fide*, we ought to consider not the far distant future, but the immediate future, that there is very little likelihood within the next few years that anything but a very small portion of this ground will be required for *bona fide* mining purposes.

Hon. E. BLAKE: Or for mining purposes. If I were asked to express an opinion myself, I

should say there was not a likelihood for a considerable time. That would be my opinion. The opinion of the Governor may differ.

Mr. Cooper: I submit we are entitled to consider that view of the case, and to determine in that sense whether there has been a reasonable and *bonâ fide* exercise of a power which has been introduced by exception, and which must be construed most strongly, I submit, against the Governor, and the most favourable construction of which must be conceded to the company; and that it was clearly in the contemplation of the company that, as to the lands along the railway-line, at any rate, their right of selection should not be improperly interfered with.

Hon. E. BLAKE: No right of theirs along the line should be improperly interfered with, of course. With reference to that point—your point of the question of exception—you must remember this clause 16 begins by a limitation of the liability, "Subject to the conditions herein contained." Those conditions are the exceptions, in point of fact.

Mr. Cooper: Yes. In other words, it says the company may select from all lands within an authorised area with the following exceptions.

Hon. E. BLAKE: *Ab initio*, it is a limited power of selection right at the start, before they state the totality at all. They indicate the totality is subject to the conditions.

Mr. Cooper: But the condition is one imposed by the grantor, and is in favour of the grantor, and not in favour of the company.

Hon. E. BLAKE: I am not certain. You can put yourself in the same position as if it was a grant of land. It is a contract for the construction and working of a railway, and, as incidental to that, an agreement about remuneration for that in the shape of land and timber.

Mr. Cooper: It is an agreement on the part of the Crown to make a grant of lands, subject to certain exceptions.

Hon. E. BLAKE: I am very much disposed myself, subject to the limitations of authority, which one must observe, to try and give to words their reasonable fair meaning—to give to words their reasonable meaning, import, and effect. The more we enter into the business of trying to show things favourably or unfavourably, the more of a maze we get into.

Mr. Cooper: I do not ask anything more than to take the fair and natural meaning of the words, whether for or against. I do not ask you to strain these words in favour of the company any more than I hope my friends will ask that they should be strained in favour of the Government; but I ask that a construction shall be given to these words more favourable to the company rather than the stricter construction contended for by the Government. I do not know that I can amplify my argument upon this point by repeating it. I wish to make myself perfectly clear. The first ground upon which we attack the Proclamations is that they are in excess of the power altogether. The second ground is that the Governor, in arriving at his opinion, has admittedly taken into consideration matters which he ought not to have considered at all.

Hon. E. BLAKE: In point of distance and conjectural character?

Mr. Cooper: Yes. I might, in this connection, make some reference to the timber—to the mining industry itself. I do not know that we have any very direct evidence as to the actual quantity of the timber on these reserves; but it is many millions of feet.

Hon. E. BLAKE: Let us make a preliminary stand upon that subject. We must remember that the reservation of all this land for mining purposes does not in the slightest degree indicate *per se* that it is intended to prevent the company taking all the timber upon it, because they have the right to proclaim——

Mr. Cooper: There is the correspondence, which denies——

Hon. E. BLAKE: There is not an absolute right, because the consent of the Crown has to be given. I mean to say the contract between the parties does not in itself contemplate that, because the land is reserved for mining purposes in these blocks, therefore the company shall be deprived of the right to select timber in lieu of the land. The moment they propose to the Crown to select timber instead of land within the district reserved, then there comes the question whether the Crown will accede to it or not, and then, again, will come the question of whether that particular area of timber be required within that neighbourhood.

Mr. Cooper: I am dealing now with the reasons of the reservation, and a very considerable portion of the evidence of many of the Government witnesses was directed to this point: that these reserves were necessary to protect the timber for the mining industry—that, in fact, the timber upon these reserves was required for the mining industry.

Hon. E. BLAKE: In certain localities, that is true; but I do not conceive that shows to me that these reserves were in all cases with reference to the timber.

Mr. Cooper: I do not suggest they were in all cases made in reference to the timber. There were some of the reserves that had no timber, or very little timber, upon them at all. It is shown clearly, too, that upon many of these reserves there is a vast quantity of timber, and therefore, if one main inducement moving the Governor to proclaim these lands was to conserve the timber for the mining industry, he has acted unreasonably in proclaiming these reserves for that purpose. It is true he has considered, no doubt, that there are gold-workings upon many of these reserves; but in the majority of cases the motives which influenced the Governor in making these reserves are not so much the existence of the gold-workings, but the double motive of preserving the timber for mining, and of reserving land for future prospects; so that, not only in reference to mining, but in reference to the timber, they have looked very far ahead indeed.

Hon. E. BLAKE: Do you suggest that the Governor acted upon an erroneous view in the exercise of his opinion in reference to the timber, or do you suggest he has unreasonably reserved this large area because it deprives the company of the right to select timber?

Mr. Cooper: I am only submitting the case in reference to the timber as an additional portion of the evidence in connection with the reservation of the land for future purposes.

The Court rose at 5 p.m.

FRIDAY, 20TH DECEMBER, 1895.

Mr. COOPER'S ADDRESS—*continued.*

The Court sat at 10 a.m.

Mr. Cooper: If your Honour pleases, when the Court rose last night I was discussing the question of the mining reserves, and the system upon which they were made. I now find that the plans I referred to are in evidence—namely, the plans of the Inangahua County Council, and also Mr. Larnach's map. I should like to refer for one moment to the Inangahua plan. There is some difficulty in explaining that; but the plan certainly seems to me to show a completed system of reservation, following exactly the scheme as gazetted. How far these plots were resolved on before the plan was sent to the Inangahua County Council I do not know——

Hon. E. BLAKE: The impression I derived from the evidence was that the Inangahua County Council, and the others to whom the plans were sent, showed the whole amount which was suggested should be reserved.

Mr. Cooper: My suggestion is that the reserves were marked out before the plan went to the County Council at all, and the reserves were simply made on the plans marked out. This is the plan which was put before the Inangahua County Council, and it would be an extraordinary thing if they did suggest what was immediately after adopted. Of course, it may be subject to explanation.

Hon. E. BLAKE: Your suggestion is?——

Mr. Cooper: That they were sent down with the reservations as contemplated by the Government, and then that the various County Councils were to give suggestions in reference to these reserves.

Hon. E. BLAKE: Can you show any evidence that will indicate that?

Mr. Cooper: There is the Maruia reservations, which are exactly the same as those gazetted. It shows the position in which the reserves were placed.

Hon. E. BLAKE: You argue that the County Council followed the suggestion of the Government officers; whereas the Government argue that the County Council followed the suggestion of their own officers.

Mr. Cooper: Yes.

Hon. E. BLAKE: I have not observed any evidence to indicate that they sent the reserves in that way. I remember a letter from one of the mining associations which pointed out that they were not professional persons, and felt some difficulty in fulfilling the desires of the Government. It would have been different if the Government had wanted to have it all cut and dried, or to get an assent or dissent. I understand you to say that the Government wanted the reserves carried out, and that they marked out what they wanted. You may argue that the Government very slavishly followed the views of the County Council. I do not see at present in the evidence anything that the Government had marked out what they wanted before the plans went to the County Council.

Mr. Cooper: The other point is in reference to Mr. Larnach's plan. Although he marked out and took a very considerable quantity more land than has been reserved up to the present time, yet the Government followed mainly the lines of Mr. Larnach's Proclamation. A comparison of the two plans shows that at once. I am dealing now with those reserves in the Grey Valley. [Plans referred to.] In other words, the position I put before the Court is, that these reserves in the Grey Valley are substantially the same as those referred to in Mr. Larnach's Proclamation.

Hon. E. BLAKE: But he went further.

Mr. Cooper: Yes; but so far as the injury done to the company is concerned, that injury was caused by the Proclamations along the railway-line.

Hon. E. BLAKE: You argue that there is a substantial identity—that one is part of the other?

Mr. Cooper: Yes, and a great part of the other. This will be clearer if the Court will look at the map dated 6th September, 1892, which was put before the Parliamentary Committee.

Hon. E. BLAKE: This is a suggested completion. A portion of this may have been reserved since 1892.

Mr. Cooper: Yes, but this map [referred to] is substantially the same in its reservations as Mr. Larnach's; substantially it follows the scheme proposed by Mr. Larnach in connection with the Grey Valley.

Hon. E. BLAKE: I am looking at the Grey Valley. I agree that a large portion of the territory that is included in one is also in the other, but I do not see that they are absolutely identical.

Mr. Cooper: They could not be absolutely identical, because the Government had to cut up their total selections into blocks, and that meant separate boundaries for the blocks.

Hon. E. BLAKE: They might have taken Mr. Larnach's area and cut it into blocks.

Mr. Cooper: Yes; and I submit that the scheme of 1892 was substantially Mr. Larnach's reservations.

Hon. E. BLAKE: Of course, that is in the Grey Valley, but I do not know that you can draw an argument from that by saying that in one particular it is the same and in another it is not.

Mr. Cooper: The maps do not exactly cover the same ground, but you can get the general idea. Before I pass from that branch of the subject, I would mention that I find upon examining the exhibits that there are three or four blocks in one certificate on one date, 22nd March, 1893. These are Blocks 93, 94, 95, and 97.

HON. E. BLAKE: What you say as to that is that one certificate was issued after the Proclamations.

Mr. Cooper: No, before the Proclamations.

Hon. E. BLAKE: That seems to be one block.

Mr. Cooper: The certificate was issued on the 22nd March, 1893, and those blocks were

gazetted—Nos. 93, 94, 95, and 97—on the 29th June, 13th July, 27th July, and 17th August. Then I find, again, that Mr. Gordon gave a certificate for Nos. 25, 26, 27, 28, 29, and 31, on the 4th November, 1893. These are the Maruia and Matakitaki Blocks; 25, 26, 27, and 28 are the Maruia Blocks. The Proclamation was on the 1st February, 1894, for Block 25; 1st March, for 26; 28th March, for 27; 22nd March, for 28, and 29th April. Then, he gave a certificate for the Matakitaki blocks on the same date, and they were gazetted on the 5th April, the 10th May, and the 21st June. This is an indication that they were all taken in under one system.

Hon. E. BLAKE: If they had made them all in one block, it would have been still under 10,000 acres.

Mr. Cooper: I submit that these reserves were all carried out at one time. Then, I find that on the 15th August, 1894, he gave a certificate for Blocks 61, 63, 64, 66, 71, 75, 79, and 80; 64 was apparently not gazetted.

Hon. E. BLAKE: In point of fact, you will remember that by arrangement between the Government and the company the proposals were sent to the company in order that they might object to them.

Mr. Cooper: I shall make some further reference to that. Then, if we turn to another branch of the same matter—I refer to the notices given to the company—we find the notice was conveyed, in many instances, of systems. On 7th June, 1892, the notice is conveyed to the company that it was intended to set apart Blocks 59, 53, and 51, and on the 12th December, 1892, there was a notice given to the company in the same terms, that the Government intended to set apart Blocks 88, 89, 80, and 79. They adjoin, at more than one point, 88 and 89; and 79 and 80 are practically one block, 20,000 acres. Then, on 3rd May, 1893, the same intimation of the system of 93, 94, 95, and 97 was given. That is the same system with those blocks running up the Coast, 36,000 acres. We find on 17th August Blocks 7, 8, and 9, which were contiguous blocks, they are the blocks along the river, 8,000 acres; it was that sectional system. On the 10th January, 1894, Blocks 2, 5, 26, 27, 28, 29, 30, and 31; Blocks 2 and 5 are Westland blocks; 26, 27, 28, and 29 are blocks down the Maruia. On 4th September, 1894, Blocks 66, 71, 75, 79, and 80, and the last one apparently on 24th September, 1894, in which there were two sets, 61, 63, and 64, that is the system, and 81, 82, 83, and 84, another system. It is true that they were not proclaimed, but they were marked out and set apart, and I am simply dealing with the system adopted. I think, perhaps, it would be convenient to see the position the company took in reference to these blocks from the outset. I will not trouble your Honour with reference to Larnach's Proclamation, for immediately it was issued there was a protest, which was followed by the withdrawal.

Hon. E. BLAKE: Under another contract.

Mr. Cooper: Yes, and immediately it was proposed that these reserves should be made under the contract of 1888 there was a protest, and I mention this for the purpose of showing that it was not an afterthought on the part of the company that this question was raised in reference to these Proclamations. It is suggested by the Crown that the company was not damnified by these Proclamations; because they found they had a non-payable contract on their hands, and that they at the last moment thought they could not carry out the scheme, and that they then raised the grievance as a mere after-thought. The correspondence shows that it was nothing of the kind. It shows that the manner in which these Proclamations were proposed, the manner in which they were set apart and proclaimed, was the real grievance, the substantial grievance, and that they protested against it from the beginning, and long before it was suggested that they were not in a position to carry out the contract. We find the first step taken by Mr. Scott and Mr. Wilson was to request the Government not to make any reservations without first acquainting the company and giving them an opportunity of considering them. Evidently the company considered at the outset the question where they were to be made a most important one in the company's interests.

Hon. E. BLAKE: I remember, and also Richardson's answer.

Mr. Cooper: I simply wish to point out the date. On the 6th of August, 1888, the company wrote to the Government requesting the Government, before the mining reserves were determined upon, to allow the company to confer with the Government in reference to that determination, and the Government replied on the 15th August that they would have an opportunity of seeing the proposals before they were determined upon. Then, a year afterwards——

Hon. Mr. BLAKE: Please read that letter of the 15th August.

Mr. Cooper: The first letter is on the 6th August, from Mr. Scott to the Minister. In this letter he refers to the proposal of the Minister to make reserves up to 250,000 acres, and asks that the company may have an opportunity of conferring with the Government before the reserves are made. That is replied to by the letter of the 13th August, wherein the Minister intimates that such an opportunity will be granted. From the outset, therefore, the company considered that this question of the mining reservation was a vital one, and a most important one, of such importance that it was necessary there should be a conference and a discussion between the company and the Government before the various reservations were set apart. No reservations were made. In 1889, twelve months afterwards, on the 20th of August, Mr. Scott again wrote drawing the Minister's attention to reports of meetings at Orwell Creek, meetings called apparently for the purpose of having all the available land in the Grey Valley withdrawn from the authorised area and reserved for mining purposes, and again emphasizes his request that the company may be consulted before a final determination. And the Minister writes to acknowledge the letter, and says: "I inform you that the promise given has not been overlooked." Another year passes, and there was a change of Ministry, and on the 1st September, 1891, Mr. Wilson asked the Government to give him the opportunity of meeting the Government and conferring upon the proposed scheme of reserves. The letter is addressed to the Hon. the Minister for Public Works as follows:—

"New Zealand Midland Railway Company (Limited), Christchurch,
"1st September, 1891.

'SIR,— *Mining Reserves.*

"I have to acknowledge receipt of your letter of 25th August, forwarding tracing and description of a third block of land which it is intended to reserve for mining purposes under clause 16 of the Midland Railway Contract.

"In order to save time and permit of the lands on the West Coast being reopened for settlement, I have the honour to suggest that the full proposals of the Government with respect to these reserves should be communicated to the company, and I should be willing to consider them with a view to their being made at once, if the Government will issue the regulations and permit the company to proceed with the applications without further delay.

"I have, &c.,
"For the New Zealand Midland Railway Company (Limited),
"ROBERT WILSON,
"Engineer-in-Chief and General Manager."

Hon. E. BLAKE: That is the letter I was about to draw your attention to.

Mr. Cooper: But no such conference was allowed. There was no such opportunity given.

Hon. E. BLAKE: I allude to the attitude of the company on this question of piecemeal and from time to time reservation.

Mr. Cooper: No doubt if the reserves were made in a manner which was within the contract, and in a manner which was to the interests of both the Government and the company, it was reasonable and to the interest of both of them that they should be set apart as soon as possible, in order that the company might know its position, and that the Government might also know its position. What the company complain of is that the promise contained in that letter never has been carried out—that no proper scheme has been submitted.

Hon. E. BLAKE: I understand that you object to have the Government form a scheme to settle more than 10,000 acres in any one block at any one time.

Mr. Cooper: The parties themselves could meet together and agree upon it. Although it was carried out by the Government in one respect—that is, they formulated the scheme, yet the Government never conferred with the company in respect to that scheme.

Hon. E. BLAKE: I do not think there has been any agreement with reference to these reserves, nor upon the whole do I think, notwithstanding the terms of that letter—though I think it is capable of being used in answer to some of your suggestions—my present impression is, subject to what may be said on the other side, that the company have ever waived their right to insist upon the legal terms of the contract.

Mr. Cooper: There are just one or two letters and telegrams which I will draw your special attention to. We have in the Minister's Statement in 1891 this statement: That in reference to the Midland Railway Company, the Government intend to set apart immediately 250,000 acres. That is a statement as to policy. Then, we have on the 24th September, 1891, a telegram which is of considerable importance. It is from Mr. Wilson to the Minister. In the meantime, after the statement made by the Minister of his policy, reserves were commenced to be made. The reserves in Westland were practically gazetted in some twelve days: they were gazetted at intervals of a few days between each Proclamation. That is, the 77,000 acres which have been referred. Mr. Wilson's telegram of the 24th September is as follows:—

"(Telegram.) "24th September, 1891.

"COMPANY protests most strongly against the mining reserves which are being made, and the method of making them. Those recently proposed being far in excess of lands *bona fide* required for gold-mining, and the time before notification to company (agreed to be given) of proposed reserve and gazetting being so short as to make any inquiry by company impossible. It will therefore be necessary for the company to formally object to each reserve, unless some time is given for examination. "ROBERT WILSON, Greymouth."

What was the time given? We have a notice conveyed to the company that it is proposed to make a series of reserves. We find that, in some instances, within three days after that notice the reserves are gazetted and the Proclamation is made. There is this other telegram that I would refer to. Five days after, Mr. Wilson telegraphs to the Hon. R. J. Seddon as follows:—

"(Telegram.) "Westport, 29th September, 1891.

"Am aware you considered reference of reserves to company matter of courtesy, but think company clearly entitled to object either before or after proclamation, and more convenient for all if done before, therefore apply for a month's notice of all not gazetted. Area of 250,000 acres, is, I consider, far greater than required, and will seriously impede settlement and people's use of land.

"ROBERT WILSON,
"General Manager, New Zealand Midland Railway Company (Limited)."

Evidently Mr. Wilson is referring to the impression in the mind of the Minister at the time.

Mr. Gully: There had been an interview at Christchurch.

Mr. Cooper: Yes; and Mr. Wilson speaks about that interview. There is a mass of correspondence on this matter. I am only going to refer your Honour to two other letters. One, of 29th October, 1891, in which Mr. Wilson writes to the Minister for Public Works as follows:—

"New Zealand Midland Railway Company (Limited), Christchurch,
"29th October, 1891.

"SIR,— "*Mining Reserves.*

"With reference to your letters of various dates indicating blocks of land which it is proposed to set apart as mining reserves under the contract, I have again to call your attention to the fact that all these blocks contain lands which cannot possibly be required for gold-mining purposes; and I would specially refer to your letter of the 27th instant, indicating the eleventh

block which it is proposed to reserve, which includes Kelly's Ridge, and extends across the route of the railway down to the Teremakau River. This block covers much too large an area, and there is no probability of the land being required for gold-mining purposes except in the immediate vicinity of the reefs.

"I protest, on behalf of the company, against lands being wrongfully included in the reserves, and shall require to have the blocks reconsidered, and, if necessary, to have evidence produced before arbitrators as to whether or not they are requisite for *bona fide* gold-mining purposes.

"I have, &c.,

"For the New Zealand Midland Railway Company (Limited),

"ROBERT WILSON,

"Engineer-in-Chief and General Manager."

I say, first, that Mr. Wilson objected to the general principle upon which the reserves were being made; and, secondly, that he objected to the particular principle upon which each reserve was being made; and, thirdly, he considered that no opportunity had been given to the company to confer with the Government; and that they were practically setting apart these reserves behind the company's back. There are some dozen letters or so bearing on this point. There is one of the 29th October; and the next one I shall refer to is on the 2nd June, 1893—two years afterwards. In that letter Mr. Wilson objects to these reserves. He says:—

"I have the honour to acknowledge the receipt of your letter of 3rd May, notifying the company that it is proposed to proclaim four further mining reserves—viz., Nos. 93, 94, 95, and 97—containing respectively 9,000, 7,500, 7,500, and 10,000 acres, in the Te Miko, Waiwhero, and Punakaiki Survey Districts; and I have again to inform you that it will be necessary for the company at the proper time to bring evidence to show that the area of these reserves is in excess of that which can reasonably be deemed to be required for gold-mining purposes, or the several purposes connected therewith or incidental thereto, and to contest the legality of these reserves, both as to the nature of some of the land included therein and as to the method by which they are proposed to be defined and made."

He objects to their legality, their nature, and as to the method in which they were made. And on the 13th March, 1894, he makes the same stand and protest. I merely refer to these letters for the purpose of showing that from the very outset the company considered that the manner in which these reserves were to be made, the extent of the reserves, and the position of the reserves was of vital interest to them; that they desired to have the opportunity of a conference, which was practically denied them; that they protested from first to last—from the very beginning to the very last—against the method and the manner and against the quantity of the reserves; and drew the attention of the Government from the beginning to the fact that they considered that a breach of their rights had been committed. And the Government cannot say that they were allowed by the company to continue to make these reserves without any warning or without any protest. I refer to this now with this object: that that protest was one which was not called forth by any desire on the part of the company to visit upon the Government the consequences of any improvident bargain which the company had made with the Crown, but was called forth honestly, and for the *bonâ fide* purpose, and for that purpose only, of protecting the company's rights. There is a letter of the 14th April, 1893, from Mr. Salt to the Premier, which I have no doubt your Honour has read, but, with your Honour's permission, I will just draw attention to it. It shows that Mr. Scott had communicated Larnach's Proclamation to the company. It shows that the effect also of the proposed reservations had been communicated to the company almost immediately they were proposed, and it shows that the company at that time considered that there was a probability that some breach of contract had been committed by the Government, and there was a very considerable probability that Larnach's action was going to be repeated. Mr. Salt's letter was written twelve months after the time; but it was called forth by a reference which had been made to Mr. Salt's speech, which, it appears, had been wrongly reported in one of the newspapers.

Hon. E. BLAKE: I remember the letter very well.

Mr. Cooper: I only make that passing reference to it. I referred yesterday, on the question of damages, to a passage in "Sedgwick on Damages," which authority I had not with me at the time. At section 618, on page 269, it says: "Where one of the parties to a contract is wrongfully prevented by the employer from completing it, the measure of damages is the difference between the price agreed to be paid for the work and what it would have cost the plaintiff to complete it." This is the part I wish to draw attention to: "Differently stated, the rule in such case is recompense to the plaintiff for the part performance, and indemnity for his loss in respect to the part unexecuted. The plaintiff is to be placed in the same condition he would have been in had he been allowed to proceed without interference." What we argue is that we should be placed in the same condition that we would have been in if we had been allowed to proceed without interference. If these acts on the part of the Government constitute a breach of contract, then we were prevented from financing. If those acts had not taken place we would have been able to obtain the moneys, and would have been able to carry out our work. And when I come to deal, as I shall, at a later stage of the case, with the probability of the company being a success in the future, I think that I shall be able to show very clearly to the Court that the action of the Government in making these reserves—that the effect of that action upon the company's prospects—was such as ultimately to cause them to lose substantially the whole of the benefits of the capital which they had raised. All we ask is that the mind of the Court shall go back to the time when the action of the Government interfered with the position of the company, and that we shall be placed, as far as the assessment of damages can place us, in the position that we would have been in had we not been interfered with by those Proclamations. I shall deal more fully with this branch of the subject when I come to discuss the evidence of the company, and the evidence which has been adduced by the Government upon the prospects of the company had it not been interfered with at all. Now, the next breach of contract we complain about is in connection with clause 33.

Hon. E. BLAKE: Under which head?

Mr. Cooper: Under the first arbitration still.

Hon. E. BLAKE: I know; but under which—4, I suppose?

Mr. Cooper: There seems to have been a suggestion made at the beginning of the case that the Crown had refused to allow selections to be made because they were outside the western range of mountains. We are entitled, under the contract, to call to our assistance clause 33 if the lands within that area are on the western side of the main range of mountains. I do not think it will be at all necessary for the Court to take any notice of——

Hon. E. BLAKE: We are not bothering about Tadmor.

Mr. Cooper: There were no refusals on the ground that we were not over the range.

Hon. E. BLAKE: It is not necessary to deal with the question of the true western side.

Mr. Cooper: All the applications we put in were within the area covered by the operation of clause 33; that is really what it is. Now, I shall have to make a somewhat critical examination of clause 33, because at the outset, from a perusal of the correspondence, we find the Government took this stand—and they appear to have been so advised by the Solicitor-General—that clause 33 was governed by the provisions of clause 29. That was the first difficulty in the way. I shall submit to the Court that that is not so—that clause 33 stands by itself, and must be administered by itself, and without any reference to clause 29, which was for an entirely different purpose. Of course, if the Solicitor-General's opinion was wrong, although the Government acted upon it, there would be a breach of contract.

Hon. E. BLAKE: Of course, the Solicitor-General does not make the law.

Mr. Cooper: I notice the Solicitor-General's opinion has been handed in for the assistance of the Court.

Mr. Gully: No.

Mr. Cooper: At all events, I find as a set-off there is the opinion from the company's solicitors in an exactly opposite direction.

Hon. E. BLAKE: I shall pay equal attention to both of them.

Mr. Cooper: Clause 33 provides that: "So far as respects any lands within the authorised area in the Nelson and Westland Land Districts, on the western side of the main range of mountains, and being available for selection by the company under clause 16 hereof, the Queen shall, from time to time, on the request of the company, sell any such lands for cash, or on deferred payments in such manner as may be agreed upon between the Queen and the company, or may let the same on lease." The first observation I would make in reference to that clause is that the words "or on deferred payments in such manner" are parenthetical. The words "in such manner as may be agreed upon between the Queen and the company" do not govern the words "for cash." The Queen shall sell for cash, the Queen shall let on lease, the Queen shall sell on deferred payments, but, if on deferred payments, there must be an agreement between the Queen and the company.

Hon. E. BLAKE: The Queen shall sell, at any rate; but your observations would be of great force if that original "shall" governed the letting on lease. It is not so forcible when you find it does not.

Mr. Cooper: The clause says, "the Queen shall sell for cash," then "the Queen shall sell for cash or on deferred payments in such manner as may be agreed upon between the Queen and the company." A separate division is made of the words "or on deferred payments in such manner as may be agreed upon between the Queen and the company."

Hon. E. BLAKE: There is no comma after "payments."

Mr. Cooper: There is no comma after "payments." If it was a cash sale, there would be no necessity for any agreement to be come to between the Queen and the company, because the interests of the Crown and the interests of the company are sufficiently conserved by the cash purchases to be made. A deferred payment is quite a different thing. There the Queen may say, "Well, if you wish us to sell these lands on deferred payments, then we must meet together and determine when these payments are to be made, whether they are to be made yearly or every six or three months"; but, if they are to be sold for cash, the interests of both sides are sufficiently protected by subclause 2 of that section—the assessment. Now, the second point that I would draw the attention of the Court to in reference to that clause is the obligation on the part of the Queen to cause the value of the land to be assessed: "Upon the company requesting the Queen so to sell or lease any land, the Queen shall forthwith cause the value of such land to be assessed." There are two obligations cast upon the Government under that section. There is an absolute obligation on the part of the Crown to sell upon request. It is not like clause 18, where the Crown has the option of refusal. It is not like subclause (*c*) of clause 16, where an opinion is to be exercised before the Crown's action can be called into question. There is a direct and distinct obligation: the words are imperative—the Queen shall do it, and under subsection (2) the Queen shall forthwith do something else. Now, the first contention on the part of the Crown was that that section was governed by section 29.

Hon. E. BLAKE: You mean the whole of the section 33?

Mr. Cooper: Yes; and therefore if the Crown was asked to call in to the aid of the company section 33, the Crown could say "No; under section 29 we have got two months first of all to consider whether we shall do it; and, secondly, after we have taken that period of two months, we can refuse to do it." That was substantially the position taken by the Crown. There was a second position taken by the Crown, that "even supposing we are bound to do it, we are not going to do it until we have made regulations."

Hon. E. BLAKE: I thought it was the company that was calling for regulations.

Mr. Cooper: No, it was the Crown that was insisting upon regulations; and, after a period of two or three years had been consumed in making regulations, the Crown suddenly discovered there was no power to make regulations at all. I think after two years they found they could not make them.

Hon. E. BLAKE: I do not remember that it was the Crown's initiative about the regulations, but the company's.

Mr. Cooper: The company tried to meet the Crown in the making of regulations, though protesting it was not necessary.

Hon. E. BLAKE: You will please refer me to the evidence on that subject when you come to that stage of your argument.

Mr. Cooper: Yes; I think those letters are all contained in Exhibit 139, and we find that the correspondence commenced on the 27th September, 1888. That is, immediately after the contract was signed. There appears, then, to have to have been a desire on the part of the people to obtain lands within this authorised area for settlement, and a very large number of applications were from time to time sent in. On the 27th September, 1888, Mr. Scott writes to the Government forwarding a list of names of the persons who have, under authority from the company—referring to subsection (1) of clause 33—made choice of some lands in Westland which they wished to acquire. The receipt of this letter was acknowledged on behalf of the Government. Well, apparently nothing was done. There seems to have been some delay. In 1890, there is a letter from the company to the Government, dated 23rd of June, complaining of the delays.

Hon. E. BLAKE: You contend, then, that if the company made application with reference to a small block the Crown was absolutely bound to sell it.

Mr. Cooper: Bound to assess.

Hon. E. BLAKE: And to sell?

Mr. Cooper: Yes.

Hon. E. BLAKE: Although you apply for a gold-mine?

Mr. Cooper: No; I did not say that. In the case of a gold-mine it is subject to the provisions of clause 16.

Mr. Stringer: The reserve might not be made.

Hon. E. BLAKE: You mean that until the reserves were actually made the company could select all the gold-mines, and the Crown was bound to sell all the gold-mines?

Mr. Cooper: I do not go so far as that at all.

Hon. E. BLAKE: I want to see where you draw the line.

Mr. Cooper: I say, subject to the exceptions in clause 16. Clause 16 excepts "All lands which at the date hereof are subject to any rights of private ownership, tenancy, or other occupancy, not being a tenancy or occupancy under leases or licenses granted for pastoral purposes; and all lands which have, prior to the first day of January, one thousand eight hundred and eighty-seven, been set apart either temporarily or permanently by or on behalf of the Queen, under any law for any public purpose, or which may at the time such selection takes effect under these presents be lawfully held, used, or occupied for mining purposes, but so that all lands so held, used, or occupied for mining purposes shall be included in the aggregate area mentioned in subsection (*c*) hereof."

Hon. E. BLAKE: I do not mean an occupied mine. I mean a mine which was unoccupied, but which was an absolute gold-mine, and a first-class gold-mine, from which large returns might be obtained.

Mr. Cooper: I take it there could be no possibility of such a piece of land being unoccupied. But, if it is put to me in this way, I say we were entitled to select——

Hon. E. BLAKE: Suppose, for instance, you send out a prospectus, which you are entitled, and to look over plans, and then obtained the returns got from the places that are gold-mines, and they are not reserved in any way?

Mr. Cooper: I say the Queen is bound to sell; and the safety to the public is this: It is not the B 1 value that they are bound to assess. The Crown could put £20,000 on that piece if they choose.

Hon. E. BLAKE: On your taking the whole block afterwards you get the benefit of that; so that you get the benefit of the gold-mine, because if a very large price was put on it it would enable you to affect the whole block.

Mr. Cooper: I say that clause was introduced to enable us to sell lands a portion of which might be found to be auriferous.

Hon. E. BLAKE: The difficulty I feel as to the applicability of section 29 to section 33 is that which I have endeavoured to state. I see nothing at all to prevent the company from taking any parcels of valuable auriferous areas. Of course, as you say, in the first instance, if they had assessed the prices the company would be gaining the benefit of the auriferous area. If they took the whole block they took the B 1 value; but the company themselves are not the ones to select.

Mr. Cooper: It is true the company would get the benefit of the sale, no doubt, if they chose afterwards to select the block; but, suppose the Government reserved the balance of the block——

Hon. E. BLAKE: Suppose they did and suppose they did not. The balance of the block might be non-auriferous, and you might take the very part which is auriferous. The Government has not right to reserve the remainder, and you are entitled to get the whole of the benefit of the auriferous land, whereas the whole scope of the contract seems to recognise the mischief of allowing private interests to creep in, in the case of auriferous lands.

Mr. Cooper: I would point out again a second element of safety. Suppose such a scheme was carried out—I will take the case in the strongest way against the company. Suppose the company had private information that there was a valuable gold-mine or lead under the surface, and they were to put up some person to make some application to select, and assuming that the Crown was bound to assess and to sell that piece of land to that person, and suppose the Crown had no knowledge whatever of this valuable gold-lead and the assessment was made on the B 1 value. Suppose, then, it was discovered there was gold, all the Crown would have to do would be to give notice that they had resumed it under the Act of 1891.

Hon. E. BLAKE: Suppose the Crown cause it to be assessed on the auriferous land value?—

Mr. Cooper: As I understand the law in relation to gold here, you cannot, unless the Crown chooses to sell, take gold from the land in derogation of the rights of the Crown.

Hon. E. BLAKE: You mean the sale itself would not include the gold?

Mr. Cooper: I say, the Crown would have this safety: First, if they knew the gold was there, they could assess on the surface-value, and they could reserve their rights to the minerals.

Mr. Gully: They could only prevent others from taking them.

Mr. Cooper: But not the Crown.

Hon. E. BLAKE: We have had proofs from time to time in cases where the holders were not entitled to take the gold.

Mr. Cooper: But in England there was the famous Welsh case, in which the Crown did come in and claim the gold.

Mr. BLAKE: Certainly.

Mr. Cooper: And, in England, if I own, say, 50 acres of land, and the surface-value is 5s. an acre, and it is shown that there is a valuable gold-mine in it, there is no special law by which the Crown can come and take that land from me at 5s. an acre as there is here.

Hon. E. BLAKE: The whole of the long correspondence, to which you have not made allusion, will show that the attempt on the part of the company—I do not use the word "attempt" in any invidious way—to have the reserves made, and to enlist the sympathies of the County Councils and local bodies in favour of not having the reserves made, but that the company should proceed under clause 33, all points to the idea on the part of the company that there should not be any private proceeding under clause 33, and, in a word, that it was not intended to allow private interests to interfere with auriferous lands under this clause 33.

Mr. Cooper: No doubt the company wished to do what is fair. The position, however, the company took at the very outset, and the position the Crown took, was, "You are not entitled to call upon us to make assessments, and you are not entitled to call upon us to sell." The company said, "We are; but we want to get settlement in this district, and, in order that we may act for the interests of the district as well as for the interests of the company, we are willing that these applications should be advertised—we are willing that inquiry should be made; but when these applications are advertised, and after inquiry is made, we ask you to make an assessment." The Crown, on the other hand, refused to do that. The Crown kept these matters in abeyance for years, on the assumption that they could not act or that they would not act until the regulations were made.

Hon. E. BLAKE: In this very early letter of the 23rd June what the company's representative, Mr. Wilson, says is: "We have hitherto understood that the fact of the Commissioner of Crown Lands handing to the company his assessment of the land applied for included the assent by the Government to the sale of that land, and that, before handing it over, he had taken any necessary steps to ascertain whether the particular land might be so dealt with. As evidence of this, the assessments have provided for applications about which there is any doubt being advertised." It does not appear to me that they contend that there is an absolute right to insist upon sale to an individual by their nominee.

Mr. Cooper: Certainly not before assessment.

Hon. E. BLAKE: But even to insist upon absolute sale. They say it was therefore deemed necessary to refer such application to the Minister for two months, not because there was no right but because there was another method, as they supposed, to reach the judgment of the Crown as to whether they should be sold.

Mr. Cooper: They do not admit they came under clause 29 at all.

Hon. E. BLAKE: I do not say that alters the law, but it does affect the question materially which you are now upon—the question of the attitude of the two parties, and of what this breach is, and what you complain of, and the damages. The attitude of the company does not seem to be that the Crown is bound in the unqualified manner you suggest.

Mr. Cooper: The attitude of the company appears to me to be at first this: "We do not wish that there should be any difficulty between us and the Government. We want this thing to go on smoothly as far as possible; we are willing, therefore, to agree to any reasonable way by which we can meet your wishes, even though it is not absolutely within your rights under the contract." Correspondence, no doubt, took place for some time, but the Government took quite a different view of the matter afterwards. First of all, they took up the position, which the company could not acquiesce in, that clause 29 governed clause 33, and the company protested against that from the first.

Hon. E. BLAKE: This earlier letter has an indication of that; I refer to the letter of the 4th July, 1890, which says:—

"New Zealand Midland Railway Company (Limited), Christchurch,
"4th July, 1890.

"SIR,— Re *Morris and Watson and Co.*

"In consequence of a communication from the Commissioner of Crown Lands, Hokitika, I beg to inform you that the company wishes to deal with the lands as per plan and description attached, by letting them to Morris and Watson and party respectively.

"The Commissioner informs us that, after inquiry into the question by both himself and the Warden, he is prepared to consent to the company dealing with the land, but subject to its being referred to you under clause 29 of the contract.

"In order to save time, and meet the convenience of the applicants who have already advertised their applications for the land, I now beg to inform you of the company's wish to deal with this particular land, though, as we have already pointed out, we do not consider it necessary under the contract that all such applications should be so referred; and do so in this case without prejudice to the question as to whether it should be the practice in other cases.

"As I understand that full inquiry has been made by the Government officers into the particular matter, I would further ask you to consent to the company's dealing with the land at your earliest convenience, without waiting for the expiration of the two months provided by clause 29. It is now eight months since the application was made to the Commissioner of Crown Lands, and the applicants have been already put to considerable inconvenience.

"I have, &c.,

"For the New Zealand Midland Railway Company (Limited),

"ROBERT WILSON,

"Engineer-in-Chief and General Manager.

"The Hon. the Minister for Public Works, Wellington."

Mr. Cooper: There is a letter of the 9th September, 1890, which is of importance. Mr. Wilson says: "In reply to your letter of the 29th ultimo, while not concurring in the opinion that a reference to the Minister under clause 29 of the contract is necessary in cases of dealing with lands under clause 33, I have the honour to point out that my suggestion was not that the Minister should delegate his functions under the contract to any officer, but merely that he should instruct the Commissioners of Crown Lands (whose duty it is, as already arranged, to assess the value of all lands to be dealt with under clause 33) to advise the Minister at the same time whether there is any cause for his objecting to the particular land applied for being dealt with, and that the request of the company for an assessment of the land shall be sufficient notification to the Minister under clause 29, assuming that he be entitled to such notice."

Hon. E. BLAKE: That seems to be an indication that the contention of the company was that the Minister had some right——

Mr. Cooper: The company's desire was that the application should be granted as speedily as possible. The company, it is true, did not take up the position that they must consent absolutely without making an inquiry, although they reserved their legal rights, but they said, if you really do think you must make inquiry, then delegate that inquiry to the Commissioner of Crown Lands; but still they object to any interference with their absolute legal rights under clause 33. Then, in the last clause of that letter, he says that the company's chief wish is to facilitate settlement. Then, on 15th September, 1890, there is a letter, forwarding 563 applications, and there again the company showed clearly that they will insist upon what they think to be a proper construction of the contract, while they are still willing to meet the Government and to facilitate the settlement of this question. He says:—

"Referring further to your letter of the 29th ultimo, and to mine of the 9th instant in reply thereto, as the company does not wish to cause delay in dealing with any western lands under clause 33, but is anxious to assist settlement, I have now the honour to enclose a list of (209) applications which the company wishes to deal with at the earliest possible date. Some of these have been assessed by the Commissioner of Crown Lands; others have been sent for assessment, but are not yet returned.

"This list is forwarded without prejudice to the question as to whether it is compulsory for the company to refer the applications to the Minister under clause 29 of the contract.

"I have further to request that you would be good enough to notify your consent, or otherwise, as early as possible."

All through there is a desire shown on the part of the company to insist upon what they conceived to be their strict legal rights.

Hon. E. BLAKE: They seem to indicate many times the view that it does not come within clause 29; but they also seem clearly to indicate the view that the Minister has a right to exercise discretion and judgment, whether it is a fitting thing to, or not, and this enclosure in this very letter, submitting a list of blocks under clause 33, indicates that also.

Mr. Cooper: No doubt the Minister had to exercise judgment or inquiry, because, if no inquiry was to be made into the matter, we might take some land which was absolutely in the occupation of some person for mining purposes. It was necessary to send every application on to the Minister for the purpose of ascertaining whether we were taking any other person's land, or were seeking to take land which was in the occupation of any other person.

Hon. E. BLAKE: Take the case of Morris and Watson.

Mr. Cooper: Still there is a protest in connection with that case.

Hon. E. BLAKE: You state that the objection announced by the company is that the land is reserved at all?

Mr. Cooper: In that letter there is a statement by Mr. Fergus that that land is to be set apart for the purpose of proclamation, and the reply to that letter was one dated 9th September, as follows:—

"In further reply to your letter of the 29th ultimo *re* Morris and Watson's application, I notice that you object to the company dealing with these lands on the grounds that they are partially auriferous, and that steps will be taken to set apart the land as mining reserves. I am surprised to hear that these are considered auriferous lands, as the company is of opinion that they are not such within the meaning of the contract, in which opinion they are confirmed by very experienced authorities, whose evidence can be brought forward. I would remind you of the promise made by the Hon. the Minister of Lands, under date of 13th August, 1888, that the company will be given full opportunity of conferring with the Government before any mining reserves are made."

It is true that the company did not take, in reference to this land, the stand that it is not occupied; therefore we are entitled to demand——

Hon. E. BLAKE: Your view is that, whether these lands were reserved or not, not having been set apart and not being in occupation, the company had a right to apply to have them selected.

Mr. Cooper: I submit that these letters show nothing more than a desire on the part of Mr. Wilson to work harmoniously with the Government without giving up his rights under the contract

Hon. E. BLAKE: A great deal of stress is to be laid on that general view, but, so far as the correspondence indicates, it does not always indicate it, although I think sometimes it does.

Mr. Cooper: In the letter of 14th July, in reference to Morris and Watson's application, we find an indication of what Mr. Wilson's views were—namely, that in order to save time he was willing that this application should be advertised, but it was without prejudice to the company's legal rights.

Mr. Stringer: In the petition, page 4, it is stated that "the advertisements were for the purpose of ascertaining whether there was any possibility of the land being required for gold-mining purposes."

Mr. Cooper: That is what the Government say.

Mr. Stringer: That is what the petition says.

Mr. Cooper: I am referring to the position of the parties at the time we say the breach took place. It is the whole trend of matters which constitutes the breach. I would not say that this mere refusal in the case of Morris and Watson was such a breach of contract, but I do say that the conduct of the Government throughout was based upon a wrong interpretation of the contract, for they conceived that they had a right to refuse to consider applications unless the company admitted that clause 29 governed clause 33. That was the position taken up from the outset, and that was the position of the dispute as regards the company from the outset. They had a desire to conserve settlement, and to meet difficulties which had arisen if such difficulties did arise. That is a common experience when two parties to a contract disagree. They endeavour to come to a settlement of those difficulties, and if they fail to settle them they get into the law-courts. That, practically, is the position here. I submit the question must narrow itself down to the question, "Was the Government right when they considered that clause 33 was governed by clause 29?" I have not referred to my reasons why clause 29 does not govern clause 33, but I submit it is quite clear. Now, clause 29 prevents the company from selecting lands until a period of two months—or, rather, prevents selections from taking effect until a period of two months shall have elapsed from the time that the company gave notice of selection. It is a clause standing by itself. I submit it is a clause which is limited only to selections of blocks. The object of it was, no doubt, in order that the Minister might ascertain whether lands included in blocks selected were required—not "likely to be"—then, for the purposes set forth in subsections *a*, *b*, *c*, *d*. The first observation I would make on that section is that there is nothing of the future in it. I say that if we select a block and there were no actual gold-workings upon it at the time we selected it, and it had not been proclaimed, and it was not then required for *bona fide* mining purposes, we were entitled to make the selection. The clause does not say that the Minister "shall." Clause 29 was simply intended to give the Minister the opportunity of proclaiming the block, and of inquiring whether the block was required for the purposes contained in subsections *a*, *b*, *c*, *d*. Now the purposes contained in subsection (*c*) are not "the opinion of the Governor that it may be required for mining purposes"; the purposes referred to in subsection (*c*) are "*bona fide* mining purposes," not for the "future," but the "present."

Hon. E. BLAKE: Should you not say that was any land which the Governor decided ought to be set apart and defined by proclamation under that subsection?

Mr. Cooper: I say that the purposes referred to are "*bona fide* mining purposes, and for the purposes incidental thereto;" not required for the purposes of the Governor's expression of opinion, but for the actual purposes which are mentioned there; and the only purposes mentioned there are *bona fide* mining purposes—in other words, for present gold-mining.

Hon. E. BLAKE: You mean what "are or may be" required?

Mr. Cooper: "Is now required"—that is, required for any purpose. It would only cover *bona fide* mining purposes. If the strict legal construction is to be used against us in reference to subsection (*b*) of clause 16, I submit we are entitled to put the same construction, the same strict construction, upon clause 29.

Hon. E. BLAKE: I think you are entitled to have a fair construction in regard to each question, but the strict construction does not mean the fair construction.

Mr. Cooper: The direct meaning of clause (*c*) is that the Government might look to the distant future, because it says "may be required." The strict interpretation of clause 29 is that it only refers to the present and not to the future.

Mr. Gully: That would limit the scope of the Minister's inquiry.

Hon. E. BLAKE: You must remember that the section applies to other matters, it admits not one, but (*a*), (*b*), (*c*), and (*d*).

Mr. Cooper: No doubt, and therefore we can deal with them in that way. Subsection (*a*), of course, does not apply, because——

Hon. E. BLAKE: You are speaking as to the meaning of "or is required"—what is likely to be required for any purpose mentioned in (*a*)?

Mr. Cooper: "Is required for purposes of (*b*)." I do not say it is not as you suggest.

Hon. E. BLAKE: We must give the words a construction.

Mr. Cooper: No doubt; we cannot select lands which are in the occupation of other persons. We are prohibited from doing so. We can only select Crown lands.

Hon. E. BLAKE: Therefore you say that "(*a*)" ought not to have been put in section 29 at all?

Mr. Cooper: Neither is "(*b*)" required.

Hon. E. BLAKE: Still the parties who framed this section thought it was, because they put in this phrase, using the words indicated.

Mr. Cooper: No doubt; but I do not submit that it is necessary that there should be a strict construction of the words "is required," and that subsection (*a*) of clause 16 is not applicable——

Hon. E. BLAKE: But it is surely a strain on the construction that I should leave out what the contract expressly put in, and the contract has expressly put in subsection (*a*).

Mr. Cooper: In subsection (*b*) there is another exception altogether from the area of selection. I say that the lands in subsection (*a*) are not in the authorised selection at all, in one sense.

Hon. E. BLAKE: Would you call upon me to strike out subsections (*a*) and (*b*) in clause 29?

Mr. Cooper: Yes; I say they are unnecessary in this connection: (*c*) and (*d*) are, of course, quite different. We can find out by reference to (*c*) and (*d*) what was meant by that section, and I submit that that section 29 reads in this way: "And within such period the Minister for Public Works may object to any such selection, in whole or in part, on the ground that the land or part of the land comprised therein is required for *bonâ fide* mining purposes and the several purposes connected therewith or incidental or conducive thereto," or "is wanted for public recreation, charitable, or educational purposes," but not that it is required for the purpose of being set apart as lands which may hereafter be required for *bonâ fide* mining purposes.

Hon. E. BLAKE: Then, the practical result is that the intention of clause 16 might, to a very large extent, be thwarted by the action of the company under clause 29?

Mr. Cooper: No doubt if that meaning is given to subclause (*c*) of clause 16 that the Crown seeks to place upon it, that they should look to the far-distant future.

Hon. E. BLAKE: You are arguing on that assumption.

Mr. Cooper: But I was assuming that the force of clause 29 will work in without any hardship with subclause (*c*). Supposing subclause (*c*) was not there at all, but that the words were incorporated with clause 29, then I submit that the reading would be that the Minister can refuse a selection, in whole or in part, of any ground that is required for *bona fide* mining purposes. To that extent, no doubt, he could look to the immediate future. I do not deny that. He could say——

Hon. E. BLAKE: You argue that "is" and "are required" does embrace the immediate future?

Mr. Cooper: Yes.

Hon. E. BLAKE: And what is "may be"?

Mr. Cooper: It has exactly the same meaning as "is" and "are required." I think I must submit that to the Court.

Hon. E. BLAKE: Yes; you are driven to that.

Mr. Cooper: Before it passes from my mind I would submit that that case of Whitehouse and the Great Western Railway Company supports that view, where "is" and "shall be" is limited to the immediate future, and not to the distant future.

Hon. E. BLAKE: It may be made to depend upon the circumstances.

Mr. Cooper: That, I submit, is the scope of clause 29; and, if the Government wish to escape from the position which, I submit, they were placed in by this contract, of giving the company an opportunity of selecting lands which might hereafter prove to be auriferous, they had a very simple way of doing it by resuming the land on what Sir Robert Stout himself calls the surface value. There would, by that course, have been no injury done to any one; there would be no injury to the Crown, and no interference with the rights of the company. Now, there is one other point I wish to refer to under clause 29: That clause refers to all the lands, while clause 33 only refers to a portion of the lands.

Hon. E. BLAKE: Clause 29 rather refers to any of the lands which the company may be entitled to select under anything contained in these presents.

Mr. Cooper: Yes. I submit that is a reason why we should not incorporate any of the provisions of clause 29 with clause 33. It it had been intended it would have been simple enough for them to have said so.

Hon. E. BLAKE: The word "any" is a very inclusive phrase.

Mr. Cooper: It means any lands in the authorised area of the Nelson and Westland Land Districts. Clause 29 no doubt governs the whole authorised area. Clause 33 is a special right.

Hon. E. BLAKE: In respect of a part of the authorised area?

Mr. Cooper: In respect of a part. Clause 33 provides a special procedure in respect of a special set of circumstances over a limited portion of the land, and sets up a special machinery for that purpose. Now, if the construction contended for by the Crown is a reasonable construction, then it would have been very easy to have introduced those words; but, if they had, the clause would have been contradictory. If the words of the clause had been, "Any lands within the authorised area in the Nelson and Westland Land Districts, on the western side of the main range of mountains, and being available for selection by the company under clause 29 hereof, the Queen shall, from time to time, on the request of the company, sell any such lands for cash," then we should have the contradiction, that, although the clause had something to do with clause 29, we should have had the word "forthwith." The suggestion on the part of the Crown is that "forthwith" means after the expiration of two months. I submit that that is a ground for saying that clause 29 has no reference to clause 33. There is a necessity for the introduction of the word "forthwith" if my construction is a sound one, because the Queen must not delay. The words "shall sell for cash" would not convey to the Crown any immediate obligation to enter into the question of how much that cash for the land would be. But suppose clause 29 does convey that obligation, if it is to be read into clause 33 I submit that you must strike out the word "forthwith," and it would be destroying the scope and meaning of the clause. The object of the clause is to permit speedy settlement, and to enable the Queen, on the one side, to part with lands which she had bound herself not to alienate while the contract continued.

Hon. E. BLAKE: The Queen can do nothing except on the request of the company.

Mr. Cooper: Yes; but there was a double benefit. The Crown was to get the benefit of what would have been the additional population, and the company was to get the value of the land after it was turned into cash.

Hon. E. BLAKE: It was a mutual advantage.

Mr. Cooper: Yes. Well, that advantage would be entirely destroyed if there was any delay. It was a mutual concession granted from one to the other, and the very spirit and effect of that depended upon the applications of the company being carried out without any delay. Now, I submit that the whole of the correspondence shows the position the Crown took up at the very outset, and which governed their conduct all through, which was that clause 29 must be read into clause 33, and if they were wrong in that they must be guilty of a breach of contract. And what is the effect of that? We had something said a few days ago which shows that the Crown contends that they had agreed to the selections. But there were applications forwarded to the Government in 1888, and a series of them in 1890, making altogether a total of over one thousand applications up to 1890. There are letters to the Government protesting against the delay, dated November and December in 1890, in February, March, July, and November, 1891, and right through during 1892 and 1893, that no regulations were made, and that no sufficient steps were taken by the Crown to have these assessments made; so that, in the meantime, of the parties who were willing three or four years ago to buy this land, some had died, some had left the district, and some had lost the money which would have enabled them to complete their purchases; and the whole benefit of the clause, had it been properly carried out by the Government, was lost to the company.

Hon. E. BLAKE: And the condition of things no longer suited the company. I admit that there was a delay that I have not seen adequately explained yet.

Mr. Cooper: I say that, in consequence of these things, we are entitled to damages. I do not mean particular, but general damages.

Hon. E. BLAKE: Are you going to include that in your general argument?

Mr. Cooper: Yes, we cannot say we have lost, say, £5,000 in connection with the delay under clause 33, but we have sustained a loss which merges into the general loss.

Hon. E. BLAKE: The general claim is, that through the action of the Government you have lost the benefits you were entitled to under the contract, and this probable or necessary breach of it had the effect of destroying your natural financial capacities. That is your ground. You have put your argument forward in reference to the mining reserves in that aspect of the case. But I do not see how this particular business has any such result as you allege.

Mr. Cooper: I do not say we claim particular damages in reference to clause 33, but what we claim is this: that the effect upon the company's prospects was such as, in conjunction with the breach of contract in reference to the mining reserves, destroyed their finance. And I will put it in this way: Supposing these applications—something like a thousand—had been dealt with at once—and I say there was every indication and every probability that if these applications had been granted they would have been followed by hundreds more—there would have been a very large sum of money (because these applications were for lands sold for cash) collected from these purchasers and placed to the credit of the company in the Treasury.

Hon. E. BLAKE: Can you give me further particulars?

Mr. Cooper: I think there were 736 to the 23rd December, 1890. I think there were 800 or 900 altogether. Up to September, 1890, we had 30 assessed, and the delay was so great that the people refrained from putting in applications. I say there were 576 lodged with the Government. The others were not lodged.

Hon. E. BLAKE: You say there were only 576 lodged with the Government.

Mr. Cooper: That was the number up to the 23rd September, 1890. There were a few more put in later on. I would not be quite sure of the actual number.

Hon. E. BLAKE: Of this total number: if the Government had the right to object, they must have objected to the greater portion, because I think 200 is the number of assents.

Mr. Gully: That is simply the number as indorsed on the exhibits.

Mr. Cooper: There were indorsements later on; I said about 1893 or 1894 the Government intimated their willingness to consent to them, but after it was too late.

Hon. E. BLAKE: My own rough idea had been that it was about 600—200 were assented to, and 200 were declined. The total number is 446; that is presented, apparently, as the total; that is all I have to do with it at present.

Mr. Cooper: The list we put in was for 47,900 acres, B 1 value; the Government assented to 23,000.

Hon. E. BLAKE: What I have to do with is what you sent in, and I must assume it is referred to in the evidence of Mr. Seddon, unless you can show me there is something further.

Mr. Cooper: In Exhibit 65, 446 were sent in, and 262 approved and 184 objected to. I am speaking now, I think, correctly, when I say that it was not till the 18th August, 1892, the Government consented to any of these assessments.

Hon. E. BLAKE: This is a return on Mr. Wilson's cross-examination of the reserves dealt with under clause 33 up to the present time. It gives the sums of the Westland and Nelson blocks. Twenty-six applications were dealt with, and then it gives those not dealt with, owing to the action of the Government in proclaiming or taking such reservations. There were a very large number not dealt with because the Government proclaimed the reserves.

Mr. Cooper: They proclaimed reserves afterwards.

Hon. E. BLAKE: It does not give a convenient sum. It gives, as you say, the area.

Mr. Cooper: It was not until August, 1892, that there was any indication on the part of the Government that they would consent to any considerable number of those applications.

Mr. Gully: Larnach consented to them.

Mr. Cooper: A few.

Hon. E. BLAKE: If there is any difficulty about the fact I would like to have it.

Mr. Cooper: The return put in by the Government does not show the assessments.

Hon. E. BLAKE: Yes; at least it gives that date; I presume it gives some.

Mr. Cooper: That date is the 17th August; that is the date I refer to.

Mr. Gully: Those not dated were not in before 1890.

Hon. E. BLAKE: What do you say?

Mr. Cooper: I was looking at that return. It appears the earliest date—the first—is the 17th August, 1892.

Mr. Gully: The reason why the dates were not given was that the consents were given by the Commissioner of Crown Lands, and he was not there. All these are previous to the date my friend mentions.

Hon. E. BLAKE: Is there any correspondence? All that one can say is that there are a considerable number without any date.

Mr. Cooper: And that the earliest date is the 17th August. The only reason I mention that date is that it is the earliest date assented to.

Hon. E. BLAKE: It is not known when these undated ones were done.

Mr. Cooper: At any rate, a very long period elapsed before any assessments were made, and a very great number of assessments were made after it was too late to be of any advantage to the company. Four years had been taken up in this time, between 1888 and 1892, and I say it was a very serious injury, assuming that the Government were wrong—a very serious injury indeed to the company, and may very well have had a very detrimental effect upon their power to carry out the contract.

Hon. E. BLAKE: What evidence is there on that subject?

Mr. Cooper: Wilson's and Burchell's evidence.

Hon. E. BLAKE: You say their evidence is as to the mining reserves and the effect of the Proclamation of the reserves; but I have not present to my mind evidence on this subject.

Mr. Cooper: Mr. Burchell refers to clause 33, question 172, and the following one on page 189. He said, in cross-examination by Sir Robert Stout,—

"172. Did you imagine the best land for settlement was on the West Coast? Did you or your company think so in London?—Yes; and we wanted to settle it under clause 33.

"173. If so, why did you not carry out clause 33?—Because you would not.

"174. Are you aware that the Government offered to carry out clause 33, and you would not do so?—The Government did not offer to carry out clause 33. They complicated it with another clause which had nothing to do with it, and which rendered it unworkable.

"175. Suppose you did carry out clause 33, what became of the money?—The money, which represented the improved selling-value of the land and the B 1 value together, went into the hands of the public officer here—I think you call him the Receiver-General—and there it remained in trust until such time as the company selected. If it had been carried out it would have been the most valuable means for the raising of further money for the company. It would have shown that the original representations as to the value of the land were of a greater value than it turned out."

I do not think the other questions have reference to it.

Hon. E. BLAKE: What question do you appeal to?

Mr. Cooper: I appeal to question 175 more particularly. Mr. Burchell says that if the clause was carried it would have been the most valuable means for raising money for the company. I do not say, and I do not suppose, the financiers in London ever heard of clause 33, but I do suggest that it was one of those matters which altered the position of the company with the public—that the company were no longer able to deal as they could have done if it had been carried out, through the immense quantities of land that we should have been able to select and sell to the small settlers, and so to settle this valley.

Hon. E. BLAKE: You were not able to give this evidence to the investing public in London.

Mr. Cooper: We might have been able had clause 33 been properly carried out, according to our view, and we might have been able to settle a prosperous community, as we hoped and wished; and that would have been done as we hoped it would have been done if these selections were agreed to. We could have settled these mining reservations, and we might have gone with confidence to the money-market.

Hon. E. BLAKE: These are mainly fee-simple lands.

Mr. Cooper: Mainly in the Westland District—the Grey Valley.

Hon. E. BLAKE: Can it be shown that it was by *bona fide* settlement for *bona fide* purposes—the 65,000 acres? You, yourself, stated that the main value of this land was the timber, and not the settlements.

Mr. Cooper: I do not suggest that we should ever have a very extensive farming community.

Hon. E. BLAKE: You might have said to the financiers, "We have sold 65,000 acres of agricultural land to the settlers, and therefore we are to infer prosperity."

Mr. Cooper: I do not say all the land in the Grey Valley would have been occupied for agricultural purposes. The settlers might have been engaged in sawmilling, or coal-mining, or gold-mining. They might have been engaged in different industries. The West Coast, of course, is not dependent, and could not be dependent, it would never be settled at all if it was dependent—on the farming industry. I say the inference to have been drawn would have been this: There is a very large quantity of money received from the selectors ear-marked for the company; therefore you have got a very large collateral security, in addition to the railway, for your advance. That is the first thing. Secondly, it would have been an indication of the growth of small settlement—not necessarily farming settlement, but small settlement—on the company's line, and the company could have fairly said, "Well, now, this is a new colony; we are making a line to a place hitherto inaccessible, because of bar-harbours and want of roads. Our railway will bring population; therefore you will have the traffic for your railway." All that was stopped.

Hon. E. BLAKE: But the main value, you say, of that land is in the timber?

Mr. Cooper: Yes; in the timber. I think it is fair to say that the timber will give employment to a very large number of people. And, of course, many of these selections were taken up by

men who were miners, or employed in some other industry in the district, and who wished to get a little freehold. I may point out this: that under the Mining Regulations and the Mines Act it is not possible for a miner to get a freehold. All he can get is a residence site or an agricultural holding. He cannot get his freehold. And although there is a strong feeling among a certain class of people that freeholds are a mistake, yet Englishmen prefer a freehold; and it is a very important element in connection with settlement in a colony like this, that the settler should have the fee-simple and not a perpetual lease, an agricultural holding, or a residence site. That was all destroyed, I submit, by the act of the Government in connection with clause 33. Coming back again just for a moment, although I say we show no particular damage, yet we are entitled to ask you to take into consideration this breach of contract,—if you hold it as a breach, which I submit it was,—to take into consideration this breach of contract as being one of the elements—I do not say the principal one, but one of the elements—tending to the destruction of the company's finance. Later on I shall deal, as I have said, more particularly with the question of finance. Now I pass from clause 33. As I have said before, I do not think it is necessary to go through this correspondence. I understand you have read it, and I should only weary you by making any further quotations from it. I will come now to two other matters: the question of the deviation and the delay, and the extension of time. In reference to the deviation I shall not trouble you with any lengthened remarks, because I think these are merely subsidiary questions. Under clause 4,—that which deals with the deviation,—I submit, there was an obligation on the part of the Crown to grant that consent, if reasonable grounds were shown for that consent in each instance.

Hon. E. BLAKE: You will remember Mr. Wilson's own statement about this.

Mr. Cooper: I do not place any very strong reliance upon this part of the clause at all. I am only referring incidentally to this question, because I do not place, myself, very strong reliance upon it. Whatever ground of grievance it may have been, the Government seemed to have acted, in the first instance, upon the ground that they had to get legislation, and delay no doubt was caused by that. And, later on, there seem to have been difficulties in connection with the determination of the matter, on which I am quite aware that Mr. Bell, when he was before the Committee—without prejudice, it seems to me, to their legal position—admitted there was no real substantial breach of contract. No doubt we had a substantial grievance, but whether that would amount to a breach of contract is not so clear. In addressing the Court on this matter I wish to avoid as far as possible placing any matters before the Court upon which we cannot submit with considerable confidence that we are entitled to ask for the Court's judgment. In dealing with the question of the deviation, and of the delay in connection with the incline, the particular facts are of considerable importance when we come to consider the question under the second arbitration of wilful and unreasonable or inexcusable delay in the performance of the contract; but so far as they form any sufficient basis standing alone for an action against the Crown for breach of contract, I do not advance the proposition with any confidence at all. I do not wish upon this point to overlay or to anticipate my argument upon the second arbitration. I shall prefer to keep it quite distinct from it. The clause under which the company claim they are entitled to an extension of time is clause 2.

Mr. Stringer: And clause 42.

Mr. Cooper: And clause 42. My contention upon those two clauses is that the Governor has not got an absolute power to refuse an extension of time, but that he must take into consideration the whole of the circumstances of the case; and I submit that if it is shown that he has acted unreasonably, then there is a breach of contract.

Hon. E. BLAKE: "To grant an extension for such period as he shall deem reasonable."

Mr. Cooper: No doubt there is a great deal of latitude allowed.

Hon. E. BLAKE: He must act reasonably.

Mr. Cooper: Now, I will put this case. Supposing that the company had, with all the force they were able, with all the money that was necessary for the purpose of carrying out this work, done the utmost they could do physically, and yet it was found that they could not, within the period of ten years, complete this work—we will say they had completed the contract all except a small section of ten or twenty miles, and that the Governor was then to say, "I will not grant you the extension of time to complete that ten miles," I submit that would be a breach of contract. It is a question of degree. Or supposing he was to say, "Yes, I will take into consideration all the circumstances of your case, that you have only ten miles to complete, and I will give you a fortnight to do it in."

Hon. E. BLAKE: Of course, the position would be very much more difficult of sustainment if he agreed they were entitled to an extension of time to complete, and gave a time which was absolutely inadequate to complete the thing.

Mr. Cooper: I make these suggestions because I submit we have some right, if the evidence supports it, under certain circumstances at any rate, to make a claim against the Crown in reference to the refusal of the Governor to grant an extension of time. I do not say the circumstances arise in this case, but circumstances may arise, and therefore we cannot be met in the abstract by the statement "You are absolutely at the mercy of the Governor."

Hon. E. BLAKE: Of course, circumstances may arise of a very different order from this, and you have stated a case. Have you any concrete cases, any authorities on that point?

Mr. Cooper: I have no authorities on that at all.

Hon. E. BLAKE: There are cases to which I might apply the proverb, "It is time enough to bid the devil good morning when you meet him"; and if you bring the case down to a position in which it is to everybody's mind an evasion, you may get something approaching to *mala fides* and want of honesty; and you may possibly evoke a jurisdiction under those circumstances, but you must come very close to that before you can.

Mr. Cooper: No doubt, under such a condition as this, my main argument upon the extension of time will of course be directed to the second arbitration—whether or not we ought to be allowed to have sufficient time and opportunity to finish our railway before the Government seized it.

Hon. E. BLAKE: There are some other considerations, because there there is a palpable appeal to a Court on some grounds or other. We will not anticipate it, but the case is certainly different from this case.

Mr. Cooper: Certainly; the correspondence is set out in this Exhibit 74, and I submit it shows that the Government determined, without any sufficient inquiry, and whether reason was shown to them or not, to refuse this extension of time. The first demand for an extension of time is as far back as 1892. It was suggested we never honestly wanted an extension of time, but there is no such evidence.

Hon. E. BLAKE: According to my memory, you rightly fix the date, but that was after those proceedings in which it was made palpable, unless you convince me to the contrary, that without a modification of the contract, without a change of the obligation, without a change of the situation as to the East and West line and the practical abandonment of the obligation to complete the North and South line, the company practically confessed its inability to carry on.

Mr. Cooper: But underlying it was this question always, that the position in which the company was placed was one caused by the acts of the Government itself.

Hon. E. BLAKE: That is the other position, in which you are claiming damages. You claim damages because the Government placed you in the impossible position you practically acknowledge you occupied at that time. The Government did not admit you were entitled to claim damages. You claimed *bona fide* that you were right, and they were *bona fide* claiming that you were wrong; and both they, the Committees, and the Legislature, all seem through this correspondence to have been not averse to the view that there might be an extension, or indisposed to grant it, provided it was made to appear—first, that it was necessary, and, secondly, that it would be useful—that you could carry on.

Mr. Cooper: The first application for an extension was on the 15th March, 1892. Still, I would draw attention to this fact, that at that time the company did seriously contemplate, if an extension of time was granted, the possibility of finishing the contract.

Hon. E. BLAKE: You will have to remove a very strong impression from my mind to the contrary.

Mr. Cooper: I will put it this way. It was impossible for them——

Hon. E. BLAKE: Take that letter of Mr. Wilson's, in which he made the proposals.

Mr. Cooper: I am dealing with the reason you will find in that letter. The letter of the 15th March gives, I submit, the reason why it was necessary to ask for an extension of time. It was utterly impossible, unless we had some promise from the Government that an extension of time would be granted, in the then condition of affairs, to ask for a further advance of money. We had to go armed with that extension of time. No financial association could possibly consider even an application for a loan to complete these works within three years.

Hon. E. BLAKE: You say you made application on the 15th of March. You do not say it was seriously wrong to delay consideration of that until the 19th of May. Can you say that it was so unreasonable that, without authorities shown to me, I am to deem it something approaching a fraud to refuse?

Mr. Cooper: I do not say the Government were acting fraudulently in that sense, that there was an absence of *bonâ fides* in imposing the conditions they did.

Hon. E. BLAKE: I will go a little further and ask you to show me if they were acting unreasonably, if one of the elements of granting an extension of time was a reasonable conviction that the company is in a position to make good use of that to execute the contract. There was more than an ordinary difficulty. There was the reserves. That was no reason, in my judgment, for declining a reasonable extension, but still a reason for exercising greater precaution and having some satisfactory assurance that the result of the extension would do some good.

Mr. Cooper: There are two answers I would make to that. The first is that it would be impossible; it was unreasonable to suggest that the company should give such an undertaking until they were in a position to ascertain the feeling of the money-market.

Hon. E. BLAKE: I do not mean undertaking; I mean such a general view of their position as showed a reasonable prospect of their being able to finish the contract in view of the letter of 19th May, which shows inability unless the Government granted them the concessions asked for.

Mr. Cooper: But with the extension of time they could have gone to the money-market, and then said, "We have got five or seven years," as the case may be.

Hon. E. BLAKE: The letter of the 19th May says: "The state of the money-market in London is such at present as to preclude my directors from raising further capital for some time, without a guarantee of interest, except at a great cost, which would ultimately fall on this country." And this they suggested for the execution of the whole contract. Of course, my functions are much more limited than those of the Government, the Committees, and the Legislature, as dealing with questions of policy and alterations of contract. I have to deal with the contract as it was, and their only proposal to complete the whole contract is that the Government should increase the total sum required to finish the East and West line. They give reasons which altogether strengthen the case in the same direction. That was the attitude—an attitude, to my mind, of hopelessness. They apply to the Government for an extension about the time when they proclaimed—and their acts and language have since proclaimed, I do not see any improvement in their position which would indicate an ability to complete the contract according to the terms of the contract.

Mr. Cooper: No doubt that was the position in May, 1892. The action of the Government so depreciated the value of the company's property, and rendered their finance so hopeless, that they

could not honestly give such an undertaking; but, I submit, what they really have reason to complain of in connection with the application for extension is that they were not allowed by the Government to be placed in the position of endeavouring to raise the funds for the purpose of completing the contract. Whether that is a breach or not is a matter we shall consider afterwards. It was absolutely impossible for them, with the contract just expiring, to go to the money-market and say, "Lend us two millions to complete the contract in three years," and it was impossible for any company to do such a thing within that time. But it would have been possible to go to the financiers and say, "We have only taken £240,000, or something like that, of our land-grant; we have got a million yet of land-grant of our own, we only want to borrow two millions to complete the line; we have got five or seven years to complete it; we shall have the whole system open; we have a million to pay back of the money we have borrowed, and shall be able to pay you your interest." They would have been able to go with greater force to the money-market than they could possibly have gone.

Hon. E. BLAKE: Then, I am afraid you are rather on the horns of a dilemma, because if they could have gone, then the effect of the Government's action was not so fatal as the other branch of your argument must be.

Mr. Cooper: I say we could have gone and said this to them.

Hon. E. BLAKE: If you tell me the result of your application would be a negative, there would be an end of the argument.

Mr. Cooper: I think the result of the application would have been decidedly in the negative.

Hon. E. BLAKE: As Mr. Salt said, they would not be in a position, without fraud and making false statements, to issue a prospectus; and, looking at their view as accepted in 1892, it would have been utterly impossible to get one pound in the London money-market for this thing.

Mr. Cooper: I will proceed to discuss more in detail the financial position of the company. Now, it has been suggested that under no circumstances could the company ever have paid—that it was a hopeless speculation from the very beginning, and that the company discovered it was a hopeless speculation as early as the beginning of 1891.

Mr. Stringer: As early as 1890.

Hon. E. BLAKE: I have not had an opportunity of seeing the whole of that letter.

Mr. Cooper: I shall refer to that later. It is also said that the company had sustained no damage from the Government, even though the action of the Government had been a breach of contract, because, as was suggested by Sir Robert Stout, the company had been relieved of an expenditure of something like a million pounds. This suggestion no doubt will also be made, because it has been already hinted at, that the claims which the company have now put forward are not honest claims, but are claims which have been induced by their extreme financial difficulties, and for the purpose of obtaining moneys which they had lost in a reckless and imprudent speculation. Now, I propose first to submit to the Court that there is abundant evidence that this was not an imprudent and reckless speculation at the outset. I submit that there was good reason to believe when the company was formed that this would be a good investment for both the colony and the company, and one which would prove of mutual advantage to each party to the contract. I shall submit that these representations were founded upon substantial data, and that these representations would have been fulfilled but for the difficulty which happened in 1891 and 1892.

Hon. E. BLAKE: You refer to the mining reserves?

Mr. Cooper: Yes, the mining reserves; and that the difficulty was entirely owing to the action of the Government in the administration of this contract. Now, if we look at what the scheme was—referring back to my starting-point of yesterday—it was one which did not depend upon the traffic of the railway for its profit or the probability of paying a dividend. It did not depend upon that, I submit, in any more than a minor degree. The company was really a land company as well as a railway company. It was a company which was formed under the Act of 1881, and some two or three years after the Wellington-Manawatu Company was formed. It was formed on the same basis—that is, it was to construct the railway, the management of which was in its own hands, subject only, so far as the traffic was concerned, to the exigencies of business and the control of the Governor. It was formed with a very much more liberal endowment of land than the Wellington–Manawatu Railway Company, in the same colony, and, so far as the promoters of the company were concerned, with quite as good prospects. At that time, in 1888, the Wellington–Manawatu Company had practically shown it was going to be a great success. First, therefore, the company had the evidence and the example of the only other company in the colony which had taken up the construction of a work on the same lines—they had that example before them. This company had also before them a more liberal land-grant.

Hon. E. BLAKE: Why was it made more liberal?

Mr. Cooper: Because the construction of the line was represented to be more difficult.

Mr. Stringer: Because the land was worthless.

Mr. Cooper: No; I submit that the reason why the land endowment was increased 50 per cent. was because of the difficult nature of the country the line had to go through, and for the purpose of inducing a financial body to undertake the construction of a difficult line in case that line was not payable. Because we have the representations contained in Mr. Blair's report of the extreme value of the land, not for agricultural purposes so much——

Hon. E. BLAKE: Had the increased land-grant any reference to the inferior prospects of the railway so far as its earning-power was concerned?

Mr. Cooper: I think it also had that effect. The railway was going into a district which was only sparsely settled. It was going into a district the future of which was not altogether known; and the increase in the value of the land-grant was, I submit—as one of the reasons—because it was contemplated that the earnings of the railway for some time would not be sufficient to pay reasonable interest, or such interest as would induce a financial body to take up the concern.

Hon. E. BLAKE: Your argument might, perhaps, to some extent be curtailed if I state to you certain things which seem to me to be established. I do not, in the slightest degree, see that there is any evidence impugning the honesty of the gentlemen who were promoting the company on one side or the other. I am not quarrelling with the prudence of their calculations or the sufficiency of their data; but, whether they were prudent or sufficient, I do not at all assume that they did not on sufficient or insufficient data honestly entertain the opinions they expressed, and I shall look at the prospectus of the company itself as an expression of their opinions, upon which they asked for their capital. I have no doubt they honestly entertained the opinion that they were presenting the public with a very soft thing when they drew up that prospectus. But I think they over-estimated the value of their land-grant and under-estimated the cost. That is made pretty clear. Now, I also think they over-estimated the traffic returns.

Mr. Cooper: I propose to deal with these three elements. I do not think there would be any suggestion that the inception of the company was in any sense dishonest. I submit that they were acting not from any excess of hope, or anything of that kind, but they were acting upon what was reasonable data submitted to them at the time, and approved by the representatives of the colony in England. I think I shall be able to show that there was a substantial reason for their arriving at the conclusions they did, and that those reasons existed, and exist to the present day, and would have continued to exist to the advantage of the company but for the action of the Government. I shall endeavour to prove from evidence, and from the figures which have already been submitted to you, that the company was founded upon a sound financial basis, and with a sufficient foundation to justify them in submitting their proposals to the public, and to enable them to say that, had certain things not happened, that basis would have been shown to be sound, and the results would have been realised. I propose now to deal with the financial aspect of the question, and I would again express the opinion which I do not think my friends will dispute, that there was a reasonable ground in the minds of the directors of the company that they believed that this line would be a financial success, and also in the mind of the Agent-General. I propose now to carry that a very considerable step further, and to show, as I have already suggested, that that reasonable view was based upon sound material, and that but for other circumstances intervening, which circumstances we say were brought about by the wrongful acts of the Crown—by breaches of contract on the part of the Crown—this company would have been a financial success, not simply in the distant future, but in the immediate present; and I am sure your Honour will bear with me while I analyse at some little length the figures for the purpose of supporting that position. The contract was a contract to construct the railway at an estimated cost of £2,800,000, and upon a statutory cost of £2,500,000. It will not interfere with the value of my argument if I submit that even that estimated cost of £2,800,000 was stated a little too low in the light of the figures I shall endeavour to place before the Court. I think we may fairly take the evidence put in that the outside cost of the construction of this railway, including the amounts which would be necessarily spent in the formation of the company, and in the finance of the company, would not exceed more than, perhaps, three millions—probably it might be £100,000 more—because we have it in evidence that in order to complete the total line it would cost something like two millions.

Hon. E. BLAKE: Do you include also the interest during construction?

Mr. Cooper: No; I am dealing with three sets of figures. First, the statutory cost, £2,500,000, and the estimated cost, £2,800,000, which some people seem to think much too low. I might say that going on a liberal margin it may be fairly estimated, even upon the evidence which has been placed before this Arbitration Court, that this line could have been built, notwithstanding the engineering difficulties, and notwithstanding the class of country it had to go through, for something like £3,000,000; and that would include the cost of the formation of the company and the incidental matters, but not the interest on debentures from time to time. I will deal with that under a different head.

Hon. E. BLAKE: That, again, mixes itself very much up with the question of interest.

Mr. Cooper: Perhaps I will go into a detailed explanation of the figures, which will make it quite clear. Now, we have placed, for the purpose of assisting the Court to follow my argument, a statement before your Honour which I think was handed in on the 16th December, and which concludes with an amount of £87,000. I submit that this statement is soundly elaborated. We start with what the financial position of the company originally was. They had in their hands their share capital of £250,000. I am dealing now with what their finance was, and then I shall deal with what their expenditure was. They raised £745,000 of debentures; they have bought in a certain small proportion—£17,100—and they subsequently raised £80,000. They have, therefore, in gross figures obtained—I will deal with deductions in the proper place—£1,075,000. In addition to that, they had raised from sales of land, and from traffic receipts, the sum of £207,000; therefore, during the whole course of their financial career they had raised in gross figures the sum of £1,250,000, in round numbers. They have expended in the bare cost of construction £760,000—that is the amount according to Mr. Wilson's estimate—leaving £500,000 which has been dealt with in matters incidental to the company's operations: the promotion of the company, the cost of the issue of the debentures, the interest upon the debentures, and the taxation paid in the colony. There is a sum there of £177,000 which includes the cost of administration, the costs of the parliamentary inquiries, and moneys which has been supplied in connection with the proceedings. The company have, therefore, expended the gross amount they have raised.

Hon. E. BLAKE: They have expended more than that, wherever it came from, because they had also paid interest on their share-capital.

Mr. Cooper: Only a small proportion of the interest on share-capital.

Hon. E. BLAKE: The announcement was made in the prospectus that interest was to be paid at the rate of 5 per cent. during the period of construction, and the announcement is also made in one of the papers that it had been paid.

Mr. Cooper: They paid interest on their debentures.

Hon. E. BLAKE: I am speaking of their share account.

Mr. Cooper: They only paid one amount on their share-capital. At all events, they were not under liability to pay interest on their share capital.

Hon. E. BLAKE: I do not know what they did; but the scheme was to pay interest during the construction on the share-capital, and the announcements when the shares were subscribed were that it should be paid. It was part of the company's contemplation, and, of course, if it was not to be done, they would have had to submit to a discount on the issue of the shares.

Mr. Cooper: The whole amount the company paid interest on in regard to share-capital is included in the general expenditure of £177,000.

Hon. E. BLAKE; It may be so. Did they pause paying interest on share-capital?

Mr. Cooper: They have paid no interest on share-capital since 1892. The interest paid on the debentures, first issue, is a separate item in the statement—namely, £206,000. The capital was not all paid at once. There was no obligation to pay interest on their share-capital, although there was upon the debentures.

Hon. E. BLAKE: I do not quite understand. Do you mean that I am not to consider whether the shareholders have got an available interest or not? I am bound to consider what has been done for them, and what the railway is likely to do for them.

Mr. Cooper: No doubt—that is the way I shall treat it, and if I explain a little more in detail these figures you will see exactly what I wish to enforce. The cost of the line to the company was——

Hon. E. BLAKE: In reference to that matter, your prospectus for the issue of these debentures states that interest at the rate of 5 per cent. per annum will be payable during the construction of the railway. That was the announcement to the public.

Mr. Cooper: Yes: but still, I do not suppose that the directors could have been held to that if they had no moneys out of which to pay it.

Hon. E. BLAKE: It is not a question of the directors not being held to it; but that is the announcement to the public on which you were able to get your £250,000 subscribed at par.

Mr. Cooper: No doubt. The gross cost, therefore, including all interest paid up to the time that the line was opened—or, rather, up to the present time—was £1,264,000. The assets in hand, irrespective of the railway, amount to £184,497—in hand at the present time.

Hon. E. BLAKE: That is, estimating the lands selected and not sold, the lands earned, and the selections refused.

Mr. Cooper: Yes. The real expenditure up to the present time, added to what may be fairly charged against the undertaking, was £1,093,790; and, deducting the amounts which we say have had to be paid by the company in consequence of certain matters, the actual cost of construction, including the Lake Brunner deviation, was £760,000, which we say we would have able to earn in another way, as I shall point out presently, if we had not been interfered with by the Government. So that according to our view the fair amount which has been paid by the company, and which is chargeable with interest, is £1,093,000.

Hon. E. BLAKE: With the sacrificed amount of dividend, and the interest on the debenture shares which have not been paid since 1892?

Mr. Cooper: Yes, the total sum is £1,093,000. I give this more for the purpose of showing the soundness of the undertaking had the Government not interfered, by the breaches of the contract which we complain of, with the finance of the company. Now, the estimated cost of the completion of the railway is shown on the second page at £2,240,000. Added to that is a sum of money to finance the rest of the capital, £140,000, which we estimate at 6 per cent., and which I submit to the Court is a fair and reasonable estimate of the cost to raise the £2,240,000. We should then only have to pay interest on the balance, the £745,000 of debentures, and the £80,000 of the issued portion of the £100,000 debentures.

Hon. E. BLAKE: That was your obligation. There was nothing left for your shareholders?

Mr. Cooper: Yes. Assuming that we had completed the line, we should have stood at the end of the completion of the line with a gross outlay amounting to £3,132,000. We say it cost, no doubt, £100,000 to raise the £745,000 of debentures, but that was under special circumstances. In the first place, there was a financial crisis at Home; secondly, public confidence had been shaken to a considerable extent by the Larnach Proclamation, and it was in the inception of an undertaking, of which the public might fairly say, "It may be of a speculative nature, and we will not pay anything like the high rate you ask for these debentures (£92 10s.) until we have seen whether the undertaking is likely to prove a success."

Hon. E. BLAKE: The debentures did not realise anything approaching £92 10s. The issued price was £92 10s., but what it cost the company was a great deal more, from the figures. It was 13½ per cent. discount, as far as I can make out.

Mr. Cooper: As an indication of what would have happened had the company not been interfered with, I will refer to Mr. Burchell's evidence, and also to the prospects which the company had of raising the £2,200,000 of debentures that was practically available if it had been shown later on to the satisfaction of the syndicate that there were no interferences which would justify the financial public in saying, "This is not a successful undertaking." Practically there was £2,200,000 provided for by the original prospectus.

Hon. E. BLAKE: I think it may fairly be said on the evidence that the gentlemen who underwrote this first issue were probably willing at the time, but they entered into no obligation to take a single sixpence at the time of the second issue should it be made.

Mr. Cooper: But there was an indication held out that, under certain circumstances or events, it would be available. Now, that that money would have been available, that the public would have subscribed what was wanted for the company's requirements, and that the company and

the public had confidence in the success of the undertaking is shown, I submit, by the fact that the debentures rose in value. That, I submit, is a very important element, because these debentures had a quotation on the London Stock Exchange, and they were supposed to be worth—and they were worth, according to the anthorised lists—a varying amount from the time they were issued until the end of 1892. We find this: that, from the time they were issued until the middle of 1891, there was a steady rise in value; that is, the value placed upon them by the investing public. Referring to Mr. Burchell's evidence on that point, we find:—

"58. It has been suggested that the bottom fell out of the finance of the company at this time. Can you tell us whether those debentures decreased or rose in value after the issue?—At first they were very stationary—91½ and 92½—and in 1890 they also remained fairly stationary, with a gradual tendency to increase; and in the early part of 1892 [this is a misprint for 1891], in May, I think it was, we gradually got up to 96.

"59. And in 1891?—That was the highest point they ever reached; they stood there some little time, I think to July, at about that—between 95 and 96—and then they began to go down, and they have gone down steadily ever since.

"60. Hon. E. BLAKE.] You would say, about the end of what year, for instance?—About the end of 1891 they were about 88; in 1892 as low as 72—that would be the end of 1892.

"61. What about the end of 1892?—Oh, it was a slow decrease all the time.

"90. *Mr. Cooper.*] You say the debentures stood at 96 in 1891. At the beginning of 1892 they dropped to about 88. Can you give any reason for that?—I can only give the reason that was given to me."

We derive from this evidence the inference that the confidence of the investing public in the concern as a good investment increased up to the end of 1891.

Hon. E. BLAKE: I have no evidence at all as to what the transactions were, or how many sales there were. We all know what the conditions of small stock are. Why, £20,000 put into the market may affect it very seriously, and to argue that it was issued at a certain price, and rose above that, and that this was proof that it might rise——

Mr. Cooper: I am not saying it is a proof. But I am quite sure that if these debentures had been quoted at 92, with a falling tendency, the Government would have said that was cogent evidence that the company's finance was failing.

Hon. E. BLAKE: I merely say that you are drawing a rather strong inference in assuming that the stock would have been raised at 94 or 96. Why, with three times that amount of capital it would be a very strong thing to say.

Mr. Cooper: We do not say it would have been raised at 96.

Hon. E. BLAKE: You say 94.

Mr. Cooper: Yes; and we say that we are fairly entitled to draw that inference from the fact that the debentures were rising in value. There is nothing to prove what the transactions were that took place that increased them to 95, but there is the fact. And, at any rate, we are entitled to draw this irresistible inference from that fact: that the confidence of the public had not fallen in the company's undertaking, and that there were people willing to buy at these higher figures.

Hon. E. BLAKE: It does not follow from these bare facts. It might be that there were those who were interested in the enterprise, and who were determined to keep the stock up.

Mr. Cooper: There is no suggestion made as to that.

Hon. E. BLAKE: No. I simply say that the simple fact that a small stock of this kind was quoted at 96 for a short period does not give, to my mind, evidence at all that you would have got the large price you mentioned, or anything like approximating to that price. It is a very small stock.

Mr. Cooper: I would point out that, if it were contended on the part of the Crown that this was not a *bonâ fide* quoted figure——

Hon. E. BLAKE: I am not suggesting that; I think that would be very wrong. I do not think for a moment it was a "cooked" arrangement.

Mr. Cooper: The inference, I submit, that can be irresistibly drawn from those figures is, that public confidence in the undertaking had not fallen, and I say we can go further, and say that public confidence in the undertaking had increased, and that there was an indication of this in the money-market—that this investment was looked upon as a fair investment.

Hon. E. BLAKE: But it may be said that if you had come forward to raise the additional capital probably the public would have made further inquiry. I think they would have made fresh inquiry.

Mr. Cooper: Yes; but I would point out that the position of the company was not like that of a colony wishing to raise an increased loan. This additional capital was contemplated in the first instance.

Hon. E. BLAKE: They would have done much the same as the syndicate who under-wrote the first debentures said should be done. They said, "We are going to construct this piece of line which is going to produce 5 per cent. on the capital invested in it." And what it does produce is £4,000 a year.

Mr. Cooper: I am going to deal with that presently. I say that we are entitled to say that we could go to the London money-market and say, "We have an undertaking which will produce what we said it would produce in 1889, and, therefore, we are entitled to ask you to put your money into it to enable us to complete the concern." But I say that our grievance is, and the damages we sustained in consequence of that grievance really comes to this: that we were prevented from doing this. Our credit in the money-market was injured by the acts of the Government, and, therefore, we could not place before the financiers, and the financiers knew we could not place before them, the same representations which we should have been entitled to do had the action on the part of the Government not interfered with our contract. I say that condition of

things arose in 1891, about the end of the year, and I say the inference is that the debentures rose till July, and therefore a feeling, induced by the information that had reached the hands of these financiers, arose in the minds of these financiers that the Government were not acting in accordance with the contract, nor respecting their contractual relations. I submit that but for this we could have raised money at 6 per cent., or at any rate upon more liberal terms than we raised the first debentures, and that we could have obtained sufficient money to complete the line. Assuming that we could have obtained the money,—and I submit we were prevented by the action of the Government from so doing,—and assuming that we should then have had to pay on that money so obtained the sum of £252,000 a year, then we would have to pay three years' interest on the new capital at 5 per cent., being an equivalent of the money called up from time to time, or £356,000. We would not have wanted to raise two millions at once; we need only have called up a portion of it.

Hon. E. BLAKE: It would have raised interest at such rate of interest as is earned, assuming that you were carrying out the same general principle and you could have raised the interest.

Mr. Cooper: We would not have required to have raised all the money at once, and I think it is a fair inference that it was sufficient to provide for three years' interest on the full sum. I submit that in the ordinary practice it would work out practically to that. The expenditure is one which covers a period of years; and it is reasonable to suggest that the whole of that £2,374,000 which was required could have been raised at intervals, and that the interest—the gross interest—we would have had to pay would not have been more than three years' interest, spreading it over the whole period. It is not until the conclusion of the contract that the heaviest payments are necessary. Of course, the money would have been provided for these payments, but not necessarily all at one time.

Hon. E. BLAKE: Of course there are contingencies involved as to the raising of the whole of the money. One of the earliest grievances is that there was an opportunity of acquiring it for the road.

Mr. Cooper: It is one thing to get it subscribed, but you do not pay interest until it is called for. If we got the promise of it we could call it up when required.

Hon. E. BLAKE: I think it would be an economical plan, and I think you could admit those issues if you wanted them; but you would not be obliged to do with each issue as you did with the first one—that is, to tie up, and place in the hands of trustees, a certain sum, as you had to do in the first instance. You would get an interest, but it would be only the bank interest.

Mr. Cooper: It is a question of degree whether that amount would be required. I submit it is reasonable to cut it down to the three years. Then, we would also have to pay during six years for administration, which I submit is fairly estimated at £14,500 per annum, which would make the amount of expenditure to complete the work £685,000, and we would have provided it in this way. We would have assets in our hands, as shown, of £184,000. Those are assets which are capable of immediate estimation.

Hon. E. BLAKE: You have investments of land agreed to be sold. We will call it a cash asset, though it is not one exactly; but these other items I cannot call cash assets.

Mr. Cooper: The company has made a profit of 33 per cent. or 40 per cent. on their land-grants.

Hon. E. BLAKE: You had to take time and incur expense in turning the land into money, and would you propose to put it down net cash?

Mr. Cooper: We do not propose to put it down as net cash at the moment we would be making these negotiations, but when we would want to use the money. There is the cost of realisation included in the £14,500 a year. However, I submit we would be entitled to assume that we would have, during the period covered by the payment of the £685,000, realisable assets amounting to £184,000.

Hon. E. BLAKE: Would you kindly let me know at what time of the scheme you are calculating. You take six years, which I think a reasonable period for the completion of your work. When do you calculate that it commenced?

Mr. Cooper: In 1892.

Hon. E. BLAKE: That is quite enough; I do not want the exact month.

Mr. Cooper: We would have that money—at any rate £184,000. We ought to have it in addition to the £170,000 which we say has been wasted by the action of the Government—a gross amount of £355,000. We have actually lost in consequence of the action of the Government, in interest we have not been able to pay, and in the cost of the administration, up to the present time this sum of £170,000. I say that item of £184,000 which exists now would have been swelled to £355,000 if no breach of contract had been committed. Then, in addition to that, we should have—based upon estimates given—receipts amounting to £105,000, and, as we have selected £245,000 worth of our land-grant, we would have an additional £1,000,000, B 1 value, on which we could fairly expect a profit of 40 per cent. We had the right to select over a very extensive area of country, and many of these lands were readily saleable.

Hon. E. BLAKE: Do you remember a very early letter from Mr. Salt, in which he says he had a difficulty in getting £600,000 worth sold in six years? It is one lately put in.

Mr. Cooper: Yes; but we would have, at any rate, the land to use. The only question is whether we could have realised in that time. I submit we are entitled to assess the prospective value of these lands at the average value we were obtaining for the land already selected. That would have left over £1,000,000 available for two purposes—paying future interest and for redeeming the debentures. We would have had a debenture-capital of £3,250,000, and we could have reduced that by paying off one million, so that, practically, at the end of the time when the line might fairly have been expected to have been constructed and in working order, we should have had a debt of £2,250,000. Now, if that had taken place—of course we are dealing

now with a very difficult matter in order to arrive at any fixed or accurate estimate under the circumstances which have arisen—I submit that we had a reasonable expectation that we would have been in this position: that we could have paid off our debentures by a fresh loan at 4 per cent.

Hon. E. BLAKE: In order to submit that, you must submit the ground for that statement. What do you estimate the traffic at for that period?

Mr. Cooper: In dealing with the traffic return we have to deal with estimates. There is no certain ground upon which we can proceed.

Hon. E. BLAKE: I am putting on one side the Government estimates altogether.

Mr. Cooper: Our gross traffics would have amounted to £126,300.

Hon. E. BLAKE: At the end of six years.

Mr. Cooper: At the end of the time.

Hon. E. BLAKE: And the net?

Mr. Cooper: And the net traffics, £58,000. That would be the first year. That tallies with Mr. Wilson's estimate; and I shall submit, when I come to deal with this question, with Mr. Ronayne's estimate.

Hon. E. BLAKE: We will put that on one side altogether. I do not want to embarrass my mind with conflicting figures. Let us have your own figures.

Mr. Cooper: I am going to work it out and show what the result would have been.

Hon. E. BLAKE: You would have to deal with these items: shareholders' capital, £250,000; interest-bearing capital, £2,175,000, or £2,200,000, as you put it in round figures; interest upon that at the rate at which the debentures had been issued and were floated would be £110,000; returns from your railway, £58,000. And you are going seriously to suggest to me that you could have reissued—got a new issue of debentures—under these circumstances.

Mr. Cooper: We had £515,000 to deal with. Our assets——

Hon. E. BLAKE: Not at all; you had exhausted them all.

Mr. Cooper: We had accumulated interest. We would have been earning interest on those moneys.

Hon. E. BLAKE: You have exhausted everything according to your own figures—your £350,000, your £150,000, and your lands and everything. All you have left is assets, £373,000.

Mr. Cooper: We have not exhausted the interest we might fairly have expected to earn on that £355,000.

Hon. E. BLAKE: But the £355,000, to a large extent, was not earning interest. The lands were unsold.

Mr. Cooper: The lands would have been sold.

Hon. E. BLAKE: And they had work to bear at once upon their being sold. They had to bear interest upon construction—£685,000 of expenses.

Mr. Cooper: But that would be taken in; the £350,000 is out of the gross assets.

Hon. E. BLAKE: But that forms part of the gross. You show me a gross of £866,000 and an expenditure of £685,000, and you suggest to me what you have done. The lands are unsold; and you are assuming that you are able to keep invested and earning interest £355,000.

Mr. Cooper: I say we would have invested and earning interest £355,000: at any rate, we would be able to keep invested and earning interest a considerable portion of that.

Hon. E. BLAKE: Your difficulty would be to keep paying the £685,000 as it came due.

Mr. Cooper: We had our traffic returns.

Hon. E. BLAKE: Yes, I know. It could only come in as your railway goes on.

Mr. Cooper: It would be increasing every year.

Hon. E. BLAKE: And therefore in the earlier years you would have to look for something less. You had only £4,000 for the first year on the bit of completed line.

Mr. Cooper: That bit of completed line is a fallacious estimate to go upon. At this time, if we had not been stopped——

Hon. E. BLAKE: You had to finish that bit of line before you went on with anything else. You were constrained to admit that you could not raise any more capital until you completed that bit. You debarred yourself from the possibility of doing any more until you completed that bit of line. You had not the funds to complete that bit of line. There was nothing to prevent your finishing that bit.

Mr. Cooper: Except the action of the Government.

Hon. E. BLAKE: No; it is in hand now—it is left still.

Mr. Cooper: Perhaps I did not make myself quite clear. I say the action of the Government stopped settlement along the line. It is a fallacious estimate to take the £4,000 a year which is now being earned upon the uncompleted portion of the line: it is fallacious to take that as an estimate of what would have been earned from 1892 up to the present time had the whole contract proceeded without any injury being sustained by the company.

Hon. E. BLAKE: Your statement has allowed for that. You have put in your statement an allowance of £170,000.

Mr. Cooper: I am assuming that those difficulties had not taken place.

Hon. E. BLAKE: You cannot charge the Government with that, and also to assume that it did not exist.

Mr. Cooper: I say if those difficulties had not happened we would have had that amount. I say we would have had another thing. We would have had the increase in traffics. Settlement would have gone on and the traffic would have increased.

Hon. E. BLAKE: That is an additional loss which ought to have been given here and which is not.

Mr. Cooper: It is impossible to estimate it at any exact figures, and I submit that we are

fairly entitled to assume that our traffic would have increased to a very much greater extent than the £4,000 a year if the settlement had not been stopped—if the company had not been embarrassed in this way; and there would have been a very considerable amount more in traffics. We would have had this money available for investment. We should have earned something, at any rate, on the interest. I am assuming that we could earn interest not only on the assets we had in hand, but on the moneys which were not being used. The deductions the first year—as shown by this scheme, which I submit is sound—taking the £355,000, and deducting from that the interest—I am dealing now with the first year—and deducting from that the interest at the existing date, which would be £40,000—all the moneys then raised, and the administration for a year, and the interest on the additional new capital which would be required to be raised for the operations of that year, we should have had to pay out of that £355,000 something, in round numbers, like £64,000. I will hand in this document to your Honour a little later. And we should have had, in February, 1893, a sum of £290,000 of that £355,000 available.

Hon. E. BLAKE: In cash.

Mr. Cooper: In cash and assets.

Hon. E. BLAKE: But not interest-bearing assets.

Mr. Cooper: The cash would have been interest-bearing.

Hon. E. BLAKE: Some of it would be interest-earning, but the land would not.

Mr. Cooper: We are assuming that portions of the land could be let, and they would have been earning money. At any rate, we should have been entitled to some return on that unsold land. And I submit we would be justified in estimating that we would get in one way or another a return, at any rate, of 5 per cent. upon our assets.

Hon. E. BLAKE: That is a better return than most people can get for cash assets.

Mr. Cooper: Well, it is not always so. It has not always been so in this colony.

Hon. E. BLAKE: I ought not, perhaps, to say that. I did not mean most New-Zealanders. I meant most people in the world. You did not include that element in your calculation here?

Mr. Cooper: No; I did not include that element.

Hon. E. BLAKE: It is quite a new gold-mine you have found since.

Mr. Cooper: I am showing how we propose to meet that £80,000. There is no evidence that the company could not sell the lands, or that they would have to hold them. On the contrary, I submit that the indications are that they could, if they had chosen to take a little less, have sold those lands regularly.

Hon. E. BLAKE: You are vague. You have given me no evidence. I know what your necessities were. I know the improvident principle on which you acted in reference to the sales. I know you say you avow the principle of selling the land which was most available. You did sell; and you left, therefore, that which was less available.

Mr. Cooper: But there was an immense area to select from.

Hon. E. BLAKE: I know—to the extent to which it was available. As to the rate at which you could have realised it, we have no evidence. I only know that it took some time to sell the best and easiest to dispose of, and therefore I know that it would take some time to sell the rest.

Mr. Cooper: No doubt it would have taken time, and it would have depended on two factors. If the colony had fallen into a state of adversity, of course we could not have sold; on the other hand, if there had been an increase of prosperity—and that might fairly have been anticipated in 1892—we could have sold the land readily.

Hon. E. BLAKE: And you must always remember you could not get it in hand except by degrees; and, if that be the case, the largest expenditure would be taking place towards the end.

Mr. Cooper: We had to get the land-grants according to the expenditure. If the larger expenditure were incurred, we got larger land-grants. As I have said, it depends upon two factors—one which might be an adverse one, and one which would be in our favour. As to t ie adverse one, that is a thing which could not be contemplated—namely, that the colony should fall into a period of adversity; and the second is one which might fairly be contemplated—namely, that the colony will be prosperous, and that settlement will increase. I am not speaking wildly upon this matter, because the policy of the present Government has been one which recognises this important feature: that the land for settlement within this colony is of limited extent, and that the exigencies of settlement have necessitated, as a portion of the Government policy, the purchasing-back of large estates of land for the purpose of cutting them up for small settlement. Considering that this policy was instituted about 1890, I say we might fairly look to this: that settlement was going to be promoted; that there would be a large increase of persons willing to purchase freeholds, because the Government themselves admit that necessity, and have determined upon investing large sums of money in the purchasing-back of large estates for the purpose of cutting them up; and, therefore, that the same principle would apply to the company's transactions.

Hon. E. BLAKE: Not in the Maruia or Grey.

Mr. Cooper: Not in the Grey Valley, it is true.

Hon. E. BLAKE: By these observations of yours about settlement, I understand you to mean very largely settlement for agricultural purposes.

Mr. Cooper: I am dealing now with the value of lands within the authorised area, and the capacity of the company to realise these lands. The company could have selected lands in the province of Canterbury which were readily saleable. I am not suggesting that our injury or our damage was so much the locking-up or the taking from us of lands which we could readily have sold, but the injury done to the finance of the company by the way the Government acted under this contract.

Hon. E. BLAKE: We are not engaged on that point. We are engaged on the point that, the policy of the Government being to promote close settlement, you had the right to anticipate close settlement in reference to your areas. I have not yet seen anything which would indicate to me

that you have a considerable area of land worth talking of in this connection suitable for settlement.

Mr. Cooper: Near to the railway-line?

Hon. E. BLAKE: Or anywhere, because you sold the best portion of your Canterbury land, and even there it is not suitable for close settlement.

Mr. Cooper: We sold a large quantity on which we did get a profit.

Hon. E. BLAKE: Mostly pastoral land.

Mr. Cooper: Some of that may be suitable for settlement. What do we find in the history of the colony, that one of the largest pastoral estates has been bought back at a cost of a quarter of a million for settlement purposes.

Hon. E. BLAKE: Do not imagine that I was suggesting that these pastoral lands were not fit for settlement. I was suggesting that the lands in Canterbury on the higher level were only fit for pastoral uses—the elevated area; that is the evidence as I retain it.

Mr. Cooper: There would be many hundreds of thousands of acres within that Canterbury area which would be suitable for close settlement. My friends would throw a very improper aspersion on Canterbury if they said it was otherwise.

Hon. E. BLAKE: Canterbury is a large plain at a relatively low level.

Mr. Cooper: Out of the 6,000,000 acres set apart for settlement, and the great bulk of it was in the Provincial District of Canterbury, the company has only made a very small selection, and I submit there would be many hundred thousand acres of that land which would be fit for close settlement.

Hon. E. BLAKE: I would be glad to see any evidence that sustains that view. I have not apprehended it yet.

Mr. Cooper: It was admitted by the Crown that the Canterbury lands were of extreme value.

Hon. E. BLAKE: I will not say that what were left were the refuse, but what remained were of less value. You sold the best of the Canterbury land, and the least valuable part remains.

Mr. Cooper: But we must not forget this: that the general values which were placed upon these Canterbury lands were arrived at by the Government and the company after consultation, and where we sold we were able to realise a large profit; and therefore, I submit, we were justified in applying the same principle to the lands not selected. It does not by any means follow if we earned a million pounds we could not have selected a million pounds' worth of equal value. Our last selections have not been shown to be one whit less valuable than the first selections; and I submit there is a total absence of evidence that we have exhausted the most valuable lands. The inference can be drawn in our favour, seeing we have realised and sold at a profit the greater portion of the lands which we have selected. It may fairly be inferred we could realise and sell at a profit within a reasonable time the balance of the lands we were entitled to select out of this very large area. And, what is more important, we find repeated indications in the correspondence in reference to the mining reserves that the action of the Government and the action of the company under this contract, or rather the locking-up of the lands under this contract, is preventing close settlement; showing that there was an indication in the public mind that this large area of 6,000,000 acres set apart would in a great measure be settled if it had not been included in the authorised area.

Hon. E. BLAKE: Your complaint in this connection is substantially mining reserves, and your statement to me from the beginning—I think you could not have made any other consistently with facts—has been that, so far as the land covered by mining reserves is concerned, there is no substantial difficulty as to settlement or close settlement. It was the timber which was the value.

Mr. Cooper: And, therefore, I might mention that a very considerable section of the public thought that there was a fair prospect of close settlement, not in the Westland lands only, but in the whole authorised area of 6,000,000 acres; and we find among the letters on that file, not protests limited to the locking-up of these reserves, but to the 6,000,000 acres, and so preventing the possibility of settlement in the Province of Canterbury. I say there is more than one letter in which the whole area of six millions is referred to as being locked up by the Government under this contract. And what did Sir Robert Stout say the other day? that one of the grievous wrongs the Government had to complain about was that for years large and valuable areas had been locked up for settlement because of the embargo placed on these lands by the contract.

Hon. E. BLAKE: It had that result, and it is obvious it did prevent settlement.

Mr. Cooper: I use this as an indication that as we disposed of the land so we got close settlement. The scheme of these figures is, we take £355,000 we would be fairly entitled to consider we could earn money by, and, paying out of this year by year the interest which might fairly be expected to accumulate upon the moneys which we were borrowing, the amounts which we would require year by year, we should find that at the end of three years we had still £101,000 left of that £355,000. I will hand these figures in, your Honour, so that you may study them. We should then have earned another land-grant, and have had £453,000 available; and so, deducting interest on the same principle, and working the whole matter down, we should, at the end of the period in which we might fairly consider we could construct the railway and earn the balance of land-grant, not only have accumulated traffics, £105,000, but should have had an asset fund of £1,075,000, and the accretion of interest thereon. I am showing how we propose to meet that £87,000.

Hon. E. BLAKE: Then, I must take your whole figures together. You show in this table, which was prepared with some care, £685,530 to meet during construction. To meet this expenditure, the company would have had the following resources—assets, £355,000.

Mr. Cooper: We have not allowed interest on these capital amounts.

Hon. E. BLAKE: But you must remember that the expenditure was to be paid during construction, and the assets were going to be realised during construction; and it is a liberal estimate to

assume that the assets would be realised fast enough to meet the expenditure; but to assume that you can turn them into interest-bearing funds and not use them, and out of these sums pay current expenses, is, to my mind, far-fetched and fanciful.

Mr. Cooper: The paper shows we do not do that. We only realise it bit by bit. It is a calculation, and I submit it is upon a proper basis.

Hon. E. BLAKE: You would have at the end of this term, on this calculation, debentures, the interest upon which would be £110,000. I know you call it 4 per cent. You would have to meet it from your traffic returns, £57,000, your capital of £250,000 bearing nothing, of course. There would be a deficiency from the returns of the railway in that state of things which would be inadequate to meet the amount by £43,000 of the debenture debt, and, of course, provide nothing on the capital. On that state of facts is it arguable you could have approached the public, and said, "It is quite true our railway is producing £57,000 a year; we expect we will increase at the rate of 5 per cent."? That—this is Mr. Wilson's statement: "We owe £110,000 of interest per annum, and we have got our share capital, which is entirely unproductive, into the bargain; we have some assets which will enable us to pay interest for a few years; and, upon that, I ask you, the investing public, to take up my 5 per cent. debentures by fours, which will not make things square upon the running of the railway, and thus will not give you a security for your 4-per-cents."

Mr. Cooper: We should have, according to the figures I have here, £376,000 in hand at the end of that term.

Hon. E. BLAKE: Instead of the £173,000 shown here.

Mr. Cooper: Yes; I have shown it by these figures that that would be a fund which could be utilised to meet the liability.

Hon. E. BLAKE: Does that assume all the land sold?

Mr. Cooper: Yes.

Hon. E. BLAKE: You could not get all the lands sold until after you have earned them.

Mr. Cooper: I submit we would have a reasonable prospect of selling them within a short time after that. We should have £376,000 as a fund towards meeting the annual payment of £87,000. I may assume now that we get money at 4 per cent. Now, according to Mr. Wilson's estimate, the net traffic for the year ending 1899 would be £58,000, and we might fairly expect to earn on that fund of £376,000, £18,000. We should, therefore, only have a deficiency in the first year of some £10,000 or £11,000.

Hon. E. BLAKE: According to your own calculation—assuming that is verified—a large portion of what you call a fund would be your last-earned selections of land, and you are actually asking me to assume that they are sold at 40 per cent. profit, and invested and bearing interest in the first year.

Mr. Cooper: I should ask you not to overlook the effect of clause 33; and we might have to ask the Government, if these applications came in, as we had every reason to expect they would, to deal with this fund as realised lands. We should then have elected to take it from time to time. There certainly was a demand for the sale of small sections of land of 300 or 400 acres, or even 1,000 acres, and that is an element which we would consider in the matter.

Hon. E. BLAKE: If you took it you would lose your profit.

Mr. Cooper: No; because we would ask the Government to assess——

Hon. E. BLAKE: But you could only take it at B 1 value.

Mr. Cooper: We should get a profit if we took the block.

Hon. E. BLAKE: Then you would be expending money instead of making it.

Mr. Cooper: We should take the money in the hands of the Government in reference to that block.

Hon. E. BLAKE: You would use up your capacity for selection; in fact, you might incur the very difficulty which prevented you from acting upon that in the later years. You did not want to lose your capacity for the selection of saleable lands by acting upon this section 33.

Mr. Cooper: But still that is an element. Now, working out the figures, which I submit may fairly be estimated as a sound basis, we find on the first year we should have a deficiency of £10,000, but we should still have our fund in existence of £376,000, and we should have to take £10,000 out of that fund. Next year our traffic receipts might fairly be expected to increase by 5 per cent.; they would then amount to £61,000, and we should have an income still on the balance left of the fund invested, and we should have a total revenue from that balance and from traffic returns of £79,000. There would be a decreasing *minus* quantity on that system until at the end of five years we should have sufficient traffic returns to pay our interest on the debenture fund; and by the end of the seventh year we should have sufficient from our traffic returns to pay a dividend of 1½ per cent. on the £250,000, that would go on increasing, until at the end of some twelve or thirteen years we should be able to pay a very fair dividend on the £250,000. In addition to that, this element should not be lost sight of: that this is a new colony, a sparsely-peopled colony, with a railway which opens up a great portion of the hitherto inaccessible portions of the colony, and which might fairly be considered to bring settlement in its train. This district which would be served by this railway from the east, west, north, and south is capable of supporting a very large population, and the railway itself might in a very short period of time be considered to be a very paying concern. We know how these railways do increase in value. I am not referring to Government railways now. I am referring to railways in new countries—opening up new areas of country to which people are attracted. We know how settlement increases along a line of railway. We know how settlement increases in a district which is served, though it may not be immediately contiguous to the railway; and if, as suggested by more than one witness, in the no distant future there should be a very large population indeed in the Grey Valley, in Westland, as well as in Canterbury, caused by the opening-up of the country, the influx of settlement, and the revival of the mining industry and other industries, we may fairly assume that the railway itself

would be a very payable speculation in point of traffic. Then the 5 per-cent., which Mr. Wilson estimated would be the increase year by year, would be a very small increase to take. I submit it is no criterion to take the Government railways, which show a falling revenue. We know that railways managed by companies are managed on different lines altogether from those managed by a great public department. I am not going to enter into a discussion on railway management, but we know that a company lays itself out to make money as well as to serve the public; whereas it is often the case in the Government railways of the colony that business success is supposed to be a secondary consideration. I say it is the experience of mankind that a great commercial concern, managed by a Government, is never a success.

Hon. E. BLAKE: I think you are fairly entitled to suggest that.

Mr. Cooper: But if that great concern is managed by individuals, or by a company, then it may be fairly expected to be a success.

Hon. E. BLAKE: I think you are entitled to suggest that a company would be more likely to make money.

Mr. Gully: What private railway has paid in this colony?

Mr. Cooper: My friend suggests that none of the private railways have been a success in New Zealand. We may refer to current events. We saw in the papers an account of a presentation made to the founder of the Wellington–Manawatu Railway, on the ground that he had performed a great public service, and that the company itself was a most unqualified financial success, and likely to pay the shareholders 6 or 7 per cent.

Mr. Gully: They have paid no dividends yet.

Hon. E. BLAKE: You cannot argue from the results of the construction of one railway. We know, with regard to the railways all over the world, that some have been failures, and some have been the reverse.

Mr. Cooper: I have taken a considerable time in explaining these figures, and I will now hand in the figures showing how the fund of £376,000 is arrived at [figures handed in]. Before passing from the subject of the traffic, one of the material points is whether Mr. Wilson's estimate is a reasonable one. I submit it is not only a reasonable one, but it is too low when we come to consider the evidence which has been given as to the possibilities and the probabilities of the future. Now, the only evidence we have controverting Mr. Wilson's statement, that there would be a net result of £56,000 at the end of the first year, is the evidence of Mr. Ronayne, supported by that of Mr. Hudson. I submit no value can be given to that at all; but if we take Mr. Ronayne's figures, and use them on the basis upon which I submit the rates ought to be calculated, we shall find that, even taking the limited quantity of traffic he refers to, instead of a net loss of £3,000 a year, there is a net profit of nearly £20,000 a year. That is, on the assumption that the rates should be charged that we are entitled to charge.

Hon. E. BLAKE: Of course, I feel a great difficulty, because the larger portion of the traffic is traffic of a character and carried under conditions to which the present rates would have no application. You feel satisfied I am to take it entirely upon the evidence, without any assumption.

Mr. Cooper: That is the first view, I conceive. I submit that one of the greatest deficiencies that Mr. Ronayne makes in his statement is that on the passenger traffic, and why he assesses the passenger traffic at that low rate I cannot understand. I submit that the estimate of Mr. Ronayne is not a satisfactory one at all—I mean satisfactory in the sense that it is not one based on reasonable figures. It is an estimate which, I submit, has been framed for the express purpose of belittling the chances of the company.

Mr. Stringer: Mr. Ronayne promised to put in a return showing the estimate on which he worked out that result, and I have it here. It is on the basis of the passengers carried between Christchurch and Dunedin, Dunedin and Invercargill, Wellington and New Plymouth, and *vice versa*. They average six a day all through.

Hon. E. BLAKE: It was proved by one witness that this estimate of six a day was considerably over some of the other lines in existence—he was very much surprised if there were an average of six a day. He also gave more details, and I thought that his evidence was more satisfactory in that respect than Mr. Ronayne's—that is, with reference to the passenger traffic.

Mr. Cooper: I am dealing with that portion of Mr. Ronayne's estimate referring to the numbers of the passengers. I am dealing with the "prices" he puts down. He only allows us 14s. as the average price a passenger would pay over the through journey, whereas the examination of the tariff showed that we would be entitled to 19s. 1d.

Hon. E. BLAKE: Then he gave you an equal number of first- and second-class passengers.

Mr. Cooper: But he does not show how that was made up.

Hon. E. BLAKE: It shows that there is an equal number of first and second, which is contrary to the usual experience, and so far is in your favour.

Mr. Cooper: I think that in this colony as many travel first as second. I submit that we would be entitled to assume that we would get the whole of the coach traffic at even the maximum rate of fares, because the Court will recollect that it was admitted by Mr. Ronayne that the return coach fare was £5, whereas our return fare was only £1 13s. or £1 14s.—I am not quite sure which—and very much less than the total coach fare. So far as the steamers are concerned I submit that we would be able successfully to compete with the steamer traffic without reducing our fares. The second ground is that the steamer takes four days to perform the passage, whereas it would only take ten hours by rail; and there is a manifest reluctance amongst the majority of people to travel by steamer. The New Plymouth line is no indication, and for this reason: that people coming from Auckland to Wellington have to perform a sea journey before they can get the New Plymouth train. They can take their through ticket from Onehunga direct to Wellington, and go in three hours less time than if they broke their journey at New Plymouth, and took the train there to Wellington. Therefore, I submit that the New Plymouth Railway is no

indication at all of the accuracy of Mr. Ronayne's contention, and that I would be fairly entitled to assume that we would gather by far the great majority of the travelling public, and at our rates, which would be less than the coach, and probably a little more than the steamer. Therefore we might anticipate that the estimate which Mr. Maxwell put upon the passenger traffic for the first year, during the inquiry of 1892, is a sound one. Now, Mr. Ronayne says that we may never expect to get £9,000 or £10,000 by our passenger traffic. Mr. Maxwell, who is, to say the least, quite as competent an authority as Mr. Ronayne, and has had infinitely greater experience, was called by the Government. He was one of the Railway Commissioners at the time he gave his opinion, in 1892, that we might fairly expect to get £20,000 a year from the passenger traffic; and there is therefore a difference between Mr. Ronayne and himself of £10,000. Mr. Ronayne, also, only allows us 50,000 tons of coal; and, in order to show you that he is desirous to destroy the company's finance as much as possible, he will not allow us even what is the freight which we might fairly expect to get, he takes the odd twopences off. It is true it is not very much, but it shows the spirit with which that return was made up; while, on the other hand, Mr. Maxwell says we might expect to receive £20,000 a year, Mr. Ronayne says we may expect only £10,000. I submit that we might fairly expect to get the whole, or the greater proportion of the whole, of the coal traffic which would go between Westland and Lyttelton; while passengers would prefer to travel by train instead of by steamer. So with the coal-merchants. I submit they will prefer that their coal shall come by truck instead of by steamer, because when taken by steamer it takes three or four different handlings, and, in the case of friable coal, a great proportion of the coal carried is destroyed, whereas in the truck it is protected from the time it leaves the mine until it reaches the vendor's premises. And there is another reason why we should get the greater proportion of the coal traffic, which in itself is a very considerable item. We have it in evidence that the quantity of coal which might fairly be expected to come to Lyttelton and Christchurch would amount to 120,000 tons. Now, a man can get down by rail 10 or 20 tons of coal, whereas if he charters a steamer he must be in a very large way of business; he must be able to bring in his 200 or 300 tons. It is only men of considerable capital who can to do that, and I submit that the railway would lead to the increase of the number of the smaller dealers who can get their 20 or 30 tons to carry down at the time. It would very materially interfere with the steamer trade, because you cannot mix your coal—I mean that you can only carry a consignment of coal for one particular person; whereas the railway can bring down a dozen trucks, each of which may be consigned to a separate coal-dealer, and we are quite entitled to argue that we could get the greater part of the coal traffic under those conditions. Mr. Maxwell says we may expect 70,000 tons, and I say it is within the bounds of reasonable probability that we may carry 100,000 tons. A very large quantity of coal is taken from Lyttelton by steamers for their own consumption, and Mr. Wilson has only taken 70,000 tons as the basis for his calculation.

Hon. E. BLAKE: I think you might fairly ask me not to place the same reliance on the Government figures as would have been placed upon them if the officers who furnished them had had the opportunity of fuller information and of further consideration. You might also fairly say to me that Mr. Wilson has had the charge of the line for many years, that he has given estimates before on several occasions, and that he has not been cross-examined upon them, and for these reasons you might ask me to make a note of the likelihood of his estimates being more accurate than the others, and I think that you are fairly entitled to ask me to consider Mr. Wilson's figures as accurate.

Mr. Cooper: Yes, I will ask you to accept his estimates up to the full amount. I would only point out three items, passengers, coal, and timber; and in reference to coal, we may assume that it is well within the mark when he anticipates 70,000 tons. In regard to the timber: first of all we have a return, I think in Mr. Blair's report, that there will be from 15,000,000ft. to 20,000,000ft. of timber produced in that district per year for a period of at least one hundred years; and Mr. Maxwell, in 1892, says that the company might fairly expect to carry 9,000,000ft. of timber per annum; and yet Mr. Ronayne stated 6,000,000ft. as the quantity which the company might fairly expect to carry. People will pay a higher rate, and they are quite content to do so, if the timber is carried by railway than if it has to be subjected to three or four handlings in being brought around by coast steamer. Why, we find from Mr. Ronayne's own statement, that the rate we say we ought to get is only £1 per ton, as against the freight by sea; and I submit that, taking all these circumstances into consideration, the company was justified, and the investing public would have been justified, in 1892, in saying that, although this line might be in the first few years of its existence a line which might lose money, still there is an immense possibility before it. There is an increasing traffic, a district rich in natural productions. It is a line in a new colony, and a district which presents many fields for settlement, and in twenty-five years, instead of having twenty thousand people on its intervening lands, we shall have something like a quarter of a million. We know what advances are made from time to time in these new countries; we know how the population has increased, and we know that Sir Julius Vogel suggested about the time that the company was launched that the prospects and population of this colony would increase by leaps and bounds. I say the investing public always take these circumstances into consideration. They are willing to deal not only with the probability of a reasonably fair return with good security for their money, but they are always very largely affected by the speculative possibility.

Hon. E. BLAKE: That is, the investing public will take shares; but when you offer them no more than 4 per cent. they want good security.

Mr. Cooper: What security would the investor have? He would have a line costing £3,000,000 to construct, and half of which has been paid off by the land-grant.

Hon. E. BLAKE: No; because you are going to raise £2,200,000.

Mr. Cooper: Our contention is this: we should have had a gross debt of £2,200,000, but our line would have cost over £3,000,000.

Hon. E. BLAKE: You talk about the amount being reduced one-half.

Mr. Cooper: It is reduced a third. And, although the investor may say you want to make sufficient money to pay our interest without being able to finance to some extent, we might say we have the means to finance; and he might say, "Oh, there is good security for the money, and although you may not earn 5 per cent., you can earn 3½ per cent."

Hon. E. BLAKE: If you cannot earn 5 per cent., he might say, "I will not lend you the money at 4 per cent."

Mr. Cooper: We say this: a man might say, "I know you cannot earn 10 per cent., but you can earn 4 per cent., and therefore I will lend you the money at 3 per cent." If, as we know, money is a drug in the market at 2½ per cent.——

Hon. E. BLAKE: Yes; but why?

Mr. Cooper: Because it is impossible to get investments in the present state of the money-market in industries on which people can afford to pay more than 3 or 4 per cent.

Hon. E. BLAKE: I know it is impossible to get a good investment. There is at present a period of stagnation.

Mr. Cooper: Yes; we know this, that it is quite within the bounds of possibility that you will be able to get money presently at 1½ to 2½ per cent.

Hon. E. BLAKE: But so long as consols are over 2½ you will not be able to do that.

Mr. Cooper: Yes; but there is a demand for industries into which you can put your money, and there is any quantity of money available if there is good security. I say, therefore, it is not outside the bounds of possibility that, if we said, "We cannot make 5 per cent., but can make 4 per cent., and you can only get 2½ per cent. in the funds, and would get 1½ per cent. more by putting your money with us," we should have been able to pay interest year after year on our general capital and reduce the amount. I submit therefore that, on the figures given of the traffic returns, the company was on a sound financial basis.

Hon. E. BLAKE: And what is the damage, then?

Mr. Cooper: Now, I come to the next question. I submit that that basis has been destroyed by the Government by their breach of contract. I am not going to re-argue the question that there has been a breach of contract. I am assuming that there has been a breach of contract. I have submitted my reasons for that previously. Now, let us see what effect that has had on the company. I take it that we have to do three things. We have first to show the breach. We have then got to show that that breach operated in an injurious manner on one of the contracting parties, the party complaining, and then we have to show what injury has been done which is directly traceable to the breach. It is true we have not a great body of evidence, but, if we have one witness whose evidence was accepted, and who was not cross-examined—and I take it, therefore, that Mr. Burchell's evidence is to be taken at its fullest value—I say that if we have one good witness, we have sufficient to justify us in taking this ground. We say that the company up to July, 1891, was in the confidence of the financing public. We say that we were able in 1889 to get a large sum of money, which we were forced to pay for, it is true; but we say that after the selection of certain lands, and the realisation of those lands, the prospects of the company improved and their position in the eyes of the financial public improved, and continued to improve up to about October, 1891. We say that it is abundantly clear that was so up to July, and that at the end of 1891 something happened which caused their debentures to fall, which destroyed their financial credit, and which rendered it impossible for them to go upon the market and obtain any more money. Something did happen. There is no doubt about it that there was a time when, owing to some cause, confidence in this company was destroyed, and we can fix that time approximately at the period between July, 1891, and December, 1891. Now, Mr. Burchell tells us what it was. I submit that the cause which operated upon the credit of the company was directly the fault of the Government, and directly arose out of what I have submitted was a breach of the contract. Let me just refer to Mr. Burchell's evidence. We find it in the second portion of his examination, after Mr. Kennedy was examined, on page 187. The question is, "You say the debentures stood at 96 in 1891. At the beginning of 1892, they dropped to about 88?" Mr. Burchell answers, "I can only give the reason that was given to me." (Q. 91.) "By whom?—By one of the members of the syndicate who originally subscribed for shares—Mr. Marnham, a member of the London Stock Exchange. He spoke to me on, I think it was the day of the general meeting, or the next day, in 1891." (Q. 92.) "What month?—November, 1891. He said, 'I am very anxious about the position of these debentures. There are very unfavourable rumours going through the city that the Government are not treating the company fairly.' He said, 'I want you to remove those rumours if you can. Can you give me your assurance that there is no foundation for them.' I said I could not give him such as indefinite assurance as that, as there were difficulties between the Government and the company, but I hoped they would be removed." Now, if we see what was going on in London at that time, and then find out what was going on in the colony at that time, I submit that we get the cause and the effect at once. In July, 1891, the Minister had intimated his intention of proclaiming 250,000 acres of these reserves at once. The position was considered so serious by the company's manager that, as early as September, 1891, he considered it to be his duty to enter a protest against the action of the Government. That was a telegraphic protest, which was followed by a formal written protest in October, 1891. It was evident, therefore, that the same thing operated on Mr. Wilson's mind as operated on the minds of the London financiers, and that was, the making of these reserves. It was evident that Mr. Wilson looked upon the action of the Government as one which was in contravention of the contract, and one which was therefore likely to seriously affect the company. It was evident that information was conveyed home. We know how matters do reach financial quarters, especially matters involving the administration in a colony, and especially matters which are considered to be of public interest. There had been a question asked in the House before; and Mr. Seddon himself put one

question, which had been answered by the Minister who had previously retired from office; and although we cannot trace the source from which the information was derived which reached the City of London—it is not essential that we should do so—I submit that we can show clearly that within a very short time after it was known to be the intention of the Government to make these wholesale reserves, the news reached London, and it had the same effect on the minds of the financiers as it had on the mind of Mr. Wilson. It caused the financiers to say that it was a breach of contract, and to say that the Government were not dealing with this company as it ought to do, and that they would not put any more money into the undertaking. I submit that this arose directly out of the action of the Government; and if that action of the Government was a breach of contract, I say we have a direct damage springing from it. That is what Mr. Marnham says. Your Honour knows that the £745,000 of debentures was negotiated by a syndicate, which would have been willing to take up the balance of the money required by the company. That syndicate consisted of Mr. Marnham, Mr. Coleman, and Mr. May, Sir Samuel Montagu, Mr. Schlesinger, Nickieson, Bishop, and others. Mr. Marnham was the first to complain. Then Mr. Burchell had an interview with Sir Samuel Montagu, which took place in the early part of 1892—about the latter end of January or the beginning of February. Mr. Burchell said the object of the interview was to obtain money, and to see if he could finance; and he was met at once by the objection that the Government had interfered with the company in the matter of the land-grant.

Hon. E. BLAKE: Yes. Mr. Burchell says, "In fact, he put it that the hostility of the Government was evident."

Mr. Cooper: Yes; the hostility of the Government was evident. It was not so much the graduated taxation, but the manner in which they were going to proclaim these reserves. The effect that their action had on the minds of the financiers was that the Government were not acting according to the spirit of the contract. They were acting without a due regard for the company's interest; they considered the action of the Government was without a due regard to the interests of the company under the contract, and therefore they did not wish to deal with them in any way, and therefore would not listen to any more arguments on the subject. Then, Mr. Burchell had an interview with Nickieson a little later on. He was a member of the syndicate. He said, "After the news he had had about the land-grant, and the general things in New Zealand, he would not touch any more railways in New Zealand unless they had a direct Government guarantee." Now, in the course of his cross-examination Mr. Burchell refers more in detail to what took place between Sir Samuel Montagu and Mr. Nickieson:—

"And Sir Charles Montagu: did he rely mainly on the land-grants or on the graduated land-tax, or did he rest on both? Did he seem to have any information about the land-grants?—He seemed to have a great deal.

"What did he tell you?—He told me he had heard direct from New Zealand.

"To what effect?—That the Government were making large mining reserves not at all in accordance with the contract, and that such reserves were not required."

There we have direct information that the causes operating in Sir Samuel Montagu's mind were the reserves made by the Government—the principal mining reserves. The same information was given by Mr. Marnham and by Mr. Nickieson as appears in Mr. Burchell's cross-examination by Sir Robert Stout:—

"*Sir R. Stout.*] These rumours got to London, you do not know how, you do not know what?—I do know what.

"Tell us?—That the Government were not treating the company fairly over their land-grants.

"Did that appear in a single paper in London?—I knew it, because Mr. Marnham came to me.

"I want to know if it appeared in any single newspaper in London?—I really cannot say.

"Can you say it did?—I really cannot say.

"You do not know where Mr. Marnham got his information from?—No.

"You did not examine him as to where he got it from, or the nature of it, excepting the general statement he made to you?—That is all.

"You were not aware whether he knew the area reserved, or proposed to be reserved?—No.

"And you yourself did not know what was reserved, nor the amount proposed to be reserved, at this time?—No, I did not.

"Now, about Mr. Nichieson: had he heard the same rumour later?—Then, of course, we had more detailed information.

"When did you see Mr. Nickieson?—It was in the spring of 1892. I cannot give you the date.

"Had you any more detailed information than you had when you saw Mr. Marnham, in December, 1891?—We had Mr. Wilson's subsequent letters.

"Was there a single letter from Mr. Wilson which gave any details as to how much of the area had been improperly reserved?—I really cannot say.

"Then, you cannot say you had any more information in the spring of 1892 than you had in the winter of 1891?—Excepting, of course, we had letters from Mr. Wilson by every mail. I cannot charge my memory with the contents.

"And do you not know the details of any of those letters?—No."

He had also an interview with Mr. Alexander Young; he was connected with the syndicate; he was a member of a well-known firm of accountants, and a man who was thoroughly conversant with the money-market and its information. Mr. Burchell says:—

"I went to him because I knew he was a man who had a command of a very great deal of money; in fact, he was the man from whom Sir John Morris got the promise of three millions in 1887. I reminded him what he told me in 1887, and asked him if he would be prepared to find some more money for the company. I put the matter before him to the best of my ability

from our point of view. He asked to see the previous prospectuses, which he said he had seen and forgotten. I gave them to him. He read them through, and he said, 'Well, it seems to me, the main inducement at the present time in this is the land-grant, so as to make sure that we can get our interest safely during construction and to have something when the line is made besides the traffic. The first question I must ask you is: would your directors make the same statements now as they did in 1886 and 1889'? I had to disclose to him the action of the Government, and there was an end to it.

"110. And you could not get any money there?—No.

"111. You refer to these four gentlemen on your knowledge of the financial world in London. Can you say whether their impressions were a fair index of the financial feeling in London at that time in relation to the company?—Yes, certainly.

"112. After meeting with these rebuffs, would it have been of any use if the company had issued prospectuses for any issue of debentures?—Before you issue a prospectus you would have to get your capital underwritten.

"113. After meeting with these rebuffs, would it have been any use going on the market for any more money?—It would not have been worth the expense of printing it.

"114. What did you gather from these rebuffs as the effect of the action of the Government upon the company's credit in London?—I came to my own conclusion; it is self-evident.

"115. Hon. E. BLAKE.] You had to stop?—Yes, I had to stop.

"116. *Mr. Cooper.*] And could not get any more money?—No."

Therefore, I submit we can show a direct effect upon the company's credit by the action of the Government. If the action of the Government amounted to a breach of contract, then the resulting injury to the company was the loss of credit. I submit the damages we have sustained are the depreciation of the enterprise by the loss of credit, an unfinished enterprise, one which we were capable of finishing, but one which we were rendered, by reason of this conduct, incapable of finishing; and I submit it is a sound reason for damages. I say that we are entitled to damages, and that the rule is that the plaintiff is to be placed in the same condition he would have been in if allowed to proceed without interference. We have lost the benefit of the expenditure. I do not want to go into the question of the second arbitration at present, but we have practically lost our railway. The effect upon the company's credit of the breach of contract was such as to put them into such a position that they were unable to complete, and, in consequence of their not being able to complete, they had, practically, a line from nowhere to nowhere. It was not as if it was open to Christchurch; if it was open from Jackson's to Reefton it would have taken a great deal more traffic, and would have had a junction with the Government line. We had a line from nowhere to nowhere, without the possibility of being able to complete it. Now, a portion of a whole is sometimes of no value at all. In this instance it was of no value. We were left in the same position as a man who has a house without any roof, or a ship without a bottom.

Mr. Gully: You being the builder.

Mr. Cooper: No; being the builders, but being entitled to finish that ship under a particular contract, and the possibility of being able to finish and put the bottom into it being prevented by the action of the other contracting party. That section of the railway is, as it stands now, in that incompleted condition, only worth a very small sum of money. In dealing, therefore, on these lines, I submit it is fair to take what is the estimated cost, deducting from it the present value of the line,—or, rather, the value as it existed on the 25th of May, 1895, without going into the ground of the second arbitration,—and the balance is the money that we have lost under that rule. Taking the second rule, I say we are entitled to be placed in the same position as if we were allowed to proceed without interference. The company, if allowed to proceed without interference, was then able to raise the money and complete the line, and the company would have completed the line. Supposing the directors themselves—men of very considerable substance—had said, "We are going to put our hands in our pockets and we will find this two millions for the purpose of completing this line. We are satisfied that we can get 3 per cent. upon it. We are satisfied that with the land-grants and the traffics we shall get a million pounds back, and we shall stand,—after paying the £845,000 of debentures off,—we shall stand with the line to our credit, which costs us, say, two millions"——

Hon. E. BLAKE: Two and a half millions, according to your own idea.

Mr. Cooper: Well, say two and a half millions; "we shall get as a return on that two millions and a half a sum of between £50,000 and £60,000, that is 2½ to 3 per cent., with this extreme probability, that the traffic will increase from year to year, and we shall open for our investment a road which it is true will only pay 2½ per cent. at the beginning, but in a few years from now may go up to 5 per cent. We will not go on to the money-market at all." I say we are debarred from taking that position.

Hon. E. BLAKE: But you are placed on a fundamentally different position, because you state that it was going to borrow, and that it is incapable of borrowing because of the Government.

Mr. Cooper: I make the suggestion that we clearly can come under the second rule. We say we were entitled to be placed in the position we were in, in the month of July or August, 1891, with our credit undamaged, with our finance unaffected by any action of the Government, when, with that credit undamaged, we could have got the money. Even if we did want to get the money we could have got it for the return of 4 per cent. They prevented us from putting our own money into it in this way to complete the line. The Government had shown that they intended to act according to their view of the matter in such a manner that our contract was worth very little indeed. They had taken the whole of the reserves along the line from Reefton to Jackson's, and left us nothing to take in the immediate vicinity of the line, so that, looking at it from that point of view,—which is the view I seek to enforce, and which I submit is the proper view,—whatever was the

actual value of the land taken, the injury resultant from that taking was the destruction of the company, and, upon the principles I have endeavoured to submit to the Court, the measure of damages we are entitled to recover is the loss which resulted from the action of the Government.

Hon. E. BLAKE: You say you are to be put in the same position as if it had not happened—in carrying out the scheme of construction which makes the foundation of their claim for damages.

Mr. Cooper: And that scheme would have enabled us to complete the line. It is true for a certain number of years we would not have opened up all the traffic on the line, but with the reasonable probability I submit—nay, with a reasonable certainty—that with the traffics of the line gradually increasing in value, we should have been able not only to pay interest, but to pay dividends to the shareholders.

Hon. E. BLAKE: And therefore?

Mr. Cooper: And therefore we have lost that opportunity, and we have lost the money we have put in.

Hon. E. BLAKE: What do you say you have lost on the whole? You might have put in a million of money, and it might cost a million and a half more to complete the contract; or you might put in a million, and it might cost you £250,000 more than the thing was worth to complete your contract. What do you say that the enterprise was worth?

Mr. Cooper: I say that the enterprise was worth every pound put into it.

Hon. E. BLAKE: And every pound you were going to put into it?

Mr. Cooper: Yes, and every pound we were going to put into it. I say that the line, if it had been constructed, would have cost £2,200,000, and at the end of five, six, or seven years from the time it was opened it would have returned——

Hon. E. BLAKE: That is not the time we are taking. It is twelve years, is it not?

Mr. Cooper: That is what I submit is the time we are to estimate on. We must have time allowed us to build up a business.

Hon. E. BLAKE: The debenture-holders' prospectus announces 5 per cent. on the portion to be constructed by these debentures.

Mr. Cooper: Because we expected to get it from the land-grant, not solely from the traffic.

Hon. E. BLAKE: I beg your pardon, the prospectus expressly states: "It is estimated that an annual gross receipt of only £1,100 per mile on the Reefton Section would pay 8 per cent. upon the capital required for this work."

Mr. Cooper: What I was pointing out was this: you must have the line constructed before you get the land.

Hon. E. BLAKE: But this is one section.

Mr. Cooper: You must have the section constructed.

Hon. E. BLAKE: You are referring now to a period of six years after the completed construction?

Mr. Cooper: I say that, after six years from the completion of the line, it not only would earn sufficient to pay our debenture-holders, but we would have had a continually rising dividend for the shareholders; and, besides, the representation made in the prospectus, I submit, does not cut away our right of damages, for the shareholders have lost their £250,000. The shareholders would, no doubt, have been quite content to have waited for their interest if there was a reasonable prospect of getting it later on. Of course, on the construction and completion of the line it might not have produced 5 per cent. for the first few years, but it would eventually have produced, I submit, more than 5 per cent. later on, and it would have secured the capital to the shareholders; whereas the non-completion of the line meant the loss of their capital, not simply the loss of their interest. The shareholders might well have said, "Well, it is true we are not going to get this 5 per cent., but we are quite content to go on, because eventually we shall get 5 per cent., and, at any rate, we will get a security for the £250,000 put into it."

Hon. E. BLAKE: What damages do you say I ought to assess?

Mr. Cooper: I say, that under the circumstances which have arisen, we are entitled to an assessment of the actual money that we have lost by the failure of the company through the Government.

Hon. E. BLAKE: Give me a figure: that is what I mean.

Mr. Cooper: I submit that it is the cost of the expenditure upon the line, less the value of the line after these injurious acts had been committed.

Hon. E. BLAKE: What do you say is the figure?

Mr. Cooper: I say £1,090,000, and the value of the line to be deducted from that is £100,000.

Hon. E. BLAKE: The line, as it stands, you value at £100,000.

Mr. Cooper: Yes, in its uncompleted state and as depreciated by the action of the Government.

Hon. E. BLAKE: You estimate it at £990,000, which you say you have lost; but you will admit that the Government might argue, at any rate, that to complete the contract it would have involved you in the loss of a million.

Mr. Cooper: I submit that it would not have involved us in a loss of anything to complete it.

Hon. E. BLAKE: But the Government might argue that, and we are bound to consider that question. Your point is that things would balance themselves: that you could have completed the remainder of the contract without loss. But you might not have completed it without loss. But you contend that you were going to borrow money for a creation which would pay its way.

Mr. Cooper: Exactly; and I say that on the completion of the contract, we would have had this position: we should have had in that concern £2,200,000 of borrowed money, and we should have had practically a million of our own money: £250,000 of share capital, and £750,000 the increment on the land-grant. We have lost that; and we have lost the opportunity of being placed in such a position; and that, I submit, is the measure of damages upon the first arbitration.

Hon. E. BLAKE: So that £990,000 would be your suggestion of damages?

Mr. Cooper: That is my suggestion, and I submit, in making that suggestion, I am supported by authority.

Hon. E. BLAKE: So that the result would be you get the £990,000 and hold your line.

Mr. Cooper: We hold our line then, because our line is only worth £100,000.

Hon. E. BLAKE: You suggest damages £990,000, the company holding the line.

Mr. Cooper: Which has been reduced in value by that amount.

Hon. E. BLAKE: The result of it would be that you would have whatever the line was worth, *plus* £990,000, and be out of it.

Mr. Cooper: And be out of it.

Mr. Stringer: And be well out of it.

Hon. E. BLAKE: On this theory you are assuming you have the line.

Mr. Cooper: The Government would be entitled to say, "We will give you £990,000 and take your line." They are entitled to do that under the contract. I propose now to deal with matters under the second arbitration. A great many of the remarks which I have made in reference to the first arbitration apply to the second, and therefore I shall deal only with two points—the seizure of the railway, and the refusal of the right of selection. Perhaps it would be convenient for me to deal with the question of selections first.

Hon. E. BLAKE: I want to point out that I find myself in some embarrassment on that subject. In the statement which has been put in, what is said is: "The questions under paragraph 5 of the particulars relating to the non-completion of such title are withdrawn from this reference to arbitration." That leaves it open to the observation that something remains under the paragraph to be arbitrated upon. As far as I could judge, all that remains to be arbitrated upon is included in 3 and 4.

Mr. Cooper: That is so, sir.

Hon. E. BLAKE (to Mr. Gully): Will you amend that?

Mr. Gully: Yes, we will strike out the words "relating to the non-completion of such title."

Hon. E. BLAKE: And perhaps, Mr. Cooper, you might dispose of 1 and 2.

Mr. Cooper: I have already disposed of those.

Hon. E. BLAKE: What you mean by that is, that the observations you have made apply to such transactions as occurred subsequent to the period indicated at any rate, and they are a subject of general damages?

Mr. Cooper: Yes.

Hon. E. BLAKE: Yes, that is my understanding of your meaning. I will mark 1 and 2 as covered by former argument, and subjects of general damages.

Mr. Cooper: That leaves three distinct matters to be dealt with: the refusal of the selections; the refusal of the Reefton proceeds, which has practically been a sum lost; and the seizure of the railway. I will deal with the question of refusal first. I do not propose to anticipate the argument on the other side: I do not think it is my duty to do so. But the suggestion, probably, will be that the contract has been broken by the company and rescinded by the Crown. It is the Crown, I submit, that has to establish that position.

Hon. E. BLAKE: I would say, with reference to rescission, that the Crown constrained me by the attitude it took at an early stage to rule with reference to the question of power, that there was no rescission—or, I would assume for the purposes of this arbitration, that there was no rescission—because they insisted that the determination of the contract ended the arbitration. I ruled that, for the purposes of jurisdiction, I would hold that there was no rescission. I cannot, without stultifying myself, now hold that there was rescission for any other purpose, and therefore I do not see how it is possible for me in this proceeding to do otherwise than assume that there was no rescission—that is, subject to any observations which Mr. Gully may make.

Mr. Cooper: It would be infinitely more convenient, therefore, for me to reply to the Crown.

Hon. E. BLAKE: On that point, certainly, because I think there is a *primâ facie* breach.

Mr. Cooper: On those paragraphs 3 and 4 I shall commence my argument on the assumption that there was a breach, and I shall take the position on the assumption that the Crown had established a breach, and such a breach, I will assume, as would justify them in seizing the railway. I am going to take the position as strongly as that against the company. I shall not occupy the Court very long upon that point, because it is covered by authority which is directly in point, and which I think my friends must have overlooked in advising the Crown to delay or refuse the right of the company to select lands. We shall have to refer to the contract. This work is to be constructed in sections. The earnings are based upon the sectional works. As soon as certain sections have been completed, and the amounts have been ascertained, we are entitled to select; our right to select arises. I will refer to the Exhibit 142 for the purpose of showing clearly what the position of the company was in point of fact. Now, on the 16th of January, 1895, and before any question arose as to any breach of contract by the company, the company were entitled to select lands to the B 1 value of over £21,000. The selections of Blocks 60 and 41 went off, because the Crown withdrew from their obligation to purchase one of the blocks, and refused to allow the selection of the other to proceed; so we stand with the amount of £21,000 for which we have got no selection.

Hon. E. BLAKE: I think the facts are these: They had invited you to sell Blocks 60 and 41. You agreed, and you selected for that purpose. They assented to the selection. They ultimately determined that they would not buy Block 60, and then said to you, under the circumstances very properly, "Do you want to select?" and you said, "No; we shall select another block." Then they said, "You shall not have it." I may say I was not favourably impressed with the equity of that decision. Then, when you do change your mind, they say, "You shall not have it."

Mr. Cooper: There is no dispute as to the amount. I will take the Government figures.

Say that we had completed these sections, and we had earned, on the admission of the Under-Secretary himself, total land-grants of £265,150, and we had had £244,083 against them, we had a right to select up to £21,605. That was our position on the 30th January, 1895. That position remains at the present time—that is, we have not had a single pennyworth of value for that £21,000. The Government have taken this position: "You have committed a breach of contract; we have rescinded the contract, and you have forfeited that £21,000. That is the position practically taken by the Government.

Hon. E. BLAKE: Subject to what may be said by the Crown, I do not see that their seizure of the railway forfeited their right to take that course.

Mr. Cooper: There is a direct authority upon it. It is the case of the Government of Newfoundland against the Newfoundland Railway Company (13 Appeal Cases, 199). I would point out that no counter-claim has been lodged by the Crown, and they claim no damages from us. Of course we had no money subsidy. The case to which I refer, in 13 Appeal Cases, page 199, and in an almost exactly similar case to ours, the Privy Council decided that each claim to a grant of land must be treated as complete from the time when the section which had earned it was complete. Now, we need not discuss the question of a counter-claim, but the question of the power of the Government to stop our selection is distinctly decided in this case in favour of the company. The contract was almost exactly similar to this. They became entitled to their grants when they finished their sections; and it was in respect of a certain proportionate part of the lands earned in respect of these sections that their Lordships say: "As regards the grants of land, they feel little difficulty . . . as each of these sections was completed, the right to 25,000 acres of land became perfect . . . their Lordships hold that such claim to a grant must be treated as complete from the time when the section which has gained it was completed." I take it that the argument by Sir Robert Stout was that,—as we had not completed the line,—the benefit we were to take was one entire benefit, although it was only to be paid in sectional parts; and this is exactly the position the Government have taken now. Then, they discuss the question of the subsidy, and they find practically the same thing in relation to the subsidy—namely, that the subsidy, being payable by instalments, does not depend upon the completion of the whole line. Then they discuss the question of the counter-claim, and say the Government have a right to put in a counter-claim for breach of the contract; but here the Government have made no counter-claim.

Hon. E. BLAKE: You do not put it forward as one item in the general damage?

Mr. Cooper: No, but as particular damage.

Hon. E. BLAKE: If I were to find for the general damage, if I put you in the same position, that includes this element. According to your principle, if I put you in the same position as if the Government had done everything they ought to have done, this would be one of the things they ought to have done but have not done; but you have counted it in your estimate of general damage. If I do not see fit to find for you on the subject of general damages—that the Government so destroyed, by breach, your contract that you were unable to complete, and so forth—I should, of course, assume you were entitled to this, and that would come in the element of general damage.

Mr. Cooper: If you should find——

Hon. E. BLAKE: That is so. It is a sort of alternative case.

Mr. Cooper: We do not ask for it twice over. I submit that the authority I have quoted is conclusive on that point. But, assuming that upon the questions I have hitherto raised the Court should be against me, and should rule that there has been no breach of contract on the part of the Crown and no loss to the company, we have still the right to an estimate of damage for the refusal of this selection. We have split it into two items——

Hon. E. BLAKE: I am in this difficulty: I am not very familiar with the basis of damage in such questions as this. You selected before the breach. That is to say, you said, "We will take that block," and the Government refused. Now, suppose I hold the refusal of the Government to be wrongful as to that block, am I bound to assess damages to you for that, or am I entitled to make an order that the Government shall carry out that selection?

Mr. Cooper: I submit we would be entitled to the B 1 value of the block, *plus* what we might fairly expect to make out of it. The number of the block is 7.

Hon. E. BLAKE: And as to the block applied for selection and refused, you claim—what?

Mr. Cooper: That we are entitled to damages based upon the B 1 value of the block, with a fair amount added for prospective injury.

Mr. Gully: I may say at once that we have not so treated the second particulars which were handed in by the company, nor do they appear capable of being treated as a claim for specific damages upon a particular item, but rather upon particulars of the alleged further breaches of the contract which go to the whole contract, and upon which the claim is founded—not for specific items.

Hon. E. BLAKE: I agree that a phrase at the end would rather support you, but, on the whole, I think it would be sufficiently intimated that it was a specific claim, and details were given, and you are not put to any disadvantage on that subject.

Mr. Gully: Not so far as information goes.

Hon. E. BLAKE: I am quite sure you are not put to any disadvantage so far as argument goes. With regard to specific damage, that means, in my judgment, alternative damage. As to the second part, I understand your point is that you were asked, that you were entitled, and that you refused, and in that case I must find damages on the B 1 value *plus* something or other.

Mr. Cooper: It is practically on the same basis as this: Supposing I deposited certain goods with a person, and I say, "Give me those goods," and if he will not give them, I can say, "I shall sue for the money-value of those goods, and the damage I have sustained by your not giving them up."

Hon. E. BLAKE: I do not think I am bound by the technicality of one course of procedure or the other. What I have to say as to the second reference is in order to let Mr. Gully see what are the points which are at issue. With regard to the second point, I may say frankly I should like to see this claim sustained. My impression of the case was rather in your favour, and I think the equities of the case are rather in favour of sustaining the claim.

Mr. Gully: We will have something to say to that, of course.

Hon. E. BLAKE: I am only indicating my present impression, which, of course, can be afterwards corrected. I think it is as well at present to leave out Reefton altogether in considering clause 33. If you say you are placed in the position of demanding money-damages because the Government have told you that they would not accede to an application for selection, I think the technical difficulty comes in that what you ought to have done was to have invited selection and to have put them in default; but what I understand you have done was this: You proposed to take the proportion of the cost, £19,000 or £20,000 in cash, and, as to the rest, you proposed to take under clause 33——

Mr. Cooper: That is what we said.

Hon. E. BLAKE: It is not a question of further selection. It seems to be a question of cash. You claim in your letter to take everything over——

Mr. Cooper: The answer of the Government is a refusal. They say, "We will not let you do anything. We say you are not entitled to any rights."

Hon. E. BLAKE: I do not see very well how you get the right to take moneys received under clause 33. Subsection 7 says, "When any land has been so sold or let by the Queen under these provisions the same shall be deemed to have been selected by the company, and the value thereof shall from time to time be debited against the company in the account mentioned in clause 24, at the price at which the same shall have been so assessed as aforesaid. On selection by the company of the remainder of a block within which land has been so sold or let, the value thereof shall be the amount of the certified valuation of the whole of such block, less the assessed value of such lands as shall have been so sold or let." Can you take more than what the value of the B 1 Block would be?

Mr. Cooper: I submit we can take the whole of the proceeds of the particular blocks.

Hon. E. BLAKE: This thing has been a puzzle from the beginning—the whole of the discussion as to clause 33, and the difficulty the company was in. Mr. Wilson has repeatedly told us that if the company had the advantage of the sales under clause 33 the company would have got cash, which would have been put aside into a suspense account, to form a fund to which the company could look in the future. I would like you to show me how you were entitled to take the balance of the money under clause 33.

Mr. Cooper: Clause 33 seems to provide that if certain acreages were sold out of the B 1 Block the moneys were to be set apart, and the company could not take that money unless they took the balance of the block.

Hon. E. BLAKE: Where is the clause which gives the right to take that money. It is not the absence of the clause saying "You shall not take it," but it is the presence of the clause which says "You shall have it" which is important. Subsection (5) reads as follows: "All purchase-moneys, rents, or royalties received or collected under these provisions, shall be paid to the Receiver of Land Revenue of the district in which the land is situated, who shall pay the same into the Receiver-General's Deposit Account; and all such moneys, rents, or royalties shall from time to time be taken into account as provided by these presents, and the whole or part thereof, as the case may be, shall be paid over to the company on its request after it shall have become entitled to the same in respect of grants of land earned in accordance with these presents."

Mr. Cooper: I submit that gives us the right; and in taking the land there was no injury to the Crown. They say they have sold the land at our request, and we ask the Minister to apply that money in part payment of the grant. I see nothing that can prevent or prohibit that.

Hon. E. BLAKE: Your claim is that the company was entitled at any time to claim the amount the Government actually received or expected to receive under section 33, and that they had to claim the Reefton lands specifically, and as much more as would accomplish this balance. Therefore, they want those sums in cash, and, besides that, they want some of the cash which is not in their hands, but which they said they would have got if the Government had handed over these specific blocks.

Mr. Cooper: There was a specific demand for the Reefton moneys put in in 1893, but it was withdrawn.

Hon. E. BLAKE: Reefton has been on the same basis as the others, and the payments for them is included in the general payment; therefore, if there is enough money in the Treasury to execute it, the company are entitled to it.

Mr. Cooper: There is further correspondence, asking that the company's selection of Block 76 should be agreed to without delay. Then there is the refusal of the Government, dated 20th April, to allow the company any rights under the contract, and saying that the Government did not propose to issue any further titles to the company.

Hon. E. BLAKE: This only becomes material, in my judgment, as an index of the claims of the company for general damage, and it is set up as an alternative claim for possible lands in the case of fulfilment of the contract. It is an intimation in respect of a completed application for land that ought to have been paid. That is the only ground upon which it can be claimed.

Mr. Cooper: That is the only ground on which we claim it. I do not think it is necessary to say anything further on that question. The only other question I wish to touch on is as to the seizure of the railway. I scarcely understand the position that the Crown takes up; whether they admit your jurisdiction to enter into that question and to make an award, or whether they dispute the right of the Court to entertain the question at all.

Hon. E. BLAKE: I understand they dispute my right; but I have said, for the purpose of the arbitration, that I shall over-rule that contention. I propose to make an award, and to make it separately and independently of the other claims in the second reference, so that the remainder of the award would not depend upon that question.

Mr. Cooper: That being so, I shall address myself to the question of the right of the Governor to make the seizure. I argued the matter very fully in the first instance, but I should like to make my argument on this point as complete as possible.

The Court adjourned at 5.10 p.m.

SATURDAY, 21ST DECEMBER, 1895.

The Court sat at 10 a.m.

Hon. E. BLAKE: Before you resume your argument, I just wish to ask whether I am correct in the assumption that you argue the case on the hypothesis—for the purpose of this case—that the debentures have not got a charge. Of course, you do not bind the debenture-holders?

Mr. Cooper: That is so. I have no instructions to act for, nor do I in any sense represent, the debenture-holders.

Hon. E. BLAKE: Or that the value of the railway would have been taken into account particularly as to the debentures.

MR. COOPER'S ADDRESS—*continued.*

Mr. Cooper: I propose this morning to be very short indeed in my concluding remarks on the seizure of the railway. I feel that some few weeks ago I argued this question very fully, and it was to that point that I mainly directed my argument on the second arbitration. I do not think it would be conducive to the proper conduct of the proceedings if I were to repeat my arguments. There is very little that I can add to what I then said. I should like,—in order to bring the matter into a focus,—I should like to crystallize the position. What we say is this: that there is no unreasonable or inexcusable delay; and, whilst we do not deny that there has been a breach of contract—that is, that the stipulations contained in the contract of 1888 have not been performed by the company, yet I say the whole circumstances taken together and implied by me have raised the inference that there is no wilful breach of contract. That is the conclusion I ask you to draw: in other words, the company has done the very best they could as business-men in a proper spirit for the carrying out of the contract. That is clear from the fact that it so recommended itself to the mind of the Premier, as appears by his speech in introducing the Bill in 1894. I do not intend to refer at length to any of the speeches in *Hansard*, but I contend, in considering this question of what was the position of the company at the time when it was said that there was unreasonable and inexcusable delay, and at the time it was said there was a wilful breach of contract, we are fairly entitled to take what was really in the mind of the Government as reasonable in 1894, and I would just refer the Court to two passages in Mr. Seddon's speech. The first is in reference to the delays. You will find this passage at page 809, volume 86, of *Hansard*, and also on page 860 of the same debate and the reply. Now, he says, on page 809:—

"Mr. SEDDON.—In 1890 there was an Act passed, and you will see there the conditions upon which this was granted. The company, I may say, for the concession, spent some two thousand and odd pounds in constructing a road so as to give connection between the railway, Lake Brunner, and the lower part of Westland. They were also bound to place a steamer on the lake. That was the concession granted to the colony in connection with this deviation, and I think that concession was a reasonable one. The company complied fairly with what was stipulated, and there was an end to that transaction. We then come to another question, and that is the question of the tunnel which was to be made at the Otira Gorge, or the Abt system. It was found on examination that, from the nature of the country through which the railway had to go, the tunnel would be very expensive to construct, the country being exceedingly broken. Then came the question as to whether the construction would stand, and that was a somewhat difficult question to decide. Of course, the slides that took place there made it hard to say what the effect might be in some of those narrow points, and there was also the question of the Abt system, and the question of putting the line on a lower level than the tunnel. However, these are matters of details which were settled by engineers to whom the matter was referred. The fact, at all events, is that representations were made to the Government prior to the signing of the contract, as I have already mentioned. This was a change that was expected to arise, and provision therefore was made accordingly. The company submitted their proposals to the Government, and the Government took the advice of the best engineers they could get—the matter was submitted to Mr. Maxwell, the late Commissioner of Railways; and ultimately the Abt system was approved. In this, great delay took place on account of the company making new surveys, which took a very considerable time. However, this was done; but, having made the change from the tunnel and from the original plans to the Abt system, the question comes in as to whether or not the company could on these grounds claim an extension of time. I simply refer to it for the purpose of showing to the House the position. I am not advising the House to do anything but take a common-sense view. From some experience I have had in regard to contracts I look upon these questions that have been submitted to Ministers as leading to the further question whether under the circumstances they would be in a position to refuse an extension of time."

Then, later on, at page 860, he says, "We have to look at the position as business-men would do. Has the company, so far as it has gone, done its best in regard to the construction of this line? I say it has. Hence I ask why should we insist upon the company doing that which we know it is impossible for them to do? Shall we, as prudent men, take what the company can do? Under the circumstances, which are extraordinary, I say, in doing that, we should be reflecting credit upon

ourselves as an Administration." It is quite clear, therefore, that in 1894 Mr. Seddon entertained that opinion—and I do not know of any reason why he should change it—that the company had done all that it could possibly do; it had done its best in regard to the construction of the line. Of course, there are considerations on the subject. This was a Ministerial measure, introduced in the interests of the Government and the colony, and we may fairly say that it was the honest view in the mind of the Premier at the time, and I do not think he has changed his mind; and if it struck his mind in 1894 that there was no unreasonable or inexcusable delay, or wilful breach of contract, I submit it is a view which should now commend itself to the Court. I do not know why they seized the line. I felt justified in making these remarks when the first arbitration had commenced. There was no legal necessity for taking this line. There was nothing done between 1894 and May, 1895, which would justify the Administration in saying that the position was so changed that they should take possession of the line under the contract. One would have thought that the position of matters was so *sub judice*, in a certain sense, that both parties should hold their hands in doing anything that would prejudice it; and the seizure of this line was not made in the interests of the colony. I feel justified in making these remarks: that in this the Government has not acted in a fair spirit to the company. The arbitration was pending; and the seizure was followed by the attempt, which, I submit, was absolutely illegal, on the part of the Crown to prevent the company from obtaining the fruits of what they had already earned; and I say we have to take that into consideration, whether the Governor, in arriving at the opinion that there was unreasonable and inexcusable delay, was advised in a proper manner. If, as I pointed out previously, you are sitting here as a Judge of the Supreme Court, then the Court would have to enter into the circumstances attending this seizure of the line. As I pointed out, whatever may be the effect of the Governor's opinion under subclause (*c*) of clause 16, it is quite clear under section 123 of "The Railways Construction and Land Act, 1881," his opinion is not final, because there is a tribunal appointed, and because it is this tribunal, I say, which is entitled to take all these matters into consideration, and I submit the seizure was unjustified.

Hon. E. BLAKE: I understand you put it before me that, practically, in effect, the arbitrator was substituted for the Supreme Court, and what you invited me to do was to act as the Supreme Court would have acted; and therefore, whatever opinion I was of, it seemed such application should be limited to the question whether there was such unreasonable delay, or whether the Government was justified in the exercise of such powers; but then it must be said that I could not award damages on that question, but simply say "Yea" or "Nay" on the question, and therefore you conceive that I should be right if I found affirmatively in favour of your contention that you had any right to damages. Your claim is technically a claim for damages on this ground.

Mr. Cooper: I think my suggestion is that you would have no further jurisdiction than the Supreme Court.

Hon. E. BLAKE: That I should not award damages, but say "Yea" or "Nay" in answer to this question.

Mr. Cooper: I do not think I would be right in submitting any other contention.

Hon. E. BLAKE: With reference to the forcible observations you have addressed to me as to the attitude of the Minister upon this occasion, and as inconsistent with his action subsequently, address yourself to this consideration: you are speaking on the theory that you are going to succeed measurably in your former contentions—namely, that the Government was wrong, and committed breaches of contract, and have produced this result. You say, on that theory, that there was no wilful or inexcusable delay.

Mr. Cooper: That is one point. I was going to deal with it assuming that all that was dismissed.

Hon. E. BLAKE: That is just what I was going to ask you to do.

Mr. Cooper: In the first instance, I say, if there has been a breach of contract committed by the company, that breach of contract was caused and produced by the actions of the Government. And before I leave that branch of the subject, I would just submit this: that it would be quite clear that, if the Government themselves had committed a breach of contract, and so brought about this result, they would have no right to seize the railway. And the reason is obvious, they might simply break their own contract, and immediately seize the railway, which I submit would be not only inequitable but illegal. Assuming that the Government have done nothing which is illegal—which is a breach of contract—then I say that there has been no unreasonable or inexcusable delay. I will deal with the question of breach of contract later on, because we are entitled to call to our assistance every circumstance which was in existence, which would be part of the *res gestæ*, not only at the time the contract of 1888 was signed, but from the time the Chrystall syndicate was formed, and every circumstance which has arisen since the contract of 1888 was signed, for the purpose of showing that the company, in the words of the Premier, "has done the best it could,"—that is, it is to be excused, and that its position is neither unreasonable or inexcusable. Just let me summarise these facts. First, we have the fact that, although under the Chrystall contract the time was limited to ten years, yet even that contract contemplated that the time might have to be extended. Secondly, we have the fact that it is not for three years and a half after the Chrystall syndicate was formed that there was any contract entered into between the Government and the company upon which the company could safely go on with the expenditure of any large sum of money. And thirdly, we have the fact that under that very contract of 1888, which rightly or wrongly continued the obligation to complete within ten years, it was recognised that it was reasonable that the company should have until the end of December, 1888—three years and a half from the time that the original Chrystall contract was signed—to expend £150,000 on the first section of the line; so that it was within the contemplation of the parties that one-half of the contract time should

go by, and that the only obligation that was taken on the company's shoulders within that half was to spend something like about one-twentieth portion of the expenditure, and to construct something like a twentieth portion of the line. Then, in addition to that, we have the fact,—which I submit is clearly admissible and relevant to this inquiry,—the fact of the conversation between Sir Dillon Bell and Mr. Burchell, in which Mr. Burchell stated that it was impossible for them to do the work within that ten years, and Sir Dillon Bell stated that that was not supposed to be absolutely binding upon the company. Then, we have the fact of the delays, which could not have been contemplated, but which arose in the ordinary course of the company's transactions: the delays in connection with the Brunner deviation and with the incline, which took months to overcome—I am not charging the Government with any fault at all—but it took months to overcome—I am referring to the alleged necessity for the introduction of a further Act of Parliament. The Government were advised to that effect, although it seems to me that it was an excessive caution on their part. The delays in connection with the Abt incline were contemplated by the contract. An examination of the country by engineers was necessitated, taking up a very considerable time. It necessitated the resurvey of the company's line in that place—necessitated very considerable delay indeed. This commended itself very strongly to the mind of the Premier in 1894, not simply as excuse to the company, but as a reason upon which he could insist to the House that the company "had done the best they could under the circumstances."

Hon. E. BLAKE: But, you see, that is a phrase which is susceptible of different meanings. We are dealing, of course, with it in a different arena, and upon different and narrower considerations, than they would be in Parliament. Does it mean "in the circumstances which you have created for yourself," or "which have been created for you"?

Mr. Cooper: Which were created for us.

Hon. E. BLAKE: Well, granted?

Mr. Cooper: Created for them by these delays which have occurred. He is dealing with the delays which occurred in the Brunner deviation and the Abt incline. Of course he is dealing with a whole set of circumstances.

Hon. E. BLAKE: On the other hand it may be said to mean "done the best they could," considering the state to which upon this hypothesis, not by the fault of the Government, the company had found themselves reduced to in 1892, and the abandonment—not of the contract, but of any new work, anything more than completing and rounding off the corners of this work from that time, and although that might be all that the company was able to do, because they had no money to do any more. My difficulty is to see whether, within the legal point of view, that is excusable or reasonable. You have delayed doing anything more: You say, "We had no money, and therefore could not go on."

Mr. Cooper: Perhaps upon this point your Honour might pardon me if I refer to what, I submit, would be very much the position of the Supreme Court in a matter of this kind, and also to the position of an arbitrator. Storey's "Equity Jurisprudence," section 1454, deals with it, and the same reference is also in "Russell on Awards." They are both in the same words practically. Storey says: "Under a general submission the arbitrators have a power to decide on the law and on the fact. And under such a submission they are not bound to award on mere dry principles of law, but they may make their award according to the principles of equity and good conscience." And I say a Judge of the Supreme Court would be in some sense in the position of an arbitrator in determining such a question, because the Court could revise the decision of the Governor, and consider the whole position of the parties, and relax what would be the strict legal rights of the parties.

Hon. E. BLAKE: Do you think it means anything more than an application of what we understand to be equity principles—as tempering the rigour of the law.

Mr. Cooper: Yes; and Russell says, on page 124, that "an arbitrator has a greater latitude than Courts of law, in order to do complete justice between the parties, and that he may take all moral questions into consideration in forming his judgment, and decide according to equity and good conscience."

Hon. E. BLAKE: I am wholly with you in the view that the very character of this particular reference is a reference to the consideration of the equitable position—by that I mean in the larger sense. How can I find what is reasonable? How can I find what is inexcusable, excepting according to the doctrines of fair play and common-sense. It seems to me it is nothing more than that.

Mr. Cooper: I again refer to what Russell says, and his authority is that of Judges of very great eminence. I would apply those principles——

Mr. Stringer: Is it not qualified later on?

Mr. Cooper: No; it is not qualified at all. I would apply that in this question of the seizure of the railway.

Hon. E. BLAKE: I think you are not obliged to go by that, because I think the very nature and essence of this question is an appeal——

Mr. Cooper: To the equitable side of the Court.

Hon. E. BLAKE: Yes.

Mr. Cooper: That is the view I take upon the reading of that section.

Hon. E. BLAKE: If I were supplied with authorities, and it was indicated what had been adjudged by a Court having jurisdiction to a Judge upon it—that the meaning of the word "wilfully" in such a case and under such circumstances is unreasonable or inexcusable, I should find myself more or less bound by those interpretations.

Mr. Cooper: I cannot find any distinct authority for the meaning of those words. We can find plenty of authority on the meaning of the word "wilful," in determining a man's crime; but these authorities are not applicable.

Hon. E. BLAKE: I do not think, however, that that at all exhausts the range of the discussion, or the inquiry as to the meaning of "wilful."

Mr. Cooper: Perhaps not; but I say that in determining the question of wilfulness we are entitled to take moral and equitable considerations into view, and that even though the action of the Government in connection with these reserves, in connection with clause 33, and other matters which have been brought before you in the evidence given on this arbitration, may not—though I submit it does—amount to an actual breach of contract, yet it does amount to placing the company in such a position; even though the Government may have acted within what it deemed to be its legal rights, it placed the company in such a position that they are entitled to say they have not committed a wilful breach of the contract; it has been brought about by a harsh and strict interpretation by the Crown of their rights under this contract, and an interpretation which was not contemplated, which was not considered, and which could not have been foreseen by the company when they entered upon this contract.

Mr. Gully: Russell qualifies the passage to which my friend has referred very much in a subsequent paragraph.

Hon. E. BLAKE: I have always assumed—I am not very conversant with the law of arbitration—but I have always assumed that these dicta were rather dicta indicating that an arbitrator might be excused if he did go a little beyond what appeared to be the law than it was his duty—to go beyond the whole range of the law, legal and equitable.

Mr. Gully: The principle distinctly will be found to be that if, on the terms of the arbitration, it can be discovered that the parties intended to arbitrate not upon strictly legal grounds——

Hon. E. BLAKE: I remember one case about a will——

Mr. Gully: That is the case referred to by Russell. He says, "Showing the intention . . . law."

Mr. Cooper: The statute has given a Judge of the Supreme Court power to decide what the Governor ought to do, and——

Hon. E. BLAKE: In this particular case I do not know upon what rational principles I can decide,—subject, of course, to what may be said by the other side,—other than those I have stated as to what is reasonable or excusable.

Mr. Cooper: Exactly; and I submit it would be unreasonable for any Court to say that, in the circumstances that have arisen in this case, the Crown should take away the railway from the company. They did not intend to complete it. It is not taken for the purpose of completing it.

Hon. E. BLAKE: Then, I am afraid neither side intended to complete it.

Mr. Cooper: All the evidence led by the Crown shows it was the rashest thing if the colony was to complete this railway.

Hon. E. BLAKE: Ever since 1892 that was stated by the company, and certainly not minimised by the Crown.

Mr. Cooper: Let me also point out that the Governor was not bound, if he thought the company was not likely to complete this contract, to take possession. He could have purchased the railway. There is a section in the contract itself that instead of taking possession of the railway he could have elected to purchase it. That section says, "If under the provisions of the principal Act or the said Act, or under or by virtue of these presents, the Governor shall be entitled to take possession of the said railway or any part thereof, then, in lieu of taking such possession he may, if he thinks fit, exercise the right to purchase the said railway, although the said period of ten years may not have expired or the said railway may not have been wholly constructed."

Hon. E. BLAKE: I do not think, viewing all the circumstances of this case, I could say that was an alternative that it was very reasonable to take. It would be impertinence of me to make a suggestion of what the Legislature ought to have done; but as to the action of the Governor in purchasing under the contract——

Mr. Cooper: I am not suggesting that, but the contract did contemplate that the Governor had the alternative course to pursue. He could either seize under the Act itself, and then, of course, his conduct was open to review by the Supreme Court, or he could elect to purchase. I do not wish to take up the time of the Court in going further into this question. I am repeating now what I said on a former occasion, and I do not think I could emphasize it any stronger than I did then.

Hon. E. BLAKE: Have you any authority which would show to me that the phrase which Mr. Burchell said Sir Francis Bell used towards him can be received by me for any purpose whatever?

Mr. Cooper: There is no direct authority, but it is part of the *res gestæ* for the purpose of showing whether there has been a wilful breach of contract, or unreasonable or inexcusable delay. Supposing under a contract such as this, giving the power to seize and enter, the parties met together, or the agents of the parties met together, and one says, "You need not trouble yourself about completing this contract within ten years; I will not exercise those powers; I will grant you an extension of time"; and then immediately, within a few days after the contract time is expired, he turns round and determines the contract, I submit a Court of Equity would hold with the company under such circumstances.

Hon. E. BLAKE: Apart from the enormous difficulties which it seems to me would be involved in an ordinary contract in the admission of such a piece of evidence as controlling the interpretation of a contract, the latitude of the discretion to be exercised according to the circumstances of the case, there is this element, that an application was made for an extension, and that the gentleman of the Crown pointed out, "You must not insist upon that." "Why?" Because it would require legislation," and then this verbal assurance is said to have been given. I do not in the slightest degree intimate that Mr. Burchell's statement is not literally correct—but there it was. This was in fact a statutory contract—a contract made under a limited power given by the Legislature; and you are practically asking me to control the degree of latitude, discretion, freedom of judgment, which by that contract was given to the Governor—acting under advice, of course, at the time he should be called upon to act—by something which occurs verbally before the contract was made.

Mr. Cooper: No; I put it on these grounds: Supposing we were now before the Supreme Court, the Supreme Court must, in order to exercise its jurisdiction, in regard to the opinion of the Governor, take into consideration every circumstance, not only those on the face of the contract itself, because that would be absurd. No jurisdiction could be exercised by simply looking to the bare words of the contract.

Hon. E. BLAKE: What you are asking me to do is that I should look into something that happened before, with the view of modifying the contract. What you are asking me to do is to put on a particular pair of spectacles with which to look at the contract.

Mr. Cooper: Not with a view to modifying the contract, but with a view of showing what unreasonable or inexcusable delay there was. The contract itself contemplates that.

Hon. E. BLAKE: The contract contemplates the possibility of that.

Mr. Cooper: Not only the possibility of that, but it practically contemplates that this railway should take until the 31st July, 1897, to construct. And not only that, as I submitted just now, the obligation of the parties to proceed with the rapid construction of the works is limited to £150,000, in the construction of one small section, within half the contract time. However, I feel I am simply repeating my argument.

Hon. E. BLAKE: It is very advantageous to hear it with these further enforcements, Mr. Cooper.

Mr. Cooper: I shall, of course, have the opportunity within due measure of replying to the position the Crown takes up upon this ground, the onus of which, to a very great extent, must rest upon them—in reference to two or three points, at any rate: and I do not think it is necessary for me to amplify the argument this morning beyond stating the general lines, and adopting all I said before. I am sorry I have taken up so much time, and I cannot conclude without thanking your Honour for the kindness and consideration which you have shown to all parties throughout the case. The responsibility resting upon me, and my friend, Mr. Jones, under the circumstances which have arisen in the case, has been very heavy indeed. I have endeavoured to carry out my duty with the utmost justice in my power to my clients, and in a spirit of, I hope, fairness to the Crown.

Hon. E. BLAKE: The extended arguments that took place at the opening of this case some time ago, and the interlocutory discussions which succeeded, and the opportunities which the necessary length of the investigation gave me, have enabled me to approach the final stage of the case having tolerably thoroughly considered on all sides the points which it was made evident were to be urged, and the arguments which it was made evident were to be advanced, and I have been very much aided by the extremely able and clear arguments which Mr. Cooper has addressed to me; and I wish to say that I think, both from what Mr. Cooper most properly declined to advance before the Court as subjects of claim under this arbitration—the things absolutely unarguable—and in those things he did advance, he evidenced a judgment which did him credit, and in the illustrations and clearness and force of his arguments he did every justice to his client. I do not feel now that I need call upon counsel for the Crown to address me on more than four points, three of which have regard to the main subject of these references. First, I should like to hear them on the legal meaning of the clause as to the power of proclaiming the reserves—the legal meaning of the effect of the 16th clause. Secondly, I should like to hear them on the question of the principle, and the facts of the damages. Thirdly, I should like to hear them on the questions which we have just now heard discussed of the seizure. Those are the three points in the principal reference to which I wish the arguments of the Crown confined on this occasion. The fourth point is an entirely distinct one. In case the company succeeds upon the other three, it becomes utterly immaterial to say a word about it. It is only in case the company fails upon the main subjects, and does not obtain relief upon the main subjects, that it is material to consider the fourth point. If necessary, it must be, of course, considered; but I invite the Crown to make the arguments, first of all, on these three points. And in the meantime, having pointed out the force and significance of that observation, that it is only an alternative, I invite them also to consider whether it would not be reasonable to pursue the same principle in which they acted—in my judgment, with great propriety—as to the selected lands which had been the subject of sale and mortgage, and concede what seems to me a reasonable settlement of this thing, which, to my mind, would be without prejudice to any question of right involved—to hand over the block which was selected, and to hand over the cash up to the amount out of the other lands. You will have time to consider that suggestion before you reach that portion of the argument. I have little doubt that Mr. Cooper would agree that was the fair way of dealing with the case. I should say, in advance, I should feel the greatest difficulty in assessing any defined sum in damages for the non-concession of the selected block beyond the B1 value. I cannot at all adopt the principle which Mr. Cooper has brought forward, and I have no evidence before me as to the value of that. Therefore, to carry out in specie the terms of the contract seems to me the best and most equitable solution of the question. I leave that fourth point for your consideration at such time as you please to make intimation, and I shall ask the argument to proceed on the other three points.

Mr. Gully: I may say with reference to your last observations, as to the fourth point, that we had already considered the matter, and had arrived before you made those observations at the conclusion which you suggested would be a proper one. I desire, however, before formally intimating that, to consult Sir Robert Stout upon the matter, as I think that is only due to him. We fully appreciate the observations you have made, and I may say at once that the object of stopping the completion of this, as of the other matters to which you have referred, was entirely founded on the desire to save the position which the Crown has thought proper to assume with reference to the peculiar position of this contract. Therefore, it is probable—in fact, I may say there is no doubt that we shall be able to eliminate that portion of the question which was present before you for

consideration, by confining ourselves to the other points which you have preferred. We also take the view which I understand you take with reference to the fourth point, as to the selection of the block being completed. With regard to the other points, I would ask whether you would grant us the indulgence of arguing this on Monday morning. The argument cannot be very long on those points, because it is entirely a question of analysis and legal reasoning. Sir Robert Stout was expected here by 7 o'clock this morning, but he has not yet arrived; and, seeing that we cannot possibly occupy even the day on Monday, I would ask you whether you would permit us to commence our argument on Monday morning.

Hon. E. BLAKE: I will do so.

Mr. Gully: We wish to have a conference as to the fourth point you have referred to, and generally as to the position. I presume my friend will raise no objection.

Mr. Cooper: I have no objection.

The Court rose at 11 a.m.

SIR ROBERT STOUT'S ADDRESS.

MONDAY, 23RD DECEMBER, 1895.

The Court sat at 10 a.m.

Sir R. Stout: I understand that there are only three questions which it is requested that the counsel for the Crown should address themselves to: First, the legal meaning and effect of clause 16 of the contract, as to the proclamation of mining reserves; the question as to the principle on which damages are to be considered, and whether there has been any damage; and, third, the seizure of the railway by the Crown. I understand that, as to the granting of certain reserves which had been earned by the company for parts of the line completed, it was intimated on Saturday that the Crown was willing to place them in the same position as the reserves already selected —namely, not to raise any question, and, in fact, to eliminate that matter from the settlement of the award.

Hon. E. BLAKE: There are other points. There is the one in regard to Block 76, I think; and then there is the question of the money claimed on the residue——

Sir R. Stout: On what residue?

Hon. E. BLAKE: For the Reefton town sections.

Mr. Gully: There is a certain amount of money in suspense, claimed as having been earned by the company in addition to——

Sir R. Stout: We put that matter, I understand, on the same footing.

Mr. Gully: We concede to them everything earned, either land or money, up to the expiration of the contract time. Nothing has been earned since.

Hon. E. BLAKE: That covers it all. Before we get into the serious matters we had better adjust the minor things finally. It is now stated that the Crown agrees—without prejudice to its effect upon other branches of the case, of course—to the selection of the blocks which you did select,—I think it was Block 76,—and agrees also to pay the difference. You very properly said you were not going to quarrel over a difference of accounts in that way in a matter involving a couple of hundred pounds, but that you would pay the difference; agreeing also to the same calculation, which is a little over £20,000 in all, as to the Reefton town sections, and the other moneys received under clause 33 and standing in the Suspense Account.

Mr. Gully: I understand, however, that the money which they have asked for and which has been earned is not sufficient to cover the difference between the value of Block 76 and the total amount which would be due——

Hon. E. BLAKE: Allowing them to select another block.

Mr. Gully: Allowing them to select a further area of land.

Hon. E. BLAKE: Yes; and, if there was any deficiency in that selection which is capable of being met by the moneys in hand, you would allow them to apply the moneys in hand.

Mr. Gully: Yes; that is so.

Hon. E. BLAKE: That is the proposal. What I am going to say about that is, that it is not necessary to come to an immediate decision at the moment; that I think the better form in which you should put it would be analogous to the forms which you have already put No. 1 in, so that we may get it out of the reference altogether by agreement between the parties, and then, when I come to make my reference, I shall not require to recite all the matters in difference between the parties, but will be able to eliminate them from consideration as having, by the consent of both parties, been adjusted out of Court. That is the form I should like to be pursued, rather than that I should be obliged to make a long recital of matters which have been settled.

Sir R. Stout: We have no objection.

Mr. Cooper: That is simply a matter of procedure. If your Honour would allow us we might mention our views at 2 o'clock.

Hon. E. BLAKE: Certainly. I think what I have suggested would be the most convenient course to pursue.

Hon. E. BLAKE: I wish to say to you, Sir Robert, what I said to Mr. Cooper—namely, that I have taken care to reread all that was said in the three other arguments.

Sir R. Stout: Yes. There are certain returns which have been handed to me which I understand were not put in—a statement showing the special rates charged for timber and coal by the company at present; a statement showing the computation of the fares between Brunnerton and Springfield, based on the same rule as is applied to Government lines; a statement of the manager as to the through traffic between Christchurch and Dunedin. It will be seen that the estimate previously made was rather more in favour of the company.

Hon. E. BLAKE: I cannot receive those statements now unless the other side has looked at them and does not desire to examine upon them.

Mr. Cooper: I have not seen one of these documents before.

Hon. E. BLAKE: Will you just look at them, Mr. Cooper.

Sir R. Stout: There are, as I have said, three questions to which, I understand, I have to address myself: First, as to the legal meaning and effect of clause 16, as to the proclamation of the mining reserves; second, as to the principle upon which damages are to be considered, and whether there has been any damage; and, third, the seizure of the railway by the Crown. Taking these three questions in their order, I shall deal first with clause 16 and its interpretation. And, first, as to the principle which has to guide us in interpreting this clause, my friend Mr. Cooper assumed that, as there has been a grant, and as this subsection (*c*) is an exception out of the grant, which is stated in section 16, the words of the section being:—

"16. Subject to the conditions herein contained, all lands within the limits of the authorised area shall be available for selection by the company, with the following exceptions:—

"(*a.*) All lands which at the date hereof are subject to any rights of private ownership, tenancy, or other occupancy, not being a tenancy or occupancy under leases or licenses granted for pastoral purposes; and all lands which have, prior to the first day of January, one thousand eight hundred and eighty-seven, been set apart either temporarily or permanently by or on behalf of the Queen, under any law for any public purpose, or which may at the time such selection takes effect under these presents be lawfully held, used, or occupied for mining purposes, but so that all lands so held, used, or occupied for mining purposes shall be included in the aggregate area mentioned in subsection (*c*) hereof;

"Provided that nothing contained in this clause shall be deemed to prevent the company from selecting, in accordance with these presents, the area of land comprised in the existing coal leases on the Blackball Creek and Ford's Creek, subject to all subsisting rights affecting the same.

"(*b.*) All lands described in the Schedules to 'The Westland and Nelson Coalfields Administration Act, 1877.'

"(*c.*) All lands which from time to time in the opinion of the Governor are or may be required for *bona fide* mining purposes, and the several purposes connected therewith or incidental or conducive thereto, and which lands shall from time to time be set apart and defined by Proclamations to be issued in that behalf; but no more than ten thousand acres shall be so set apart or proclaimed in one block at any one time; and the lands so set apart and proclaimed from time to time shall not in the aggregate exceed seven hundred and fifty thousand acres.

"(*d.*) All lands which shall from time to time hereafter be reserved or set apart for purposes of public recreation, or as endowments for charitable or educational purposes, under any law for the time being in force: Provided that no such lands shall be so reserved or set apart unless the situation and extent thereof shall have previously been agreed upon between the Queen and the company."

And he argued, as this was an exception out of the grant——

Hon. E. BLAKE: I do not think we need trouble you on that point. I intimated to Mr. Cooper my opinion. I wish to give the words their fair value.

Sir R. Stout: I only wish to show that the opposite construction——

Hon. E. BLAKE: I will not give it the opposite construction. I will give the fair meaning of the words. I think there is something to be said in favour of your contention, and something in favour of his, but I think the balance is in favour of——

Sir R. Stout: The principle laid down in Bullen and Denning, though applicable between subject and subject, is not applicable to the Crown. I might mention some cases, without reciting them at length. One is The Queen *v.* The Lord Mayor of London; the Eastern Archipelago Company *v.* The Queen (2 Ellis and Blackburn, 906); and Feather *v.* The Queen. All these cases concur in saying that, if there does occur any ambiguity or doubt as to the meaning of any grant from the Crown, then the grantee has to lose, and there can be no inference whatever as against the Crown. I do not ask that that interpretation should be applied. I am not pressing for that. I am quite willing to take the principle laid down by Jessel, Master of the Rolls, in 6 Chancery Division, page 264, Taylor against the Corporation of St. Helens, where he said the words must be taken in their ordinary sense.

Hon. E. BLAKE: I am with you, Sir Robert, if that is satisfactory to you.

Sir R. Stout: That being so, taking the words in their ordinary sense, I say the meaning of the exception is to be ascertained by looking at the section as a whole, and that the section may be viewed in various aspects. What I now submit is this: that a discretion is left to the Governor, that is the first thing; and that his opinion, however wrong—however erroneous it may be—cannot be attacked in any Court unless fraud could be alleged. I submit that the opinion of the Governor is conclusive. He is in the position of an architect, an engineer, or an arbitrator. As to how the Court is to consider such action in dealing with powers, I might just refer to what Mr. Justice Kay says on that point in the case Henty against Wrey (19 Chancery Division). He says, "The same general principles which are applicable to discretionary trusts in general are applicable to this particular species of discretionary trust. Unless it can be shown that the trustee having the discretion exercises the trust corruptly or improperly, or in a manner which is for the purpose not of carrying into effect the trust, but defeating the purpose of the trust, the Court will not control or interfere with the exercise of the discretion." Now, I submit that that case is a conclusive authority that the Court cannot interfere in any way with the discretion

of the Governor unless fraud could be alleged, and, as fraud has not been alleged, then the discretion of the Governor is absolute. Then, my next point is, that, even assuming that the Court ought to consider the exercise of control over the discretion of the Governor, there is nothing to show that discretion to be improper. The words are, "All lands which from time to time in the opinion of the Governor are or may be required for *bonâ fide* mining purposes." Taking the words first "from time to time," I submit that gives the widest possible discretion. The second words we come to are "are or may be." I understand Mr. Cooper to argue that "are" means the present, and that "may be" means what he calls "the immediate future." That is not the grammatical meaning of the words. There is no limitation whatever. "May be" must mean as controlled by the discretion of the Governor —whatever he thinks may be necessary for the exercise of mining, not in the immediate future, but it may be the distant future. It is something in the future. There can be no line drawn between "immediate" and "distant." What is to be the line? The surroundings are these: What the Governor had to look to was not only the protection of mining for the present, but to see that land suitable for mining or necessary for mining purposes, incidental or conducive to mining purposes—all these words are words of the section—should not be granted. We have had to pass statute after statute to get land from private individuals, so as to encourage mining. That has been in all the Australasian Colonies a burning question for years—how can you allow mining on private lands? In New Zealand we have had to pass statute after statute to deal with it—not only to declare that lands sold after a certain date may be resumed possession of, but have had to give large compensation to private owners in order that their land might be taken for mining purposes, and that their water-rights and other rights might be interfered with for mining purposes. It is not merely the injury that might be done to them by tailings being run over their land, but it has also involved the destruction of their riparian rights. The Governor had not only to think that the land was actually required for the digging of gold, but for all purposes connected with mining—the supply of timber for mining, water for mining, and a provision for allowing tailings and sludge and other things to flow down the streams. And in the contract itself the riparian rights of the people who purchased land in mining districts are limited. But that only helps to show to what extent Parliament intended that this private company should be limited in its acquisitions of land which was likely to be necessary for mining purposes. I submit the only true interpretation that can be put on this section is that whatever land the Governor thought in the future might be required for mining purposes he might reserve, so as to prevent that land being privately acquired, and so as not to lead to great difficulties and complications. Then, the next thing is, how is this land to be set apart? I submit it cannot be deemed to be set apart until it is done by Proclamation. The setting-apart is by the Proclamation, and I submit the Court has no right to look at anything prior to the *Gazette* notice—unless, indeed, fraud is alleged. Then the question of *bona fides* might come in. But as that is not open for argument I need not refer to anything which took place before the Proclamation issued. The Governor might not have acted on the advice of his Ministers; the present Ministers might not have advised; or the Governor might not have taken their advice;—a hundred things might have taken place. Minutes are put on documents; but a minute on a document by the departmental Minister or head is not always carried out. Indeed, some of the minutes on these papers show they have not been carried out. We have only to look at the Proclamations at the time they were set apart; and if we look at that, the next point will be, has there been anything done in setting apart that is contrary to law? Before I refer to that, however, I might just mention the two cases my friend referred to—the case in 5 Exchequer and the case of Flower *v.* The London and Brighton Railway Company. I submit none of these cases touch the matter at all. The first case was as to the payment of damages, and it was held that the arbitrator, in assessing his damages for the severance, rightly included additional loss which would necessarily be sustained in working the mine, and capable of being immediately estimated with reasonable certainty. That, I submit, tells against my friend, because it is said that under the words "all expenses that shall be incurred," the arbitrator was to look not at the expenses incurred up to the time of his award, but expense which might be reasonably incurred. Surely it might be contended on the face of that that he had no right to look at anything but the loss suffered up to the time of his award. In Flower *v.* The London and Brighton Railway Company, in which it was contended that any land they might consider necessary might be taken from the landowner for the railway, it was held that in what might be necessary for the railway, if it increased its traffic, they must be limited to what they must think necessary at the time. None of these cases have the wide words that appear in this section 16, and therefore I submit the Governor had power, under the phrase "may be," to deal with mining which might be in the future. Well, how are the blocks to be set aside? They are to be set aside from time to time; and, so long as no block exceeds 10,000 acres in extent, and so long as the limit of 750,000 acres is not exceeded, the discretion given to the Governor is absolute. He need not have made one block only in one *Gazette*. I submit he might have proclaimed fifty blocks at once if he pleased.

Hon. E. BLAKE: Although contiguous?

Sir R. Stout: Even though contiguous, so long as necessary. However, I shall show that, up to the time they say they were injured, there were no blocks proclaimed contiguously.

Hon. E. BLAKE: I do not think Mr. Cooper professed to show there were any contiguous blocks proclaimed absolutely contemporaneously.

Sir R. Stout: They were not even that. There were no blocks contiguously proclaimed up to the end of 1891, not even at different times.

Hon. E. BLAKE: I have greatly misunderstood the plans, then.

Sir R. Stout: I shall give the blocks they complain of, and will show there were no contiguous blocks proclaimed.

Hon. E. BLAKE: Oh, yes; but they complain of the system. It is a question of the exercise of power, irrespective of the point comprised in the hatching question.

Sir R. Stout: I understood they accepted 2, 3, and 4 as being properly proclaimed.

Hon. E. BLAKE: On the point of their being auriferous or otherwise; that does not affect the other question at all.

Sir R. Stout: I do not think there were any contiguous blocks. I presume that, as the river separates the blocks, they are not contiguous. It is only the Grey Valley blocks they complain of.

Hon. E. BLAKE: There are the Maruia blocks.

Sir R. Stout: But none of them were proclaimed until 1892. I am dealing with the blocks of 1891.

Hon. E. BLAKE: You are drawing a distinction between them?

Sir R. Stout: Yes, for this reason, that they say the damage was done to them at the end of 1891.

Hon. E. BLAKE: Your point is, you draw a line at 1891.

Sir R. Stout: Yes.

Hon. E. BLAKE: Very well.

Sir R. Stout: Now, what I do complain of, when I come to deal with this question of the breach, is this: that my friend has not fixed any date. Surely, if we have broken the contract, the least the company can do is to show that we have broken it in a certain month. What was that month? That has never been answered.

Hon. E. BLAKE: They allege in what manner you broke the contract, and I do not think you are hurt by want of a definition.

Sir R. Stout: Everything hangs upon this question as to when they say the breach took place. Let me deal with this question of Proclamations. The first Proclamation issued was Block 1. That Proclamation was issued——

Hon. E. BLAKE: It will not be necessary for you to go through the whole of them. The cases on which Mr. Cooper relies were specified in the course of his argument. Fight with them, but do not let us go over the whole.

Sir R. Stout: He has not fixed a special date.

Hon. E. BLAKE: But he gave the blocks; and you know by the proclamation of the blocks what it refers to. He gave them very fully to me.

Sir R. Stout: I understand, then, that what he gave were what may be termed the Buller blocks, the Barrytown blocks, and the Grey Valley blocks, and the Maruia blocks.

Hon. E. BLAKE: Those are the lot; are they, Mr. Cooper?

Mr. Cooper: Substantially so; and the Westland blocks.

Sir R. Stout: I submit none of those were proclaimed in 1891. At any rate, none of these even were in 1892; I think they were in 1893.

Mr. Cooper: All of them were in July, 1892.

Hon. E. BLAKE: Of course, you are now mixing up your argument with reference to the construction and effect of this power with the question of damages, because you are arguing that, even although you may be wrong in the construction of the effect, and Mr. Cooper right, yet the particular cases complained of were at a time when they could not possibly inflict damage. Even assuming that Mr. Cooper is right, you point out the instances I have got down—the Buller and certain Westland blocks—were all of them as late, at any rate, as the middle of 1892?

Sir R. Stout: Yes. Down to November, 1891, the blocks proclaimed were 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12; that was all in 1891. I understood that 2, 3, and 4 were not objected to.

Hon. E. BLAKE: Do not fight a phantom. You have got Westland; do not fight the others.

Sir R. Stout: I want to know the Westland blocks.

Hon. E. BLAKE: 51 and 52.

Sir R. Stout: They are not in the Westland blocks; they are north of the Arnold River.

Mr. Cooper: 1, 5, 6, and 7, are all contiguous. I mentioned the Wesland blocks.

Sir R. Stout: Well, then, I say that does not apply, because Section 1 is separated from Section 5 by the Teremakau River; they are not contiguous blocks; they were proclaimed at different times; the river is between them. These are the instances my friend gives.

Hon. E. BLAKE: What were the dates of these Proclamations.

Sir R. Stout: 20th August, 1891; 24th September, 1891; 8th October, 1891; 15th October, 1891: these are the instances given. If these are the instances upon which my friend relies, again I ask him, what date does he say this damage occurred? I understood him to say he would not fix any date. It was towards the end of 1891. When could the news reach London? The last of this was only on the 15th October, 1891.

Hon. E. BLAKE: The news which reached London is only confessedly general news with reference to the 250,000 acres, and that sort of thing. There were no specific acts.

Sir R. Stout: As to the 250,000 acres, I believe the Government had intimated as early as 1890 that they intended to proclaim their reserves, and after that, in November, 1891, we had Mr. Salt's speech to the shareholders saying he had nothing to complain of on the part of the Government. The Government had treated him handsomely, and everything was going on smoothly.

Hon. E. BLAKE: I think I must make a certain allowance with reference to speeches made to shareholders and speeches in Parliament.

Sir R. Stout: If it is said we have broken the contract, surely the company would say that the breach had taken place prior to this meeting of November, 1891. I want to ask my friend to fix the date of the breach. I never heard of a case in which a person tried to sue another person for breach of contract——

Hon. E. BLAKE: Considering the nature of the alleged damage, I should regard it as hopeless to argue upon such a thing as these two or three blocks, even if they were in excess of power. It is a system the provisions of which were to be carried on wholesale; therefore your argument, in my view, is not relevant as to dates.

Sir R. Stout: Was their credit broken then by what was done in 1892? To show that could not be so, we had a statement made by them, even so far back as 1892, that they had an unprofitable contract. There is Mr. Wilson's letter to the *Colonist*, in Nelson. There is the statement made by him to Mr. Seddon before Mr. Seddon became Minister. There is the statement after Mr. Seddon became Minister. There is the statement to the Committee. There is the statement by Mr. Wilson in his evidence, when he was examined as to whether the mining reserves had any effect on their finance, that the reserves were only proclaimed in August, and that was not likely to have had any influence on their finance.

Hon. E. BLAKE: I have already held that the letter by Mr. Wilson, written in April or March, 1892, was a substantial acknowledgment by the company to complete the contract as it was. It is true he alleges, and is entitled to allege, that the situation was produced by the improper conduct of the Government.

Sir R. Stout: That being so, I cannot deal with the system, because there was no system up to the time of writing the letter. There were at that time only something like 75,000 acres of reserves proclaimed altogether, and if, therefore, their finance was gone before other reserves were proclaimed, how can they say they have suffered any damage by the Proclamations? They were unable to complete their contract. The company was practically an insolvent company; they were unable to carry out what they had agreed to do; and for them to go afterwards and assert that the Proclamations could have any effect on them is, I submit, too ridiculous to mention. I wish to get from them the exact date upon which they say the breach took place. They cannot give an exact date, but we know their finance was at end before any substantial reserves were proclaimed at all; and, even if the reserves were proclaimed, some of them, of course, were auriferous, or necessary for mining, and could not have had any effect on their finance. Take the Barrytown reserves as an illustration. What are the hatched portions on those maps? They consist of two things—mountain-tops, utterly valueless for any purpose whatever, and a great deal of swamp, which is also valueless. All the rest would be auriferous, and necessary for mining. Then, taking the Maruia reserves, the evidence given about the Maruia reserves is that the land is away from the railway, and it is inaccessible by roads, and therefore utterly valueless for any purpose whatever. Then, take these Grey Valley reserves. What are they? The point is this: There is not a single acre of land taken by the Crown that has been proved fit for agricultural purposes.

Hon. E. BLAKE: Mr. Cooper confined his attack to the Maruia.

Sir R. Stout: The Maruia is inaccessible. It is fronting the railway that is to be made between Reefton and Nelson, which they never attempted to make, and which they never intended to make after Mr. Wilson had first seen the line. It has no connection whatever with the railway to Reefton, and can have no connection. It is a narrow gorge of a river, inaccessible even by a pack-horse at certain times of the year. There is no agricultural land therefore taken from them, and they have no right to the mining land; therefore, so far from the reserves being an injury to them, they were a benefit to them, because the very fact of large areas being proclaimed for mining purposes would tend to encourage mining settlement and mining, while if the land had not been proclaimed, mining would have been discouraged and the miners would be leaving and going off to every new rush. If they thought the reserves were not to be made for mining, there would be a tendency to leave rather than to stay. I now come to the second question, as to the principle of damages. But before leaving the other question I might add that when Mr. Wilson was before the Committee he did not rest his claim on the granting of reserves as the cause of collapse. He rested upon taxation and other things.

Hon. E. BLAKE: As far as I can remember, he rested on the mining reserves.

Sir R. Stout: No doubt, when he was cross-examined, the words he used——

Hon. E. BLAKE: I am going to give the company all the benefit they may derive from the facts I have seen in the petition, in the letters and correspondence put before the Committee, which form part of the Appendix—claims with reference to mining reserves—which I think Mr. Wilson intended to be fair.

Sir R. Stout: Now, even straining the argument as much as possible against myself: assuming that we had taken agricultural lands, they still have no right to damages. Now, what is the principle of damage my friend seeks to invoke? He seeks to invoke the principle laid down in the case Hadley *v.* Baxendale, and no doubt followed in many other cases. That principle is that if you have the carriage of a certain piece of machinery, or if a company has to manufacture a certain piece of machinery, within a certain period; and you fail to carry this machinery or you fail to manufacture this machinery in time, the damages assessed on the failure to carry or to manufacture the machinery are not merely the price of the machinery, but it is the loss the other party has sustained through his not getting the machinery in time. That is the principle laid down in this case. My friend wished to incorporate that principle in this contract, and in order to do so he has to go outside the contract, and he seeks to introduce private talk and private letters, or, if he likes, "public" letters between the Agent-General of New Zealand and Messrs. Salt and Burchell. Now, I submit it is improper to introduce into this any private or public conversation whatever. It is the statutory contract—the terms of the contract—only which can form the basis for damages. If the Agent-General has made misrepresentations—if he has made promises that he is not authorised to make, he may be liable to the company, but the Crown cannot be liable for conversations of its officers. It is admitted that if they cannot bring in this principle of Hadley *v.* Baxendale, there is no claim for damage. My friend is relying on this conversation with the Agent-General; but how can Parliament or the Crown be bound by a conversation with the Agent-General. Sir Dillon Bell was not even a special agent to make the contract, and if he had any powers at all they were limited. He was not the general agent of the Government; he was only a special agent to carry out what was proposed and to bring the parties together. If he had been even the general agent, it would be an

extreme position to take up. To give an analogous case, suppose a builder had undertaken the erection of a house by contract, and suppose he went to the person who had to erect the house, and said to him, "I have not capital sufficient to go on—I suppose I must rely on my bankers." And we will suppose when the first progress-payment fell due the proprietor of the house said to the builder, "I cannot pay you," or, "I will not pay you," can the builder sue for anything but his progress-payment under that power? Can he sue for general damage to his credit? That is what they now seek to do here. They seek to sue not for the reserves or selections they were entitled to make—not for any progress-payment—but they sue for general damage to their credit. I venture to say there was no case ever heard of in the history of any civilised country where such a thing was attempted. If they are going to sue for money, or sue for the reserves, what would be the *quantum* of damages? It could only be, in the case of money, money and interest; and in the case of reserves, the value of those reserves. Therefore, I submit that this principle of damage cannot be invoked at all. I refer to the principle laid down in Hadley and Baxendale. Then, the next point I take is that my friend says that he was suing on a *quantum meruit*, and for profits in addition—the general profits of a contract. I understand my friend bases his damages on that. Well, before he can sue on a *quantum meruit*, he has to get over a stile which he does not seem to see—that is, what is laid down in all books on damages. I refer to "Sutherland on Damages," second volume, page 1549, which lays down this principle: "If the performance had been arrested by the act or omission of the defendant the plaintiffs would have had their election to treat the contract as rescinded, and recover on the *quantum meruit* the value of their labour, or they might sue upon the agreement and recover for the work completed according to the contract and for the loss in profits or otherwise which they had sustained by the interruption." Now, they can only sue on a *quantum meruit* if the contract was rescinded. Do they say the contract is rescinded? The same principle is also laid down in "Mayne on Damages" as to when a *quantum meruit* can be sued for, page 223: "Where the non-performance of the contract arises, not from any failure on the part of the plaintiff, but from some act of the defendant, who absolutely refuses to perform or renders himself incapable of performing his share of the contract, the plaintiff may rescind the contract, and sue at once on a *quantum meruit* for what he has done." The same principle is also laid down in Sedgwick, page 270, volume 2—that is, before he can sue on a *quantum meruit*. If he could sue on that he would have to rescind the contract. Now, has he rescinded the contract? If he has rescinded the contract I submit that the argument cannot apply, as the power of the arbitrator has gone.

Hon. E. BLAKE: It is not possible for Mr. Cooper to contend that the contract has been rescinded because he abandoned the ground that it was rescinded.

Sir R. Stout: Then, I submit, his argument about *quantum meruit* is gone, and he cannot assert that principle. He is driven from that point of view—from the *quantum meruit*. He cannot sue as laid down in Mayne, except he has a complete rescission of the contract. Then, if he cannot sue on that, what is left to him? He can only sue us for specific breaches. He cannot sue for anticipated profits, because this contract is still existing, and he cannot sue for anticipated profits unless he is absolutely prevented from fulfilling it. There is no suggestion of that being done, because that means that the contract is put an end to by us. That contract is not put an end to by us. Then, if he cannot sue for anticipated profits, let him go on. Let this claim be confined simply to damages for specific breaches of contract by us.

Hon. E. BLAKE: They say the company was prepared, if faithfully treated, to complete the contract.

Sir R. Stout: Then they can only sue for specific damages. Let us see how that will come out. Let me assume that this is a case in which they are suing for specific breach of contract—what, again, is the breach? Here, again, I submit we are still in a difficulty by not knowing when this breach arose. But what does it appear to be—that we have made too many reserves. I shall assume that we have made too many reserves, and withdrawn too much land from the B 1 Block. Then he would have to show that he intended to select this land that was withdrawn, and that we prevented him selecting it. I submit that if that be his breach he should not have sued at all, but should have gone to the arbitrator under the contract and said, "This reserve has been improperly made."

Hon. E. BLAKE: Is it necessary to set up these men of straw in order to knock them down? These are not the grounds on which the company is suing. They are suing upon a distinct ground indicated in the conclusion of their claim—namely, that their credit was destroyed and their capacity to complete the contract was destroyed, and that therefore they are entitled to recover damages.

Sir R. Stout: Yes. I was showing that they have given up this question of specific damages; they have waived it.

Hon. E. BLAKE: They gave it up long ago.

Sir R. Stout: The point I want to make is the only thing they stand on—that they have been prevented selecting these reserves; and I submit that if that be their only ground they should have gone before the arbitrator and asked that the reserves should have been set aside.

Hon. E. BLAKE: Three weeks ago we discussed that, and agreed with you. It was a future and contingent damage altogether. I pressed that, and the company conceded it.

Sir R. Stout: Then I cannot understand on what they can rest. They have no legal right on which they can rest any legal claim for damages. This notion of *quantum meruit* seems to be absurd. First, *quantum meruit* only arises where a proprietor has got a service or work done for him and which has passed into the proprietor's hands, and which will prevent the contractor doing that work. The question is: What am I entitled to demand? We have not got the railway; the railway is still with the company. We have not to pay for the railway. What we have to give for the railway is these lands. They have got their land-grant, they have taken it, they have waived

any question of the proclamation of the mining reserves—that is gone—they have chosen to say, "Notwithstanding your reserves we have gone on taking land as payment for our subsidy"; and, that being so, how can they turn round and say that they have lost money at all? It seems to me that they have abandoned every ground of claim for damage, and there is nothing left to them.

Hon. E. BLAKE: I do not think they abandoned anything they could hold.

Sir R. Stout: Oh, no. I think there is nothing left which they can hold. The other point I wish to refer to is that they say that this line was a profitable one, and that they lost anticipated profits. This was in addition to their financial credit being ruined. As to that, it cannot be said for one moment that the contract was a profitable one. If it was, why could not they get on with it? According to the statement put in by themselves, assuming that all their statements are correct—assuming that even there were 70,000 tons of coal brought into Christchurch, which only uses including Newcastle (the company have given no evidence as to the quantity of coal imported into Christchurch in a year) I believe that the quantity of coal used in Christchurch for several years—Newcastle, brown coal from the Malvern (Canterbury) District—would be found to be not equal to 70,000 tons, everything considered.

Hon. E. BLAKE: I cannot accept that as an argument.

Sir R. Stout: I submit that there is no evidence of what comes into Christchurch.

Hon. E. BLAKE: You do not produce it?

Sir R. Stout: I say that if evidence were called it would be seen whether or not the company's calculation was correct. I am taking their own calculation, which shows at least a loss per year of £20,000. I take it from this broad point of view, that they would have to get £100,000 a year to pay interest to their shareholders and to the debenture-holders.

Hon. E. BLAKE: More than that, unless they reduce the debentures to 4 per cent.

Sir R. Stout: I am willing to reduce their debentures, and to take everything that is in their favour, and then they cannot get, I submit, more than £80,000 a year of profit, which will leave them a deficiency of £20,000 a year.

Hon. E. BLAKE: You are very liberal indeed, for Mr. Cooper only claimed £58,000.

Sir R. Stout: I am going up to ten years, and I have worked it out. Supposing the increase was even 5 per cent. a year—it is not increasing to any such extent—but, giving them everything, it shows that they would lose at least £20,000 a year. How can it, then, be said to be a profitable contract? Where is their profitable contract? The fact is that from the very first—ever since Mr. Wilson came here—they have proved that this was an unprofitable contract, and ever since they found out that it was an unprofitable contract they have used all the means in their power to get Government to change the terms of the contract. Every time they have gone to the Government it has been for more and more concessions. This arbitration is simply an additional means of trying to wring from the Government concessions that they are not entitled to by law. The contract is an unprofitable contract. They say they have no means to pay, their capital is gone, and they have no means of completing the line. When they were asked to say, if certain concessions were given to them would they guarantee that the whole of the railway would be completed—that was after the resolution passed in 1893—they could not give the guarantee. I therefore submit that, so far as the question of a profitable contract is concerned, they had not a profitable contract. They had an unprofitable contract—a contract, I believe, that would not have paid 1 per cent. That being so, they wished to get rid of it. That explains the whole of their position. As to the other question, of dealing with damages, I submit that there is another answer to this claim for damages in reference to the proclamation of reserves. That is the principle laid down in the case of Churchward *v.* The Queen, and in other cases. I apprehend the principle is this: that the Crown, through Parliament, agrees to do a certain thing, and that contract cannot be challenged on anything less than the authority of Parliament. Now, what is attempted to be done here? They are suing for damages—for what? for not giving them the land-grant. That is the way in which it can be put, because we shall assume that the taking of these reserves was the taking from them of a land-grant which Parliament had given them the right to do. They are now suing for money, because they have got the land-grant.

Hon. E. BLAKE: No. They are suing because they have not got the land-grant.

Sir R. Stout: It amounts to what I said.

Hon. E. BLAKE: No. They are suing because you improperly proclaimed certain reserves, which they say did so much damage to their capital as to render it impossible for them to complete the line. I have already pointed out that of the counts they abandoned two; and as to my giving them damages because they have not got any particular block, or because they have not done things necessary to enable them to make application to select, or which have precluded them or disentitled them to deal with particular blocks, we have got rid of all that, and there is no use bringing it up here. We dealt with it so long ago that you have forgotten——

Sir R. Stout: I have not forgotten. I was only meeting the expression of my learned friend.

Mr. Cooper: I did not advance anything of the kind.

Hon. E. BLAKE: I did not understand Mr. Cooper to employ any such argument as Sir Robert Stout is referring to.

Sir R. Stout: I am showing that what he is now claiming is in violation of his argument, for this reason—the point of the thing is this: that when the Crown agreed to give a grant, it never agreed to give money; and my point is that no damages can be given in money against the Crown in reference to this railway land-grant. All the Crown agreed to give under the contract was land, not money. There is no power, therefore, to award money. If an officer of the Crown had done anything improper the Crown could not be sued, and the Crown cannot be sued for any illegal acts done under this contract.

Hon. E. BLAKE: You say that, under this contract, no money under any contingency can be recovered?

Sir R. Stout: I say that.

Hon. E. BLAKE: Then, what is the meaning of clause 47, which expressly provides that no money can be given until the General Assembly has authorised it?

Sir R. Stout: I am not aware that clause says that money shall be given.

Hon. E. BLAKE: No; but it indicates the possibility of money being given.

Sir R. Stout: They are taking clause 33. That is not damages for dealing with the land-grant. I will put a case in the strongest possible way. Supposing a Minister of the Crown were to say, "I do not wish to give you the land-grant, but in order to allow you to continue the railway we will give something instead of land. We will get behind Parliament by doing something which will cause the company to break the contract, and thus enable you to claim damages." I submit that that cannot be done. Whether the Governor or the Ministers acted properly or improperly, the Parliament have never sanctioned anything to enable the company to get money instead of land. The other point I wish to mention, in dealing with this question of damage, is that they have suffered no damage to their credit, and they have not proved that they have.

Hon. E. BLAKE: They appeal to the evidence of Mr. Burchell.

Sir R. Stout: I submit that Mr. Burchell's evidence did not prove that position at all. His evidence certainly was peculiar. I am not acquainted with the way in which they apparently carry on financial business in London, but his evidence is that he was told by Sir Samuel Montagu, Mr. Marnham, and others that they had heard something which prevented them giving financial aid to the company. That was all. That is the effect of his evidence. Mr. Marnham, Mr. Nickieson, Mr. Bishop, and Sir Samuel Montagu seem to have been the only people he interviewed. Sir Samuel Montagu said that, owing to the news he had heard about the land-grant, and about other general things in New Zealand, he would not touch any more railways in New Zealand unless they had the Government guarantee. That was all. The Proclamations about the reserves did not seem to have been known to these men. They had no information about them, and Mr. Burchell had no information about them.

Mr. Cooper: You have not read the whole of Mr. Burchell's evidence.

Sir R. Stout: I put the question:—

"223. Was there a single letter from Mr. Wilson which gave any details as to how much of the area had been improperly reserved?—I really cannot say.

"224. Then, you cannot say you had any more information in the spring of 1892 than you had in the winter of 1891?—Excepting, of course, we had letters from Mr. Wilson by every mail. I cannot charge my memory with the contents.

"225. And do you not know the details of any of those letters?—No.

"226. And Sir Samuel Montagu: did he rely mainly on the land-grants or on the graduated land-tax, or did he rest on both? Did he seem to have any information about the land-grants?—He seemed to have a great deal.

"227. What did he tell you?—He told me he had heard direct from New Zealand.

"228. To what effect?—That the Government were making large mining reserves not at all in accordance with the contract, and that such reserves were not required.

"229. Did he tell you from whom he had heard?—He did not.

"230. You did not inquire?—I did not.

"230A. You do not know the nature of the information—whether it was detailed or not, or a general statement such as you have mentioned?—That is what he told me.

"231. About the graduated tax: what did he tell you about that?—He said that it very seriously depreciated the value of the land the company would be entitled to have.

"232. Did he know that the company was selling its land as fast as it possibly could?—No."

I say it would be a most extraordinary thing to say that the results of an interview with Sir Samuel Montagu based on information got from somebody or somewhere is evidence. We do not know what the letters sent by Mr. Wilson contained, or what information Mr. Marnham or Mr. Nickieson or Mr. Bishop had received. Not a single witness has been called to show what information they had got; and I have yet to learn that because Mr. Marnham and Mr. Nickieson declined to give money for the construction of the railways, that therefore the company could not get it elsewhere. None of these people in London have been called to say what they had heard; and what they did hear may have been untrue. Their letters are not produced, and what they heard is not told to us. How can it be said for one moment that the company was damaged to any extent by what took place in New Zealand? The only way in which it could be said the company has been damaged was that the proclamation of the reserves had been told to them, and directly told to them.

Hon. E. BLAKE: I think it is extremely unlikely that any of the general public of New Zealand would have taken an unfavourable view of what the Government was doing, and therefore had indicated that view to Mr. Wilson, unless they had become aware of the unfavourable view which Mr. Wilson took of the attitude of the Government. It is likely that Mr. Wilson's views became known in New Zealand, and that those views were made known to people in London.

Sir R. Stout: There does not seem to be any proof of publication in London. The only thing seems to have been the letter to Sir Samuel Montagu.

Hon. E. BLAKE: I think there is another gentleman, Mr. Marnham, who says he heard unfavourable reports in London. They seem to have got round, as these things do.

Sir R. Stout: Seeing that their complaints were made in the petition, we know about those; but there were statements made by Ministers, and so on, and what they heard at Home may have been about these, and not the proclamation of the reserves at all. This is what Mr. Marnham is said to have remarked in reference to the debentures, that there were rumours going about that the Government were not treating the company fairly over their land-grants.

Hon. E. BLAKE: They may have been made by persons interested either in the colony or in

London. The general public does not take a very warm interest in these matters, unless they are talked of by persons having an interest in them.

Sir R. Stout: At any rate, we have no evidence that any such letters went to Sir Samuel Montagu at all.

Hon. E. BLAKE: We have only Mr. Burchell's, who said Sir Samuel Montagu told him.

Sir R. Stout: Yes, but that is no evidence at all; and Mr. Marnham and Mr. Nickieson only heard rumours in London; that is all. Now, suppose we were sued for defamation or slander, surely we have a right to have evidence as to the statements which were made.

Hon. E. BLAKE: The claim for defamation has been eliminated. There was a claim, but it is struck out.

Sir R. Stout: Yes, but I want to know this: Suppose we had been sued for slander, we would have a right to know the words which were used, and by whom used? I say there is no proof that any person in London got information about the proclamation of these reserves. There is no evidence. Sir Samuel Montagu has not been called, and has not been examined. He may have heard anything or nothing, and his statement to Mr. Burchell does not make it evidence. Surely, if the people in London were going to lend this money they would go to the contract, and there would see that there was power given to the Government to claim 750,000 acres as reserves; and surely it can be said that these people would know whether what was claimed was proper or improper.

Hon. E. BLAKE: I have already said that I find a difficulty in conceiving that this generally unfavourable impression was derived otherwise than by having its source and origin either in the company's office in the colony or in London.

Sir R. Stout: I have only to refer again to Mr. Salt's speech, in which he says the Government had treated the company fairly, and in which he made a roseate statement altogether. There is another point I have to mention, and that is that it cannot be overlooked that Mr. Wilson informed Mr. Seddon that the finance of the company had given out, and that statement was made before a single reserve was made. That was said before the 250,000-acre reserves had been made, and before Mr. Marnham, Mr. Nickieson, or any one else had heard anything about the statement in London. I therefore submit that as far as damages are concerned they cannot claim anything under the contract. There is no proof that we have damaged them in the slightest degree. They cannot claim damages for loss of credit, and they can claim damages for nothing else; and their claim under this head is just as unsubstantial as the other claims they have made. Mr. Seddon reminds me also that it shows the weakness of their finance that when they applied for their first debentures they had to give a pledge that they would not go on the market again until the Reefton line was completed, and until they had seen what the result of that line would be. That shows the miserable character of their finance. They commenced with a quarter of a million to construct a work costing between two and three millions, and it is not surprising that they miserably failed, and that the discount on their debentures amounted to 13½ per cent. They were only able to get £87 for each £100 they got, and for that they had to pay 5 per cent. That shows the straits they were in before doing anything under the contract; and therefore to set up now that the Government injured their credit is, I submit, but another attempt to get the Government to vary their contract and give them concessions not in the original contract. It is simply an attempt to do that. All this pretence about the credit of the company having been injured is simply pretence and nothing else. That leaves the question of damages under this head, and I now come to the question of the seizure of the line.

Hon. E. BLAKE: Before you depart from that, I desire to say that I invited Mr. Cooper to formulate to me his argument as to his claim under this matter in the gross, and his reply is that £990,000 is due from the Crown to the company. And now in a similar way I wish you to formulate what it is that you think I ought to find.

Sir R. Stout: I submit, on this question of damages, that the evidence and the argument both show that there were no damages whatever.

Hon. E. BLAKE: You do not think that the company has any right against the Crown, or to recover the premises. There is only a million or so between you.

Sir R. Stout: That is all. I now come to the seizure of the line. I understand my friend to say the seizure should not have been made when there was litigation pending between the parties. I do not know that that is a question that can be raised, for this reason: that if the company had shown in any way or had any desire to go on with the work, then no doubt it would have been improper to seize the line; but we know, by the resolutions of 1893—Parliament passed certain resolutions offering certain concessions if the company would assure the Crown that they would be able to go on with the contract in 1893—the Crown waited eighteen months, and they would have waited longer if anything had been done. Was the Crown going to allow this contract to remain in its present unsatisfactory state any further? I submit the Crown had the right to make the seizure, and I lay down this principle: that if it had the right to make the seizure, then no one can quarrel with the exercise of that right. It is really a proprietary right. There is the case, which I submit has an analogy, which I cite, The Mayor of Bradford against Pickles, in the November number of the Appeal Cases, Law Reports, 1895, page 587, House of Lords, which held that if a person has a proprietary right he may use it even maliciously, and not be liable for damages.

Hon. E. BLAKE: Mr. Cooper does not argue that. It is really a limitation of the rather large charges which in the earlier days had been made against the company. He made what I thought a merited statement as to his company, that on the whole there was no right to say anything unfair, even if you were legally entitled, excepting as to the question of the seizure. He limited his remarks to the question of the propriety of the seizure. He did not for a moment contend that I was to adjudicate on that question. He reasoned on the legal right, and on the ground that there was no unreasonable or inexcusable delay, and that is where the points arise for argument.

Sir R. Stout: I submit the unreasonable delay is there, and I repeat what I said before in my previous speech to the Court. Considering the small portion of the line that has been made, and considering the term of years, and that for the last eighteen months no new work was done, surely there has been an unreasonable delay; and that is what we now rely on. What is the excuse for it? We need not rely on the question of wilful breach of contract, though I submit that the term "wilful" is put in contradistinction to the other term of "technical or accidental."

Hon. E. BLAKE: Do you mean that you do not contend on that point?

Sir R. Stout: No, I do not say that. I say it is unreasonable also to contend that we have anything to do with their financial position: we have nothing to do with how they were to get their finance. It is no excuse, surely, for a contractor who is putting up a building for another person to say that he has got no money: it is absurd; and that is the only excuse they have to give. It is not an excuse. An excuse might be that of a strike amongst their men, continued bad weather, or unforeseen difficulties, but it is not an excuse to say that they have not the money: that cannot be deemed to be an excuse. Then, the other point is whether they have committed or suffered a wilful breach of the contract with the Government or Crown; and even on that head I submit we are entitled to succeed. They have stated for years past that they could not carry out the contract, and therefore the right of the Governor to seize the line has accrued.

Hon. E. BLAKE: Of course, one has to eliminate from one's mind the reference to the claims of the company under the first reference, if they were able to prove delay caused by the misconduct of the Government. You are now arguing that the Government was right in what it has done?

Sir R. Stout: Yes. I would also point out that there is a remedy under the statute, an additional remedy. I submit that the case of the Eastern Archipelago Company against the Queen is analogous (2 Ellis and Blackburn, 857), the head-note is as follows:—

"A charter incorporating a trading company directed, amongst other things, that the corporation should not begin business until it had been certified by the President of the Board of Trade, and by at least three of the directors, that at least one-half of the capital had been subscribed for, and at least £50,000 paid up. The charter contained a proviso that in case the corporation should not comply with any of the directions and conditions in our said letters-patent contained, it should be lawful for the Queen 'by any writing under the great Seal or under the sign-manual' to revoke and make void the charter either absolutely, &c. In *scire facias*, at the relation of a private prosecutor, it was suggested, amongst other things, that before the corporation began business a certificate was given . . which certificate was false in fact, and judgment *quod cancelletur* was entered." Now, the point there was this: Whether this was a limiting condition that if any of the conditions were violated, the Queen could by writing under the great Seal and sign-manual revoke the charter. Whether that was a cumulative remedy, or the only remedy to get rid of the patent——

Hon. E. BLAKE: What is the inference?

Sir R. Stout: That is, as between the company and the Crown and subject to the Council's conditions, that this remedy of seizure is left under special power to the Governor, and that the only power they have to affect that special remedy is by an application to the Supreme Court.

Hon. E. BLAKE: That is, for the purposes of this arbitration?

Sir R. Stout: I say, how is the Court to look at this question. I submit that it rests upon them, and not upon us, to show—that is the great point—that the delays have not been unreasonable or inexcusable.

Hon. E. BLAKE: I think Mr. Cooper has practically accepted that. He proceeded to demonstrate that the delay was not unreasonable or inexcusable.

Sir R. Stout: I submit the Court cannot say that the delay was not inexcusable when by their own admission there has been nothing done for eighteen months, and the statement was made time after time that they could not do anything. Take the analogous case which Mr. Gully has referred to, for example, the supply of goods with payments from time to time, which applies to all this class of cases. In such a case as this, if the person says that he cannot complete the contract, the other party is allowed to say, "We can cancel it at once." We have not got to that length under the second reference. What we have said is, "You are not going on, you say you are not going on, to do anything; you are not pretending you are doing anything. We shall step in, and"——

Hon. E. BLAKE: The Act is extremely deficient. It does not make provision for what is to happen in case the company withdraws. The Crown does not accept the position defined by the seizure; the company is accountable to the Crown for the money the Crown expends in the course of completion. It would seem to follow that the properly logical construction of the statute intended to provide the manner in which the company should act. At any rate, I agree with you; I regard it as not uncommon in regard to the decision. It is a remedy which, in one sense, keeps the contract alive rather than otherwise.

Sir R. Stout: I submit it is a Receiver in possession. We have more powers than Receivers, no doubt, but it is a Receiver in possession. Can it be said—if it is an application to appoint a Receiver—can it be said that a Receiver should be appointed? I submit that is the fair way to test it. I submit that there are many cases calling for the appointment of a Receiver.

Hon. E. BLAKE: It does not extend the argument a bit, supposing a Receiver should be applied for: it must be unreasonable or inexcusable delay.

Sir R. Stout: The reason is, that the Courts are always slow to declare forfeitures. My friend has said that the Court is sitting in an equitable jurisdiction, and quoted the laws against forfeiture. It is not a case of declaring forfeiture at all.

Hon. E. BLAKE: There is a very considerable change. The Crown says it has now the right of going on and completing the contract, involving an expenditure of two or three millions of money, at such rate as it pleases, and compelling the company to pay at any time, or losing the right altogether. The two things are both distinct, one would think they imported a distinction. Whether on payment of the amount spent by the Crown the company would be still entitled to get its land-grants—that is left vague.

Sir R. Stout: But it assumes that, even if after three months, what is called a satisfactory arrangement may be in the meantime made between the Government and the company.

Hon. E. BLAKE: I think that the meaning of the statute is, that it minimises but does not destroy the effective interchange. It is a tremendous interchange for a corporation to find that it has no longer any control over its contract; but, as you say, they had practically given up their contract.

Sir R. Stout: They have practically given up their contract—they have not attempted to do anything under it; and therefore I submit that the Crown had a right to enter. The only other question that I wish to mention is the costs of the arbitration. I submit that on the first arbitration—which I submit is the main arbitration—we are entitled to costs; and therefore entitled to them on the whole arbitration. The whole question has been as to whether we have caused damage to the company. On the second arbitration there has been very little evidence given—in fact, almost all the evidence and all the time has been taken up with the first reference. As to the land they have earned, of course if there were any costs incurred by them in making——

Hon. E. BLAKE: I may say at once that I have thought a great deal on this question of costs. I have considerable latitude about costs, and, in considering the question of costs, I would not wholly ignore making some use of the parliamentary proceedings, and I would not wholly ignore the statement of the Premier in dealing with the Bill before the Legislature in 1894.

Sir R. Stout: As to the delay?

Hon. E. BLAKE: The general statement that he made.

Sir R. Stout: I submit that any statement made by the Minister ought not to be used to control the contract. I say, in reference to the statement made by him in 1894, he was fighting for the company both in 1893 and 1894. That is perfectly apparent; and, having against him a strong opposition that was opposed to the company getting any concessions whatever, it will be seen from the various divisions which took place that there was a very strong opposition in the House——

Hon. E. BLAKE: There was an opposition strong enough to defeat the Government.

Sir R. Stout: Yes. I only want to show that there was a strong opposition, and that the Premier fought to get the concession for the company. What was the position about that? In 1893 Parliament came to certain resolutions, and they said, "If the company will accept certain money debentures instead of land grants, and will give some reasonable assurance to the Government that they will be able to complete the contract, we will give this to them, and give them an extension of time." The company could not give that assurance. In 1894 an attempt was made to get a Bill passed to give the company some concessions. What the Premier said was, "Well, as the company has been delayed, if they are going to carry on the work now we will give them an extension of time." I submit that cannot bind the Crown. And since he made that speech the company has done nothing. It is not as if after he had made that speech the company had gone on, and attempted to complete the contract. This is the quotation made by Mr. Cooper. It is in Volume 86 of *Hansard*, page 868. One has to read the whole speech.

Hon. E. BLAKE: I have read it.

Sir R. Stout: That was delivered on the 16th October. Months elapsed, and nothing was done by the company.

Hon. E. BLAKE: But we are trying the questions which were raised in the Committee in 1894, and upon which the Committee of 1892 reported. With reference to this particular question of the mining reserves the Committee reported that the Government had acted within their legal rights, but they also reported that the extent of the operations of the Crown was such as might fairly and reasonably not have been expected by the company. I do not say that that should control the contract, of course—I do not say it is evidence; but I think these are questions which I am bound to take into consideration in considering the question of costs.

Sir R. Stout: It cannot be said for one moment that the statements made——

Hon. E. BLAKE: I am rather inclined to adopt these views, and I point out to you that they are views which are not unknown either to the Crown or to the Assembly. One set of views was adopted by a Committee of the Assembly, and the other set of views was expounded by the first Minister of the Crown in the Assembly.

Sir R. Stout: I submit that, so far as the Committee is concerned, its decisions were arrived at by very narrow majorities. The House agreed to give certain concessions on certain conditions. The clause in the report that refers to the extension of time——

Hon. E. BLAKE: Look at the clause in the report which refers to the dealing with the reserves. Read that if you please. I have not looked at it for some time.

Sir R. Stout: "The generally auriferous character of the country through which the Midland Railway passes on the western slope has made it possible for the Government to reserve an area of land in continuous blocks exceeding what might have been reasonably contemplated by the company to have been reserved in this way. It does not appear to the Committee that in doing so the Government has exceeded its legal rights, nor has reserved or proposed to reserve more land than an exclusive regard for possible future mining developments may prove to be of advantage to that industry"——

Hon. E. BLAKE: It is the prior parts I referred to.

Sir R. Stout: As to the delay and the extension of time, this is what they said: "The Committee are of opinion that the time allowed in the original contract for the completion of the work was sufficient, but that, owing to the delays consequent upon the negotiations for modifications of the contract, and also owing to the many other difficulties under which the company has laboured, it is evident the work cannot now be completed within the contract time. The Committee, therefore, recommend that the Government should grant a reasonable extension of time for the completion of the contract. In any such arrangement, the Committee consider that the Government should insist"——

Hon. E. BLAKE: I did not allude to that, because I pointed out at an earlier stage of the argument that the Government and the House seemed to be not unwilling to grant an extension on certain conditions, which were not unreasonable—namely, that they saw their way to the completion of the contract by the company.

Sir R. Stout: That is what I am dealing with. I submit that the speech which Mr. Seddon made was simply carrying out the intentions of the Committee—namely, to give a reasonable time for further extension if the company would undertake to complete the contract. I submit that, after that speech was made, nothing was done. The company has never attempted to do anything; and the reason is that they have no finance. And I submit, therefore, that what has to be looked at is this: Can it be said that the invoking of this power under the contract—of seizure—is not warranted by the statute?

Hon. E. BLAKE: You are now only dealing with the question of costs, and of course my jurisdiction is extremely limited, and, when this arbitration is ended, it does not necessarily end all. There may be a settlement arrived at, which settlement may be ratified by the Legislature. I have, however, a certain discretion with reference to costs.

Sir R. Stout: Only one word more with reference to costs. I submit there is another question to be looked at in connection with costs, and that is, that a great deal of the money-claims made in respect of timber, taxation, &c., have practically had to be abandoned.

Hon. E. BLAKE: I do not think the taxation would affect or increase the costs. That is a pure question of law.

Sir R. Stout: I submit that the question of fact has been the fight over these mining reserves. That is the whole gravamen of the case—that is the whole point; and I submit if we succeed in that we are entitled to our costs.

MR. GULLY'S ADDRESS.

Mr. Gully: I propose in addressing the Court not to follow the sequence of Mr. Cooper's argument, because there appeared to me to be some answers of an affirmative kind which may be held to be complete answers to the whole claim, and which require to be dealt with in addition to the topics which he advanced. I propose, therefore, to submit for your consideration the following propositions of law: First, that the arbitration clause cannot be invoked for the purpose of an action for breach of contract, but that the only remedy is under "The Crown Suits Act, 1881"; second, that the right to arbitrate is barred, or, at any rate, suspended, by the seizure under "The Railways Construction and Land Act, 1881."

Hon. E. BLAKE: I am afraid that has been advanced already, and disposed of. Let us dispose of it at once. That was an objection to our jurisdiction to go on.

Mr. Gully: I do not propose to argue it on that. I propose to argue on the seizure under that Act quite apart from the question of jurisdiction: that it puts the contract in such a position that either the right to arbitrate has gone altogether or that it is suspended.

Hon. E. BLAKE: I know; but then the positions are not novel. I have heard them stated before in the same words, and I ruled upon them for the purpose of arbitration. It was suggested that the right to arbitrate was either gone, or was at any rate suspended, and I recollect well Sir Charles Lilley saying, "that means that we are to come back here in May." The Crown called upon me to rule upon these things. I wanted to rule on as few things as possible, and as I have ruled on that point I cannot now go back on that ruling.

Mr. Gully: Well, the third point is that the right to arbitrate is barred by the company's breach. The fourth point is that there are no damages.

Hon. E. BLAKE: You brought forward at an early stage of this contention this ground, which you then thought material, that the right to arbitrate was barred. Do you mean to say this is a new—a further contention?

Mr. Gully: No; it is a contention on the facts now before you.

Hon. E. BLAKE: Barred by the breach?

Mr. Gully: Yes.

Hon. E. BLAKE: But the fact of the breach was before us from the beginning. The time had expired. It was acknowledged that a breach had been committed in Sir Robert Stout's opening argument as to jurisdiction.

Mr. Gully: The company must satisfy you that the breach has been waived, or dealt with in some other way, so as to permit them to establish a right founded on the contract, and that, I apprehend, is open to argument now, and must be dealt with on the basis of the whole facts brought out on the inquiry. Now, the first proposition which I submit is that this action for general breach of contract is not a matter for arbitration at all, but should be dealt with under the Crown Suits Act of 1881. It cannot be denied that, apart from the Act to which the contract owes its existence, there can be no remedy against the Crown either for or upon the contract, except that provided for by statute. I refer to "Broome's Leading Cases," pages 51 to 55. The first section refers to the general principle that the King can do no wrong.

Hon. E. BLAKE: I am with you on that point, subject to what Mr. Cooper may say.

Mr. Gully: In this colony there have been declarations by Judges showing that not only is the general proposition of law such as I have indicated, but the Judges have always held that there is no right against the Crown except that provided by statute. The only case similar to this was that of Brogden against the Crown. It was a claim on a contract of a somewhat similar character to this, and the plan adopted there was on petition.

Hon. E. BLAKE: There are many colonies in which a remedy by petition of right has been decided by statute, but unless there was some petition of right or special statute there was no right to proceed against the Crown.

Mr. Gully: Turning to our present statute, we find that under clause 4 of the Crown Suits Act of 1881 a declaration under that and subsequent sections is not merely a question of procedure, but a declaration of the class of rights, or of wrongs, which can be dealt with on a petition of right. Therefore it is quite plain that, if there be any grievance which is outside the Crown Suits Act, that is not the groundwork for any remedy against the Crown at all. Therefore I come to the real point: whether or not this arbitration clause under the contract controls the Crown Suits Act of 1881. I say that the other side have got to contend that this arbitration clause not only gives by contract a right to ventilate grievances under the contract, but they have got to contend that it gives an action, so to speak, for damages for breach of contract, and that an arbitration clause such as that, in point of fact, can, by abrogating the provisions of the Crown Suits Act, not only alter the procedure, but vary the law—vary the law as against the Crown. The rights of the Crown would be, in many respects, entirely different to the liabilities the Crown is under upon the arbitration clause of the contract. Now, if one looks at the arbitration clause itself, neither in nor under the statute is there, I submit, anything approaching what is requisite—namely, a statutory right given to the subject to sue the Crown—to claim against the Crown for damages for breach of contract. The two things can well be read together—I mean the remedy under the Crown Suits Act and arbitration under the contract; and not only, therefore, do I say there is no statutory authority to make this claim, but not even an implied authority under the contract to go to arbitration on these grounds. What, I submit, the true construction of clause 43 leads us to is that all disputes arising from time to time under the contract, whether they involve a mere order for the vesting of land, or the question of disputed interpretation, or the right to recover money, already arise under the contract. It does not go any further than that, and does not in the least degree support the suggestion that there is a right to claim for wholesale breach.

Hon. E. BLAKE: That is to say, they could ask me to say whether the Crown was right or wrong in proclaiming mining reserves, but not to find the damages sustained by it by reason of that misinterpretation?

Mr. Gully: But they could say the damages for that misinterpretation would be a claim arising out of the contract, and would perhaps come within the wording of this arbitration clause, while a general claim for damages for breach, I submit, does not.

Hon. E. BLAKE: Under what does it arise?

Mr. Gully: It arises upon the contract, but certainly not under the contract, for directly a party sues upon a contract for breach——

Hon. E. BLAKE: He says, "Under the contract I am entitled to so-and-so; you have not given it to me."

Mr. Gully: May I direct your Honour's attention to the words: First, "The right to come under the arbitration clause is upon the construction, meaning, and effect of these presents, or any clause or thing herein contained"; next, "the rights or liabilities of either of the said parties under these presents." My friend will contend, as the Court suggests, that the right or liability on a breach is a right or liability under the contract; but I submit, from the use of these general words, you must come to the conclusion that under this contract the Crown has contracted itself out of the provisions of the Crown Suits Act. Then follow the general words . . . I need not labour the argument. Shortly, it is this: that the arbitration clause really means that disputes arising under the contract are disputes that arise while the contract is treated as in existence by both parties, but does not give the right of damages as against the Crown. I propose to defer my argument upon the point of seizure under the statute of 1881 until we come to deal with the second reference, not to deal with it as a question going to the whole jurisdiction. Then, I proceed to deal with clause 16.

Hon. E. BLAKE: That would be the fifth point you mentioned.

Mr. Gully: Yes. Now, I submit, coming to the interpretation, it would be useful to consider generally, in a few words, the scope and intent of this section of the contract. It is, of course, admitted on all hands that the object of the insertion of this clause is to effectually protect the mining industry, and I would submit that one ought to expect to find in such a clause that provision was made for the reservations being affected as quickly as possible. It is quite manifest that unless that is done, at least I submit that unless that is done, this reservation can be of no use at all. It is too late, of course, to shut the door after the horse has been stolen; and I submit, therefore, the general scope and intent of this section of the contract indicates that the reservations for mining purposes must come first in point of time; that is to say, one would expect a reasonable time, at least, should be given to set apart the reserves before any selections are made by the company. Whether the clause carries that into effect or not I shall deal with later on. No better example, perhaps, of the urgency of something of this kind being introduced can be found than in the case which occurred here of Costello against McDonnell. It is a case showing an exact illustration of what this subclause of clause 16 was intended to guard against. It was a case in which Costello sued a large number of miners who had been working on localities the names of which have become familiar to us within the last few weeks, and I will read this passage from the judgment of the Chief Justice: "The land comprised in the lease is situated on the Totara River at the confluence of a stream known as the 'Right-hand Branch.' At a short distance above the plaintiff's land a stream from the Croninville Gorge joins the Right-hand Branch. The defendants are persons holding miners' rights within the Nelson south-west goldfields, and they, or some of them, are also holders of a certificate for a main tail-race, commencing at the Croninville Gorge, and terminating at a bridge over the Totara River just below the junction of the Right-hand Branch. For some time before the commencement of the action the defendants had been carrying on gold-mining operations, by means of ground-sluicing, in the Croninville Gorge and on the Right-hand Branch." There the whole mining industry in that locality might have been blocked if there had been a selection by the company before these reserves were made.

Hon. E. BLAKE: There is always the provision 29.

Mr. Gully: Yes; I shall compare the two presently. It also contains, so to speak, a suspense period during which inquiry can be made. The point of my observation at present is, it would be reasonable to expect the reserves for mining purposes should be antecedent to the selection.

Hon. E. BLAKE: There is nothing in the world to show they should be postponed until after the selections.

Mr. Gully: It is illustrated by Mr. Seddon in his evidence that reserves, if postponed, would have blocked mining in the locality of Maori Gully altogether. Further, it is to be observed that the resumption under the Mining Act, which seems to be relied on to some extent, would be not only inconvenient, but, in a mining district, would be practically useless. There is one clause especially I wish to point out, as to whether there is any power to resume at all where there is a garden or orchard, or house or plantation; and it is obvious, therefore, that any argument which bears on the resumption under the Mining Act——

Hon. E. BLAKE: It is a sort of *pis aller*. It is a remedy by jurisdiction, where it could not be remedied in any other way.

Mr. Gully: Now, let us take the next suggestion, as to what we ought to have done compared with what we have done. It was suggested by Mr. Cooper in argument that if these reserves had been taken, say, once or so, and with a proper interval of time between them, that would have been the only proper thing to do.

Hon. E. BLAKE: I think it was the contiguous blocks Mr. Cooper was speaking of.

Mr. Gully: I was going to show the fallacy of the more extensive intervals of time, because the intervals of time, I submit, must be short. The real substantial test is this: whether the blocks were honestly adjudicated upon, apart from the exact words of the contract; one would suppose that if there had been sufficient and honest adjudication of each block, that would satisfy the terms of the contract.

Hon. E. BLAKE: There is some limitation——

Mr. Gully: No doubt. Of course, I understand we are not called upon to argue anything on the question of excessive area, but only on the method on which these blocks were reserved.

Hon. E. BLAKE: Except with reference to the far-distant future.

Mr. Gully: I shall deal first of all with the subsidiary question, so to speak. My friend was, I think, forced to admit that we had to look to the future; but he said we must look only to the immediate future. Well, it is, after all, a breach of contract or it is no breach of contract. It is difficult to see how anybody could really draw the line; and he himself did not suggest any test by which you could arrive at how much time you are to look forward to or how little, and I do not see how it is possible for any one really to judge; nor is there any reason, I submit, if the contract provides for 750,000 acres of land as a maximum being taken. I submit that the question as to looking forward to the immediate future is not at all a safe test. Why should not the power exercising this authority look forward ten or twenty years, and, if so, where is the line to be drawn? In a country such as this it would be quite reasonable to look forward a very considerable period of time. The whole history of mining reserves shows this, and that must have been in the contemplation of the parties when the contract was entered into. Now, I come to what my friend more strongly relied upon, and that is, the methods in which these blocks were taken. He rather suggested, I understood, that it was a sort of fraud—I do not use the word in the offensive sense—on the power given under the contract, relying to some extent on authorities which I submit are entirely useless, as to the frauds upon powers committed by trustees. They do, however, I submit, point to cases referred to upon this proposition of law. In construing a power you must consider not the actual intention of the party, but the fact, and you must simply come to the conclusion whether or not it is beyond or in excess of the powers which are given. A person may do from the worst possible motives something which is within the powers, and yet that exercise of the power would be perfectly legal. On the other hand, he might do something which is outside that power from the best possible motives.

Hon. E. BLAKE: Evil motive is not attributed here, so that it is not necessary to discuss that subject.

Mr. Gully: I was merely referring to the evidence upon which my friend relied. I submit also, upon the method which was pursued, the company's own attitude upon that must be taken into account. Now, first of all, I say they have admitted all through as a principle that the reserves would have to be made as the contract provides, and that they would have to be made within a reasonable time--promptly. Further, they did not complain, I submit, of the shortness of the intervals of time which elapsed between the reservation of the auriferous blocks. All they complain of is that they themselves did not receive sufficient notice, so far as time is concerned, before each block was settled and application adjudicated upon.

Hon. E. BLAKE: There was no obligation to give notice, and it was agreed to be a matter of reasonable arrangement. I have already stated against you that I do not think in many cases the intervals were sufficiently long to induce any interference, waiver, or abandonment of objection. I leave it on its merits.

Mr. Gully: I now suggest that the words of the contract itself do not support the theory which has been advanced for the company. They appear to endeavour to make the words "at one time and in one block" control the whole section. They make them the controlling words, which they say, strictly construed, are in their favour. Now, it may be a little difficult, perhaps, to find a reason for the insertion of the words "at one time." I suggest it is proper to take into consideration that this clause of the contract was the result of a compromise: the form of the contract was only arrived at after a great deal of contention. As to the words in clause 29, and in (*a*) and (*c*), it is obvious that futurity is looked to. We say that substantial futurity is intended to be provided for in subclause (*c*), because in subclause (*a*) present workings are already provided for, and therefore the words "may be" are manifestly intended to give effect to what is provided for by

subclause (*a*), and therefore, as my friend suggests, it is quite manifest that these words were put in with the object of giving the Governor the right to deal with the future.

Hon. E. BLAKE: I do not think you need labour that, because Mr. Cooper agreed to it.

Mr. Gully: I am arguing that it is substantial futurity that is intended to be aimed at. This also is to be considered: Here is a discretion vested in the Governor. He is the person appointed to adjudicate on this question of futurity, and my friend is precluded; not only the principle of the immediate future is right, but it is so certain that it controls the discretion of the Governor. I was going to touch upon clause 29, because Mr. Cooper seemed to rely to some extent upon it, although he does not seem to me to insist on it. He relied upon the clause because it does not contain the words "may be"—it only contains the word "is"—required. Therefore that means "what is actually required at the present time." But that contention is fallacious, because it makes two provisions for the future, and you do not want the future provided for twice over. Now, as to the position of the contract. My friend's argument was that the decision of these blocks was "wholesale," whereas the adjudication might have been "retail." Now, it seems to me that it would be quite insensible to insist upon a separate decision upon each block, or even upon each group of blocks, for this reason: Assuming that the reserves for mining purposes are urgent, as must be admitted, and varying in degree of urgency, how in the world is the proper officer, or the Governor, on the advice given to him, to ascertain which blocks out of the 750,000 acres ought first to be reserved? And it would really lead my friend into this logical position: Assuming that the Governor would have to consider all the blocks, or a great many, before he made up his mind which to deal with, first taking the ones he so considered entered into that consideration, he could not enter into it again, or, in fact, he could not refer to any block excepting the one which was picked out, because my friend says there must be a separate and distinct consideration applied to each block.

Hon. E. BLAKE: I should say the strong point is that there is no setting apart or proclaiming until the final act of the Governor—that everything else is preliminary. The Minister of the Crown for the time being recommends these things to be done at some future day, whether the Governor acts or not in the distant future.

Mr. Gully: Quite so. I think it is quite plain that the first and final act of proclamation, as done at the time, is what we have got to look at. That is to say, part of these blocks being contiguous, the Governor did not exercise a separate and independent judgment upon each of them. I have no doubt he did do so, but it is not certain quite here that he did not. I have no doubt that all of those blocks, although necessarily considered to some extent *in globo*, were contemplated to be of very large area, and properly so; and notwithstanding there has been separate adjudication as to each particular block. Moreover, the intervals of time surely are sufficient to come within the terms of the contract. These questions of what are called evasive intervals of time—that question is bound up in the question of adjudication, and, so far as the question of time alone is concerned, it surely cannot be said, looking at all the surroundings of this contract, that these intervals of time deserved to be applied to this section. It cannot be said that a week, or a fortnight, or a month—that is the time mentioned here—it cannot be said that that was a breach of the contract.

Hon. E. BLAKE: You say it is not one time?

Mr. Gully: I say it is not one time under the contract, and that evasion does not apply.

Hon. E. BLAKE: I think Mr. Cooper put it, "Want of determination to carry into effect the intervals of time." I do not think he would seriously argue that intervals of a week, a fortnight, or a month, were one time.

Mr. Gully: He argued in this way; he said substantially they were. I come now to the matter of another phrase used in clause 16—namely, the "opinion of the Governor." Now, parallel cases have been suggested where an architect or an engineer's certificate is under a contract made final; and I go further and say that we should take into account, in dealing with these words, any further branch of argument we desire. I should take into account the fact that the Governor is a high officer of State. It may be that the contracting parties have thought fit to leave this decision, which will be assumed to be a proper one—to leave the question to his opinion to a much greater extent than they might be accustomed to do in cases of an ordinary contract.

Hon. E. BLAKE: Substantially, I do not think they thought that they were leaving it to the Governor, but to the Minister of the Crown.

Mr. Gully: No doubt. It seems very difficult to say that they left it to him or any one, or if his decision can be reviewed, in respect to the ground of collusion.

Hon. E. BLAKE: I think you might fairly say that it is not to be looked at so jealously as if it were left to the engineer of the company, who might be assumed to be necessarily biassed.

Mr. Gully: I also suggest that there is some discretion as to the use of the words "*bona fides*," but after what you said was the true position, the words neither add to nor detract anything from the phrase used. The matter is not bound by *bona fides*—they are equitable rights which arose under the contract. It may have been intended to leave not only the question of fact but also to have submitted the *bona fides* to the Governor, giving him the right to decide not only that the reserves were required, but whether they were *bonâ fide* used for mining purposes. Now the Governor is committed to the duty of giving this decision, and, I submit, as I said before, in the absence of proof that it has been an unlawful, collusive, or fraudulent exercise of power, that such can be reviewed at the instance of either party. The general principle indicated by the cases referred to—Downey against the Bishop of London, and other cases—show that as long as there has been some material upon which the person to whom the decision of the matter is committed—as long as there has been some material upon which to act, the Court will not go into the question as to whether there was right or wrong. Therefore I say that, upon what has occurred under subclause (*c*), there has been an adjudication by the Governor, and that his opinion has been given upon the ground, which I submit was a reasonable ground; and I further submit that that

includes the whole of the questions under that part of the clause. I next turn to what I suggest is the principal position of the parties upon this contract—the matter of contract law. I submit that the facts have shown that when these reserves were made the company had placed itself in such a position that it is not entitled to claim——

Hon. E. BLAKE: You mean to say that the right of the arbitrator is barred by the act of the company?

Mr. Gully: Yes; perhaps that is a short and adequate way of putting it. I say that they have come before this Court in such a position as to show that they are disentitled to say that they claim for general damages for breach of contract. I understand that that is now their whole case—that they are here in this position: They say to the Crown, "You broke your contract with us in 1891, and afterwards, and the result was that our finances were ruined; therefore we were unable to carry on our operations, and we sue for the loss on debentures and for substantial damages for the breach." Without elaborating the matter I shall just simply put each proposition, and cite one or perhaps two cases in support. The first proposition is that the contract was broken by the company, the second is that that breach was not waived by the Crown, and the third is that there was no breach by the Crown, or that, if there was, it was waived by the company. The conclusion from these propositions is that the company, having broken its contract, first by non-performance, and secondly by abandonment, cannot show that it has performed the conditions precedent which are the essential foundation for action for a breach of contract. As to the third point, that the company themselves come here as the party who has broken the contract, it may be worth while to say a word or two as to the degree of breach which it would be essential for me to establish in order to support this proposition. For that I refer shortly to "Chitty on Contracts," 736; Pollock, 257; and the case referred to by Sir Robert Stout—Norrington *v.* Wright. Pollock, at 257, says: "The later case of the Mersey Steel and Iron Company, where there was only a postponement of payment, in peculiar circumstances, under erroneous advice, confirms Freeth *v.* Burr, so far as it goes. As a positive test, the rule of Freeth *v.* Burr is doubtless correct: that is, a party who, by declaration or conduct 'evinces an intention no longer to be bound by the contract,' entitles the other to rescind, and this whether he has or has not, apart from this, committed a breach of the contract going to the whole of the consideration. But it seems doubtful whether the test will hold negatively. Can an intention to repudiate the contract be necessary as well as sufficient to constitute a total and irreparable breach? Can there not be, without any such intent, a failure in a vital part of the performance which destroys the benefit of the contract as a whole? Must it not depend on the nature of the contract and the order and apparent connection of its terms? All that the authorities require of us is not to presume delay in payment, as distinguished from delivery, to be in itself a total breach. In other words, non-payment will not as a rule justify refusal to perform on the other side, unless there be something more in the circumstances by which it is shown to amount to repudiation; as in Withers *v.* Reynolds, where there was a deliberate and wilful refusal to pay for the successive deliveries according to the terms of the contract." Then he refers to this case of Norrington *v.* Wright, ending "The contract was for rails to be shipped," &c. I do not think I need go further into that. I do not see how the general principle can be controverted that a substantial breach bars the party that makes it because of breaches by the other party. We desire to treat this as a breach by the company in this matter. We say that the first indication of the breach was in 1890, and more particularly in 1892. But it has to be observed that it was a continuing breach, and I apprehend that the Crown was not bound, and, perhaps, could not under any circumstances be bound, at least was not bound to act upon, either in 1890 or in 1891——

Hon. E. BLAKE: What do you mean by "acting"?

Mr. Gully: By rescinding the contract.

Hon. E. BLAKE: Are you leading up to the rescission?

Mr. Gully: Yes; and also to the question of waiver. I do not think I can keep them apart, as they are mixed up so much together.

Hon. E. BLAKE: You must try and keep them apart, so as not to allow them to be constantly cropping up, like King Charles's head.

Mr. Gully: My point is not as to the rescinding of the contract, but they are bound——

Hon. E. BLAKE: They are debarred because they told you in 1892 they could not complete?

Mr. Gully: That is one reason. Their breach consists in this: First, their declaration; secondly, their conduct in not going on with the work, and that coupled with the fact that the contract time has expired. There would have been sufficient for us on the declaration or abandonment of the work.

Hon. E. BLAKE: Do they allege that they abandoned with your consent.

Mr. Gully: No. It would give us a right of action under the law.

Hon. E. BLAKE: You have nothing under the law in these proceedings.

Mr. Gully: We are not in the midst of a lawsuit at the present time, but there are close questions on this question of breach and waiver, and my point is that we have not waived the breach they committed partly by the abandonment.

Hon. E. BLAKE: I do not understand you. You say that their declaration, positive, deliberate, circumstantial, accompanied with reasons that they were incapable of completing their contract, is itself a breach of the contract. I agree with you that it gives you under the authorities a right under the circumstances to say, "You have definitely abandoned on your side, and now we declare the contract at an end"; but that relates to the rescission.

Mr. Gully: If the contract is still on foot, before we could sue on the breach of 1892——

Hon. E. BLAKE: I do not see yet how you could sue under that declaration.

Mr. Gully: But if we rescinded the contract under that declaration, surely we could sue for damages for non-performance?

Hon. E. BLAKE: At any rate, you are always getting down to the rescission on this point.

Mr. Gully: It is so mixed up with the question of precedent to perform, that it is almost im-

possible to avoid also considering what would be the result in case of rescission. What I do say is that after the contract time expired we were entitled to take every piece of their conduct and every omission on their part, and to take them altogether and ask whether they can satisfy you that the performance of their conditions is such as to entitle them to sue. It seems to me clear law that an intimation of intention not to be bound by a contract is continuous.

Hon. E. BLAKE: That is to say, it justifies your action on a date subsequent to which the intimation was given.

Mr. Gully: Yes, quite so. The case to which I refer is Ripley against McClure (4 Exchequer, 345). This is what Leake says: "If, before the time appointed for performing the contract, one party gives notice to the other of his intention not to perform it, he may be charged in an immediate action as for a breach; in which action the other party may claim prospectively such damages as would be caused by a breach at the appointed time, subject to any circumstances which may operate in mitigation of the damages." This case of McClure is on the point of the continuance of the refusal if there is not a withdrawal.

Hon. E. BLAKE: That seems common-sense.

Mr. Gully: It applies in this case, because there was this indication, which we all agree was absolutely definite, and it was protracted down to the time these proceedings commenced.

Hon. E. BLAKE: You want me to go through and link together a legal argument to prove that there has been a breach of contract, and to say whether that affected the contract at the time it expired?

Mr. Gully: Yes.

Hon. E. BLAKE: They say there was a breach of contract, but that it was owing to your intromission.

Mr. Gully: They claim that the very breach was owing to our action.

Hon. E. BLAKE: You are now arguing that the breach disables them to sue?

Mr. Gully: It really comes down to this: that they admit they broke the contract as from 1890, or at the latest 1892, but they contend that that breach was caused by us.

Hon. E. BLAKE: That is the ground of their whole complaint. They acknowledge that the contract was broken, but say it was through your fault.

Mr. Gully: As to that, I do not intend to address any more argument as to whether they can connect their breach with what the Government have done or left undone. That is a question of fact. I propose next to take the question of the seizure.

Mr. Gully: There is one point on the general contract I desire to touch upon. That is that the breach complained of by the company must be shown to go to the whole construction of the contract, and I submit that Mr. Cooper has an entirely insufficient standing upon the authority of that case. I do not propose to cite the authorities, because there is no doubt about the principle held in Johnston against Mailing (16 Q.B.D. Law Reports) and Hookster *v.* DeLatour ("Pollock on Contracts," pages 52 and 53). As in all those cases, the only question is that the facts show this breach was of a substantial character to go in excuse to the full contract obligations on both sides. So far as the mining blocks are concerned, it is quite evident that they were not in the point of view, and, second, that they were not treated by the company. They are merely, at the most, a comparatively inconsiderable interference with the technical contract and the company, and cannot be in any sense, I submit, said to govern the whole question of the contract, unless they could be successfully shown to have resulted in the financial breakdown of the company.

Hon. E. BLAKE: That is one proposition which Mr. Cooper puts.

Mr. Gully: That is one proposition we have to deal with in our argument on the topic mentioned by Sir Robert Stout, of *quantum meruit*. If they are really suing on this point, the decision would be a complete answer. I do not understand that they are in any sense really suing on the question of *quantum meruit*.

Hon. E. BLAKE: I have not yet seen there is any difference between you, supposing the question arose for damages.

Mr. Gully: I next propose to deal with the question of damages. Obviously, upon the question of damages, the two points are these: First, they have to show that there was a breach of contract; second, that the financial breakdown of the company was connected with that breach. Our answer to that is: First, that there was no breach; second, that, in fact, the breakdown was not connected with the making of the mining reservations; and, thirdly, that it has no effect, and, if it had, it is too remote in liability. These are our answers upon the question of damage. It must obviously be an extremely difficult matter for my friend to establish the second of these propositions—namely, that the financial breakdown flowed from the making of the mining reserves. This question is entirely in a different position before you now than it was before you in the prior tribunal; and I suggest, first of all, in order to test my friend's position, we should ask what they themselves have from time to time considered was the cause of their financial breakdown. It will be found at various times that one or other of the large number of grievances which they have brought against the Crown have been the cause of the financial breakdown. Now, however, if they are to confine it upon this inquiry, they must confine it to the making of the mining reserves, and the improper making, in the contract-sense of the words. That leaves them in a very remarkable and very difficult position. The other difficulties are eliminated, because of the alteration to the Abt system, and the delay caused by the Lake Brunner deviation, the grievance under clause 33 and clause 18, so far as it gives a special right connected with the timber, and the misrepresentation, and Mr. Gordon's evidence.

Hon. E. BLAKE: And defamation?

Mr. Gully: And slander, and something else, have all gone. How can they say that they have successfully traced this financial breakdown to the reserves and the mining reserves? Let me first draw attention to what they themselves suggest, and then let me begin, first of all, in 1890. There we find Mr. Wilson distinctly saying that the difficulties of the company arose from taxation; that

if the property-tax was not modified it would be impossible for them to go on with the Nelson part of the line.

Hon. E. BLAKE: Would you mind referring me to that?

Mr. Gully: I refer to Mr. Wilson's letter to the Nelson *Colonist* of the 29th March, 1890. I quote from that letter. He says, "It may prove an insurmountable barrier against the introduction of fresh capital, which appears to me to be the one means of rapidly developing the almost boundless resources of the country. My directors make no secret of the fact that, unless important modifications are made in the present incidence of taxation upon the company's property, it will be most difficult, if not impossible, upon any reasonable terms to raise the balance of the capital required to finish the New Zealand Midland Railway."

Hon. E. BLAKE: Is there any reference to any other cause of difficulty?

Mr. Gully: No.

Sir R. Stout: There is a statement in the letter that the contract in the Bellgrove line may be unprofitable.

Mr. Gully: I will just refer to that: "I need not say one word in defence of my directors. The names you mention in your article are sufficient evidence of the absurdity of the supposition that they are men requiring compulsion to carry out the company's contract, however unsatisfactory the terms may now prove to be." I suggest, although I speak with great deference on any question connected with finance or the law of finance, because I, at least, know nothing on that head; but I hope it will not be considered immodest if I say it is a question of common-sense that the carrying on of the work was felt to be a practical impossibility, owing, first of all, to the financial position of the company, which started extremely weak in finance, and the further opinion acquired by Mr. Wilson that a great part of the line was absolutely impracticable. Then you come down to 1892, and you find that Mr. Wilson and the company complain in their petition of the making of the reserves. That takes a comparatively subsidiary position, and was not connected with the financial breakdown by Mr. Wilson, either in his examination-in-chief, or, indeed, incidentally when he was being cross-examined. Here is what Mr. Wilson said (question 114, page 9, Parliamentary paper I.–7A, 1892):—

"Have you made any attempt since then to raise further capital?—Yes, we have made several.

"When was the second attempt made?—The second attempt has been made within the last six months. When I informed my directors the works were nearly completed, and advised them to push on with the financial arrangements, we tried then. It looked hopeful until the sudden change in the incidence of taxation, which simply threw a wet blanket over our finance. The most serious thing has been the proposal to tax debentures. But, of course, I may tell you further that the adverse reports as to the value of our land-grants, notwithstanding that we showed satisfactory sales, had a marked effect upon our prospects of raising money."

Mr. Gully: Of course that is the chief thing—the value of the land-grant. I think it was generally understood that the lands were not so valuable marketably as they were previously supposed to be.

Hon. E. BLAKE: It was also referred to as being, in effect, defamatory.

Mr. Gully: It threw a wet blanket on the finance. As to raising money, that statement is also important, as indicating the ground given by the financiers at Home for the feeling about the position of the company by persons to whom Mr. Burchell spoke. A little further on, in answer to question 119: "We were then suffering from the reports as to the value of our land-grant, and the general value of stock in the market. Then comes the most important point, "Would the mining reserves make any difference?—I cannot tell you." Although he is there to establish their grievances against the Crown, any that could be a possible and reasonable ground of complaint from their point of view, he will not say that they would have made any difference at all: "I do not say they were the primary cause. The primary cause was the discredit thrown upon us in the London market owing to the reports as to the value of our land-grant, and the delays." Now, I think I will now refer to what Mr. Wilson says in 1893, at page 17, Parliamentary paper I.—6c, 1893. I refer you to passage beginning: "That is my letter of instructions," . . . "how delicate a task finance is."

Hon. E. BLAKE: There is no doubt that had been the impression. It was the reports outside.

Mr. Gully: The money-markets being unfavourable. I am founding on this the extreme difficulty of placing the breakdown on one cause when there were some others, some arising out of the contract, and some that were admitted to be the effect of it. Then he goes on: "The least breath . . . money-market." We found this observation upon it: that there were admittedly a number of contributory causes, which resulted in the financial breakdown of the company, and that upon only one of them—and that of a subordinate character—the whole breakdown is now placed. How is it possible to say, for instance, that the breakdown did not arise wholly from eight or ten other contributing causes, and not at all from the making of these reserves?

Hon. E. BLAKE: Or it may have been from a more accurate opinion, or from a more favourable opinion, as to the merits of the speculation itself.

Mr. Gully: It is undoubtedly a fact that everybody got to know more about it after the contract was entered into. I shall compare that with Mr. Burchell's evidence, which is the only thing relied upon by the other side, to found a connection between the alleged breach as to the mining reserves and the financial breakdown. Mr. Burchell, at page 187 of the evidence, speaks of his conversations with three or four different persons, who were members of the London Stock Exchange, or, at any rate, who are called "financiers," and who are influenced by the state of the money-market in London. If you take his evidence exactly as it is, without any contradiction or explanation, I submit that it is utterly absurd to found upon it a contention that it shows that the measure of the damage is the financial breakdown of the company, and that that is con-

nected with the making of the mining reserves. This is what Mr. Marnham says, according to Mr Burchell's evidence, "I am very anxious about the position of the debenture-holders"——

Hon. E. BLAKE: I remember the evidence quite well. Please comment on it.

Mr. Gully: The most that it shows is that the three or four persons with whom Mr. Burchell had conversations said there were rumours—vague rumours floating about—that the company was not being fairly treated by the Government in reference to these land-grants, and that is all. They do not even say, although they may have known, that the land-grant would be affected by the making of the mining reserves; and though some of them may have had in their minds the notion that that was part of the grievance, they do not make any point of it. There is nothing in Mr. Burchell's evidence to show that any point was made, in these conversations with the London financiers, of the fact that mining reserves had been made. I do not intend to take up time in going over the evidence to show how ridiculous it was to say that it really affected the position of the colony.

Hon. E. BLAKE: It is not suggested that it was the cause . . . according to your view.

Mr. Gully: Not the . . . How could they legally affect the parties to the contract—the making of these reservations? In the first instance, only very few of them were made at that time; and one does not know how it was reported—if it was reported at all.

Hon. E. BLAKE: I have already said that the other side refer to the statement of the Minister that about 250,000 acres was about to be proclaimed.

Mr. Gully: The answer to that is, that that is not nearly so much as the contract itself does. The contract indicates that a large reservation will be made. It cannot be said that the contract was in any way varied because of the declaration that a third portion of what was allowed under the contract would be made in due time; and, as Mr. Stringer points out, they themselves admit now—apart from the question of principle—that about 750,000 acres are proclaimable. I do not wish to labour the matter, but simply say that it is an extremely difficult proposition to support. Of course it must be conceded that if some persons chose to misrepresent the effect of what the Government had done, and that that influenced the money-market unfavourably——

Hon. E. BLAKE: Of course, they do not argue that. They say you did wrong, and your wrong was reported.

Mr. Gully: I propose very shortly to address a few observations to you upon the general question of the remoteness of damage. The question of remoteness of damage has had a good deal of consideration given to it, but it still remains in this position: that it depends more on the application of particular facts than on the definition of general principles of law. But the rule still remains after Hadley and Baxendale (9 Ex. 341)—the rule of common-sense—and that is that the measure of damage flows directly from the breach of contract, although it may be influenced by the knowledge which the parties had as to the use or value of any particular part of the subject-matter of the contract. You cannot by connecting things through a series of intermediate causes make——

Hon. E. BLAKE: Rather, you would say, it is the measure rather than the quality of the damage to which this rule has special application.

Mr. Gully: Of course, in a case like Hadley and Baxendale you have got a case where a man has certain machinery to construct or repair, and he knows if he chooses to break the contract that the stoppage of the mill must result from a breach of his contract. And, therefore, why should he not pay for it? If a watch can be hired out at £1 per week, and if it is sent for repairs, and the watchmaker undertakes to repair it in a week, and if he does not do it for a month, of course he is liable for the loss resulting from his breach of contract. In Hobbs against the South-western Railway (Law Reports, 10 Q.B., page 111) this is how that case is introduced by Maine: "In a case where a passenger who had been set down with his wife at a wrong station sought to recover from the railway company damages for a cold which his wife had caught by walking in the rain at night, Cockburn, C. J., said, 'You must have something immediately flowing out of the breach of contract complained of—something immediately connected with it, and not merely connected with it through series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of. To illustrate that, I cannot take a better case than the one now before us. Suppose that a passenger is put out at a wrong station on a wet night, and obliged to walk a considerable distance in the rain, catching a violent cold, which ends in a fever, and the passenger is laid up for a couple of months, and loses through his illness the offer of an appointment which would have brought him a handsome salary. No one, I think, who understood the law would say that the loss so occasioned is so connected with the breach of contract as that the carrier breaking the contract would be liable. Here it cannot be said the catching cold by the plaintiff's wife is the immediate and necessary effect of the breach of contract, or was one which could fairly be said to have been in the contemplation of the parties. The wife's cold and its consequences cannot stand upon the same footing as the personal inconvenience arising from the additional distance which the plaintiffs had to go. It is an effect of the breach of contract in a certain sense, but removed one stage; it is not the primary but the secondary consequence of it.' The Chief Justice proceeded to put the cases of a passenger who, from not being carried to his proper destination, walks in a dark night and falls down; or takes a carriage and is upset, suffering bodily injury; and added, 'In either of those cases the injury is too remote, and I think that is the case here; it is not the necessary consequence; it is not even the probable consequence of a person being put down at an improper place, and having to walk home, that he should sustain either personal injury or catch a cold. That cannot be said to be within the contemplation of the parties so as to entitle the plaintiff to recover and to make the defendants liable to pay damages for the consequences.'" That is a somewhat analagous case, I suggest, to this case. The finances of the company caught cold—they took a chill—and that was contributed to by various causes. Unfortunately that cold became chronic, and the physicians, Mr. Salt and other gentlemen, have been unable up to the present time to cure it. The other case is somewhat different, but it illustrates the same principle. It is the case against the Victorian Railway Commissioners (13 Appeal Cases,

page 222). It was a question whether the mental shock caused by fright where a person was crossing the railway was part of the measure of damage. The case is as follows: "Through the negligence of the servant of the defendant in charge of a railway-gate at a level crossing the plaintiffs, while driving over the level crossing, were placed in imminent peril of being killed by a train, and by reason of the premises the plaintiff, Mary Coultas, received a severe shock, and suffered personal injuries, and still suffered from delicate health and impaired memory and eyesight. The defendants, by their defence, denied the allegations in the statement of claim, and further said they would contend that no cause of action was disclosed by it, as it was not stated that either the plaintiffs or their property were struck or touched by the train of the defendants; and, further, that the alleged damage arising from shock or fright without impact was too remote to sustain the action." There is also the case of an opera-singer, where there was a breach of contract, and where the damage was held not to flow from the result. The case of the Railway Commissioners of Victoria against Gaulter is also, I submit, a case in point. In this case there was fright created by the negligence of the railway-guard. In the present case a panic was created in the financial market—or something like a panic—by something which they say was caused by our own act. Supposing it was distinctly shown that our act caused this panic, the case I have quoted is an authority, and the general principle of law is, as laid down by Maine, that no damage could accrue in law. The next point to which I propose to come to is the question of damage. Our answer—and if you are satisfied that it is a complete answer to the whole claim—is that this is not the loss of a profitable contract, but, on the contrary, is the loss of a very unfavourable contract. It seems to me quite useless to go into very precise detail in figures. We have got to speculate, and the most we can do is to take whatever bases there are in order to form a reasonable opinion of what the future is likely to show. I will go back, and shortly take as an illustration the figures given us by the company themselves.

Hon. E. BLAKE: I think they are the most satisfactory basis.

Mr. Gully: Because then we will take them on their own ground, with a slight alteration which I think you will approve of. It seems to me that they have proved that the railway is certain —taking the whole railway right through to Nelson—to eventuate in ten years' time in an annual loss of nearly £50,000, and I get at it on their own figures except as to traffic receipts. Their estimate of traffic receipts during construction seems to be entirely too liberal. I take first of all the interest on £100,000, £5,000; the cost of raising the extra two millions and a quarter, £166,000; but I put that down at £100,000 instead. At all events, it will be admitted that an extra £100,000 is a very moderate estimate.

Mr. Stringer: They have allowed £134,000 on the same basis as before.

Mr. Gully: Then, we take their traffic receipts over the time of construction at £50,000.

Hon. E. BLAKE: You must remember the traffic receipts from the completed portion. Take six years on the basis of the portion already completed, and that would be £24,000, and you propose to give £50,000 only over all the rest of the period.

Mr. Gully: We submit that £50,000 would be a liberal allowance. There would be a total interest-bearing capital you have to provide for of £2,175,000, *plus* £250,000 share-capital, or a total of £2,425,000, which at 5 per cent. would be £121,250, as against which they get £77,369.

Hon. E. BLAKE. Only £58,000 at the end of six years.

Mr. Gully: That is, giving them the full ten years, they get £77,369, which, if our traffic estimate is fair, would lead them into a loss of £43,881.

Hon. E. BLAKE: They rather object to regard it as a thing to be taken into account.

Mr. Gully: They cannot sink money, borrow money, or use money without paying interest.

Hon. E. BLAKE: They recognise that proposition when making the contract originally.

Mr. Gully: As to the expected increase of traffic during the construction of the line, this is the memorandum we attached to their figures: "The portions of the railway already open for traffic are the only portions of the line that could (until line is completed right through) be worked at a profit, so that no profit beyond what is now being realised (about £4,000 a year) will accrue by constructing further portions of the line short of completion." Except the general fact that this line is completed right up to Jackson's, and on the other side of the range you come immediately on to Government railways, there is no settlement at all on the way. It would appear to be a fair inference that while this line is being constructed over the mountains there would be no increase in the passenger traffic.

Hon. E. BLAKE: It was propounded that as there would be no increase of traffic it would save expense in the way of providing way-stations.

Mr. Gully: It leads me irresistibly to the conclusion that, taking this contract as a whole, the thing must have turned out in a disastrous loss, as we know the facts at the present time. But nobody suggests there was any bad faith in the inception of the contract. No doubt it was entered into with a good deal of general ignorance, but the company had every opportunity of testing the question, without taking proper steps to do so. No one suggests bad faith on the part of any one. The company were dealing with people who had local interests, and they should have taken proper precaution to value the property they were to get. If allowed, I might suggest that the position of the company then and now might very well be summarised in two lines:

"Gay hope was theirs by fancy led,
Less pleasing when possessed."

When they got it they found out what a bad line it was. That is all I have to say on the question of damage. I now come shortly to deal with the question of seizure. Now, as to that, as has already been observed, our answer is twofold. First, there were facts which made it reasonable to step in; and, secondly, whether there were or not, the Governor's opinion is conclusive as to whether there was unreasonable delay.

Hon. E. BLAKE: I have to find whether there was unreasonable delay or not.

Mr. Gully: You can only find one way.

Hon. E. BLAKE: That is, upon the evidence. You were suggesting the Governor's opinion was conclusive.

Mr. Gully: If, on looking at the statute, you come to the conclusion that you ought to consider that the Governor's opinion is binding on the contracting parties, you would say so, exactly as an ordinary Court would say, if it so came to the conclusion.

Hon. E. BLAKE: If the Governor's opinion is to be final, why ask the Court to find that there was unreasonable or inexcusable delay or breach of contract?

Mr. Gully: If you say I am bound by your decision to arbitrate on this point, and prevented from raising the argument on the Governor's opinion——

Hon. E. BLAKE: You put me precisely in the position of the Supreme Court under the clause.

Mr. Gully: If you are prepared to be put in that position.

Hon. E. BLAKE: For the purposes of this arbitration. I do not see any *viâ media* at all. I cannot see any argument in jurisdiction which is evolved other than by the process by which Mr. Cooper evolved it. If I am put in the position of the Supreme Court I must exercise judgment.

Mr. Gully: If you have been substituted for the Supreme Court, then, obviously you have the same functions to perform as the Supreme Court, for that simply leaves the other question, as to whether there has been unreasonable delay or wilful breach; but it is quite far enough for us to go if we say there has been unreasonable delay. Mr. Cooper suggested something as to there being some impropriety about the seizure, but, of course, that cannot affect the question.

Hon. E. BLAKE: Mr. Cooper did not ask that it should affect my decision, and it is not going to. I agree with the suggestion—I do not know that it was an improper one for him to make—but he did not ask me to act upon it, and I do not intend to act upon it.

Mr. Gully: Then, I suggest, this is the true test. If they are going to prove there was an impropriety in the seizure—and the onus is on them—it is on the application to you as the Supreme Court that the order is to be made. That brings them straight back again into the difficulty they are under on the first reference—namely, they have got to show conduct on the part of the Government which excuses non-performance by them of the contract. That means, they must show a breach or a series of breaches which justified them in abandoning the contract. What I am endeavouring to get at is this: because you have got grievances under the contract, that cannot give you any contract right at all. Supposing for the sake of argument the Government were wrong, from a fairplay point of view,—in obstructing, delaying, taxation and other things, and in the making of these reserves,—that could not give the other contracting party any right to rescind it unless it amounted to a breach of contract. The idea is elementary that when dealing with contract rights you have got to deal with contract law—whether there has been a breach or breaches which justified the opposite party saying, "I abandon the contract; I will not be bound by it." All the grounds which they have alleged in opening the case, taken together, have disappeared, leaving only this one; so it comes back to the same point they are in on the other reference. They have got to show that the mere fact of these mining reserves being taken justified them, in 1892, in saying, "We have done with the contract." I do not desire to go into detail on this point. I submit they are not able to stand this test. The making of the mining reserves in itself has not done them any harm apart from this rather subtle contention about the injury to finance. It is obvious it has done them no harm at all, and for this reason: that if certain sections may have been interfered with, they got others. Therefore, they sustained no damage from these specific acts. None is claimed, and they have got to show it was a breach. Of course, if the lands comprised in these reserves were apparently auriferous—and they apparently were—they would not be entitled to get them at all. As to our refusal to complete titles to blocks selected by the company, I wish to explain that our reason was, we had to take up a consistent position after the arbitration proceedings had begun, to save our rights under the contract.

Sir R. Stout: I wish just to quote a case I have already alluded to. I intended to mention it on the question of the interpretation of the clause as to the words "may be required." This case is almost on all-fours. It is the case Errington *v.* The Metropolitan District Railway Company (19 Chancery Division, page 559). The words of the statute are these: "Subject to the provisions of this Act, the company may make and maintain, in the lines and according to the levels shown in the deposited plans and sections, the railway works, *et cetera*, and may enter upon, take, and use such of the lands delineated on the deposited plans, and described in the deposited book of reference, as may be required for those purposes." On page 570, the Master of the Rolls deals with the words what "may be required" mean, as follows: "It is the company who are to be the judges of what they require unless they are not acting *bona fide*." Further on, Lord Justice Brett says, "Then, the only remaining question is the one which Mr. Archibald—I think, almost by the course of his argument—practically, substantially, and argumentatively admitted was the only point that could be really raised in this case, which was, assuming that if they did *bonâ fide* want the space occupied by the minerals for use, they could purchase them, and that they could purchase them after having already purchased the surface without them, he says they are bound to show they want that space occupied by the minerals, and they must show that it is absolutely necessary for them, whereas, he says, their affidavits do not show it. Now, I cannot think that 'required' means 'absolutely necessary.' 'Required' means where the company *bonâ fide* think that they are desirable, and are *bonâ fide* of opinion that they are desirable." Now, I cannot think that 'required' means 'absolutely necessary.' 'Required' means where the company *bona fide* think that they are desirable, and are *bona fide* of opinion that they are desirable." Lord Cranworth also deals with another case, Stockton and Darlington Railway Company against Brown (9 House of Lords, page 256).

Hon. E. BLAKE: I wish now to state the finding to which I understand the parties have consented. The finding that the company is entitled to select Block 76; that the company is entitled

to take the moneys which are in the Suspense Account on account of their selections as far as they will go, the lands being charged to them at their B 1 value; and that the company is entitled to make other selections to meet the balance of the £20,000 and odd pounds, which I will state exactly.

Mr. Gully: That is satisfactory to us.

Mr. Cooper: I have very few remarks to make, because I went so fully into the matter on Thursday, Friday, and Saturday last that it would be improper for me to take up any very considerable time of the Court. There are, however, one or two points I wish to remark upon. The first is the question of damages. There is the case of Hobbs *v.* the South-Western Railway Company, which has been put forward so strongly by Mr. Gully as an authority in favour of the Crown. That finding has been practically overruled by the Lords Justices of Appeal in a later case. They did not go the length of saying that they would overrule it, but they did not acquiesce in it, and practically they could not understand how the Judges had arrived at that result. That was in a case already quoted to the Court, MacMahon *v.* Field. It is quite certain that, if the decision had been appealed against, it would have been reversed. Lord Justice Brett says, "Now, I must confess, if I do not acquiesce in that case, I cannot agree to it." The case referred to has been distinctly disapproved, and we rely upon the case of MacMahon and Field in the Court of Appeal. Now, on the question raised by Sir Robert Stout, as to the legal meaning of the contract, I have nothing further to say. My contention was as clear as I could make it in the first instance, and it is not part of my duty to go over my original address. On the question of the principles of damage, I do not see that Sir Robert Stout has answered the position that I have placed before the Court. In fact, I fail to see that there is any disagreement between us as to the question of law. His statement is only giving from another point of view the rules I have endeavoured to lay down, which are sound rules; and if in your judgment there is a breach of contract, I think we are entitled to bring in the principles which I have carefully endeavoured to state to the Court. The case Churchward *v.* The Queen has no bearing whatever on the present case, and I must confess I failed to appreciate the argument of either Sir Robert Stout or Mr. Gully upon this point. I can scarcely conceive that they can seriously argue in this case that, because Parliament has provided no funds to meet damages for breach of contract, therefore we are not entitled to recover damages for breach of contract. That is one proposition that has been made. Or, if we are entitled to recover damages for breach of contract, where Parliament has not provided funds, we are bound to proceed for a remedy at law under the Crown Suits Act. I fail to understand that that argument has any force in it at all. The arbitration clause is quite clear. It contemplates a breach of contract—that a difference may arise between the parties as to what their rights and liabilities are. A difference may arise between the parties as to something done by one or other of them under the contract. On the other points, with regard to the right to arbitrate on the breach, I do not understand that these are questions which are now open for argument, because I understand the jurisdiction has been accepted by your Honour upon all the points of the case. On the question of damages something has been said by Mr. Gully. He said that this contract was originally a worthless contract—that the company took up something which was non-payable—that they could not possibly anticipate obtaining any benefit from it. My answer to that is that you have to take into consideration the position of parties at the time the contract was made. No doubt since the contract was made, owing to the wrongful action of the Government, we claim that such a delay has been caused and such obstacles placed in the way of our obtaining money, that, whether it was a good or a bad contract, we are entitled to look at what the Crown on the one side and the company on the other considered was the value of the contract when it was first mentioned. I say that the Crown to some extent, at any rate, is estopped from saying that the company entered into a bad contract; and that in the opinion of the company it was a good contract at the first. But the circumstances which have turned that good contract into a bad one are, I submit, such as to entitle us to claim that there has been a breach of contract by the Government. On the question of figures, I could not add anything to my former argument, and I do not propose to discuss them again. I went as fully as I could into them on a former occasion, and Mr. Gully has, from his point of view, endeavoured to do the same thing. However, upon one point I wish to make a few remarks: that is, the suggestion that as far back as 1890 the company had determined not to complete this railway. Now, the only ground that they have for that assertion is a letter of Mr. Wilson's published in the Nelson *Colonist*, and I submit there is nothing whatever in that letter which could justify the Crown in inferring that in 1890 the company had come to the conclusion that they could not carry out the contract. In the first instance, we have to look at the circumstances under which that letter was written. It was written in consequence of some suggestion that Mr. Wilson was not carrying out the work sufficiently speedily to satisfy the good people of Nelson. There is nothing in that letter which indicates that the company were not going to carry out the whole of their obligations. On the contrary, Mr. Wilson says that "the directors are men of high standing in London, willing to carry out the whole of their obligations under that contract." It is true he goes into the question of the property-tax, and he says, "the property-tax is pressing rather hardly upon us, and that may render it difficult for us to get the money." But there was no suggestion in that letter that there was any desire on the part of the company to do otherwise than to fulfil the contract, and in a proper spirit to carry out their obligations under that contract. In reference to the other suggestion, that in April, 1891, Mr. Wilson intimated to Mr. Seddon that the company were not able to carry out their contract, the answer to that is that Mr. Wilson had no knowledge of the finances of the company in London at that time, and he was speaking not as a financier of the company, but he was speaking simply as the engineer of the company. It was quite clear from the evidence in April, 1891, that there was no intention on the part of the directors of the company in London such as has been stated.

Hon. E. BLAKE: I think that Mr. Salt privately stated that they received with great surprise the intimation at a later date from Mr. Wilson as to the unprofitableness of the Nelson end of the line.

Mr. Cooper: Yes. In April, 1891, so far as we can see, it would appear that the company seemed to have been in what was good fettle at Home, and it was later on, towards the end of the year, that the difficulties in finance arose. And all those difficulties, I submit, have arisen from acts of the Government which bring us within the legal principles I have endeavoured to lay down to the Court. We bring ourselves within those principles by showing a breach of contract, by showing resultant damage from that breach of contract, and by showing that that resultant damage was the destruction of the finance of the company. The whole of the evidence is now before your Honour, and the whole of the arguments. The contentions that have been raised by my friend are, I think, fully covered by my address to your Honour at the end of last week. I shall not, therefore, take up the time of the Court at any greater length. Perhaps I might add a word in reference to the cases quoted by Mr. Gully. The Victorian case, Railway Commissioners and Galton, was a very peculiar case. It was for a tort founded on a charge of the most trumpery description. A lady was walking close up to the railway line, and while she was there a train came rushing by. She was a weak-minded woman, and fainted, and claimed damages for the injury to her nerves caused by the train rushing by. That was her ground of action. In Hobbs's case there was a real question in that case. A lady and her husband were intending to take the train at the advertised time, but the train was delayed, and the lady caught a cold. The case of McMahon and Field was a similar case, only it was a horse instead of a lady, and the Court of Appeal held that the owner of the horse was entitled to recover damages.

Hon. E. BLAKE: As I stated before, the circumstances under which the case has proceeded have enabled me beyond the ordinary conditions to grapple with the questions involved from time to time, and I do not feel any doubt as to the conclusion I shall ultimately reach. And I intend to make my award almost immediately. The lawyer's natural mind burns to state conclusions, and to justify them by reasons, which appear to him to be conclusive, but the prudent arbitrator refrains.. I have to ask you to whom my notice of award shall be indicated on behalf of each of the parties.

Sir R. Stout: To Mr. Gully, for the Crown.

Mr. Cooper: Mr. Burchell and myself will both be in Wellington within range during the next week; so will Mr. Harris.

Hon. E. BLAKE: It is not necessary to wait, as I shall give my notice to-morrow.

Mr. Cooper: I think the solicitor of the company (Mr. Harris) would be prepared to receive the notice.

Hon. E. BLAKE: Then, the notice of the award will be indicated to both gentlemen to-morrow, and, in closing these proceedings, I have only to express my thanks not only for the great assistance rendered to me by both sides, but also for the kindness, courtesy, and consideration which have made my duties lighter than they otherwise would have been.

Sir R. Stout: On behalf of counsel for the Crown, we have to tender our thanks to you for the great pains and trouble you have taken in the case, and we feel whatever the award may be that it will be satisfactory.

Mr. Cooper: I join with Sir Robert Stout, on behalf of the company, in thanking you.

Hon. E. BLAKE: I declare these proceedings adjourned *sine die.*

The Court adjourned at 3.15 p.m.

NOTE.

With the exception of the remarks on pages 1 and 194 of the evidence, no part of the reports of Mr. Blake's utterances has been revised by him.

No part of the report of Mr. Gully's address has been revised by him.

LETTERS FROM THE CROWN SOLICITOR AND MR. THEO. COOPER ON THE SUBJECT OF THE REVISION OF THE REPORTS OF THEIR ADDRESSES, ETC.

The CROWN SOLICITOR to Mr. KANE.

Wellington, 24th December, 1895.

SIR,— *Midland Railway Arbitration.*

With reference to the proofs submitted to me to-day, which purport to report the proceedings on Saturday and Monday, I desire to state that I absolutely decline to attempt to correct the printed report.

Throughout the case the reporting has been skilful and accurate in part, and I desire to make no reflection on the reporters generally, but I am bound to say that many passages in the proofs as submitted to me are utter rubbish. More than this, the earlier proofs (I refer more particularly to Mr. Hutchison's speech and Mr. Wilson's evidence) have not only been incorrectly reported, but they have been so altered that they now stand in print not in the least as a report of what was said, but rather as a statement of what these gentlemen, on mature consideration, think they ought to have said.

I therefore find it quite impossible to correct and approve of reports of isolated parts of the proceedings when I cannot subscribe to the assumption that the whole report or any part of it is correct.

Accordingly I decline to correct any proofs, and I desire to place on record my conviction that the printed report of the proceedings, taken as a whole, does not even approximately represent what was said or done.

I must ask you to send a copy of this letter to the Hon. the Premier.

I have, &c.,

HUGH GULLY,
Crown Solicitor.

E. W. Kane, Esq.,
In charge of reporting, Midland Railway Arbitration Case.

Mr. THEO. COOPER to Mr. KANE.

DEAR MR. KANE,— Wellington, 6th January, 1896.

In reference to the report of the Midland Railway proceedings, I desire to say that on the whole my address, &c., was reported satisfactorily, and I found it necessary to make very few alterations, and these mainly verbal inaccuracies.

Every now and again, however, I found portions very badly reported—in fact, the report was sheer nonsense—and in such instances I had great difficulty to correct the proofs. An examination of the proofs will show where these patches of misreporting occurred.

I have not inserted in the proofs anything that I did not say, and the proofs as now corrected are accurate records of what I actually said. Of course, in the patches I have referred to I have had to rely on my memory.

The omission of the reporters to insert any of the extracts I read or the letters I quoted, and their practice of leaving them for me to insert under line "Please supply," threw on me a very heavy task indeed. I have supplied all the extracts and documents, &c., quoted by me accurately, but the labour involved occupied me three complete days. I am not blaming the reporters for this, as I recognise the difficulty they met with in the matter. On the whole, I have to thank you and the reporters for the courtesy I have experienced in the matter.

You have my authority to forward a copy of this letter to the Premier.

I shall be glad if you will send me a copy of the proceedings as reported.

Yours truly,
THEO. COOPER.

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