

(No. 24.)



1877.

SESSION II.

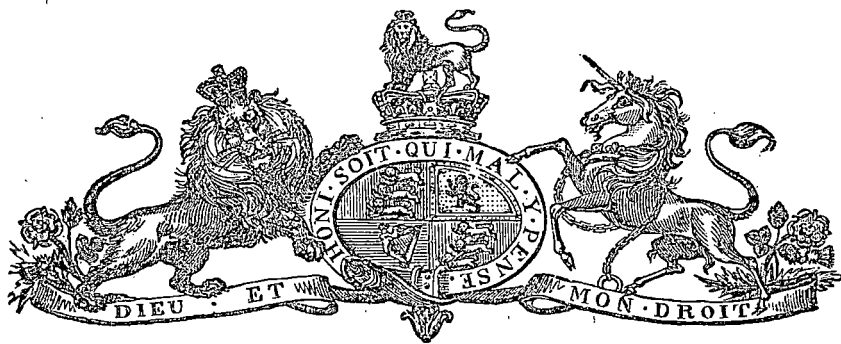
T A S M A N I A.

LEGISLATIVE COUNCIL.

M A I N L I N E R A I L W A Y.

CORRESPONDENCE.

Laid upon the Table by Mr. Crowther, and ordered by the Council to be printed,
April 24, 1877.



MAIN LINE RAILWAY CORRESPONDENCE.

*Tasmanian Main Line Railway Company, Limited,
General Manager's Office, Hobart Town, 2nd February, 1877.*

SIR,

I HAVE the honor to acknowledge the due receipt of your letter of the 19th ultimo, to which I was unable at the time to reply in a manner that would be acceptable to the Government, since you gave me no reason to anticipate that the appointment of an Inspecting Engineer might not be as barren of results as was the last inspection, which I have so strongly deprecated as being grossly unfair in its origin, and, the preliminary instructions given, treacherous in the manner in which it was forced upon the Company; only embarrassing from the very incorrect information obtained, and consequently wholly abortive in leading to any settlement of the matters in dispute, for which alone it was professedly but tardily made, in accordance with the very earnest desire of the Company, and with what had been repeatedly stated was the sincere wish of the Government.

The appointment of a Colonial Engineer-in-Chief, which has since been announced, (and which no reasonable person can doubt has been far too long delayed either for the interest of the Colony or of the Company), gives me every reason to hope that the inspection you propose will be of a *bonâ fide* character; and undertaken with a view to give finality to the question. The Company will therefore give every facility and assistance therein, and trust that you will be successful in obtaining the services of a professional man who will merit the confidence of both parties.

In respect to your remark that the guaranteed interest is withheld from the Company owing to the unfavourable report of Messieurs Mais, Mason, and Stanley, I have to remind you that I lost no time in challenging the statements in that report, and declared that some of them could be proved incorrect without professional evidence, and by any one that had noticed the Railway works at Hobart Town, and elsewhere throughout the line, during their construction. I also pointed out the extremely general character of the terms used, which entirely precluded any detailed denial being given to the objections, or their value in any degree ascertained.

The Company hoped that the Government, having taken the inspection under the fifth clause of the Main Line Railway Amendment Act, would further proceed in the manner so precisely defined by the Contract, and not take the very questionable and inequitable course of withholding money so well and hardly earned.

Before instructing the Inspecting Officer you desire to be informed if the Company have effected such alterations and improvements as justify me in maintaining that the Railway is completed in full accordance with the terms and conditions of the Contract; to which I must reply that I have never wavered in the assertion that the Company have from the first fully and loyally performed their Contract; and it would be impossible to prove this in a more clear and practical manner than by a reference to the train service, which has been continuously performed for the last sixteen months, and for nearly eleven months under the full contract conditions, with extra services not therein required. A reference to any of the passengers who so freely use the line will assure you of its greatly improved travelling condition, owing to the consolidation of the works.

Since June last a very large sum has been expended, on capital account, on the new Launceston Station yard and branch line into Launceston; in the alteration and repair of the third rail over the Launceston and Western Railway; in the renewal of ballast where found unsuitable or deteriorated, (as must happen on every fresh constructed railway); in the maintenance of bridges; increased accommodation at stations and sidings; the construction of new rolling stock, improved locomotive appliances, &c.; all of which I consider to be additional on the Contract requirements, but were executed for the general improvement of the line and to give increased public accommodation.

I have also to acknowledge and thank you for your second letter, of the 19th instant, in which, while stating that the Government are unable to concur in the case of the Company being stated at the bars of both Houses of Parliament, you assure me that the Company cannot desire to arrive at an equitable adjustment of the several points in dispute more earnestly than the present Government.

After this clear and decided expression of the views of the Government, which so entirely accord with those of the Company; I sincerely trust that the Government will, as far as possible, carry out the suggestions contained in my letter of the 6th September last, which was most favourably commented on in Parliament, except that two of the four conditions may now be considered as completed by the intended appointment of a Colonial Engineer-in-Chief, and by the full completion and use of the extension of the Main Line into Launceston.

I was informed by the last mail that the proposal made to you had been most favourably received by the Company and the Bondholders in England; and consequently there needs only the approval of the Government to make a speedy, final, and satisfactory adjustment of every matter in dispute.

Trusting that I may be able to inform my Directors that all difficulties between us have been provisionally arranged,

I have, &c.

(Signed) C. H. GRANT.

Hon. THOS. REIBEY, M.H.A., Premier and Colonial Secretary.

*Tasmania,
Colonial Secretary's Office, 19th March, 1877.*

SIR,

HEARING that the Government of New South Wales have availed themselves of your professional services for the inspection of the Railways in that Colony, I am induced to enquire if it would be agreeable to you to undertake on behalf of this Government the inspection of the Main Line of Railway between Hobart Town and Launceston, and to report whether the works and rolling stock are in accordance with the terms and conditions of the Contract entered into by the Government with the Main Line Railway Company, the parties responsible for the construction of the line?

If it would be compatible with your present engagements and you are disposed to afford us the benefit of your services, may I enquire on what terms you would be prepared to undertake the inspection of the line, &c., and when it would be convenient for you to visit Hobart Town for that purpose?

I have, &c.

(Signed) THOS. REIBEY.

*W. CLARK, Esquire, C.E., at Mrs. Waugh's,
159, Macquarie-street, Sydney.*

TELEGRAM.

Hobart Town, 20th March, 1877.

WILL it be agreeable to you to visit Tasmania to make a detailed inspection of the Main Line of Railway from Hobart Town to Launceston on behalf of the Government? If so, when could you arrange to come, and on what terms?

(Signed) THOS. REIBEY, *Colonial Secretary.*

To W. CLARK, Esq., 159, Macquarie-street, Sydney.

BY ELECTRIC TELEGRAPH.

Sydney, 21. 3. 77.

My services at disposal of Tasmanian Government on completion of work here. Will write you by post.

W. CLARK.

To THOS. REIBEY.

159, *Macquarie-street, Sydney, New South Wales,*
21st March, 1877.

SIR,

I HAVE the honor to acknowledge the receipt of your Telegram on the 20th instant, from Hobart Town, as follows :—

From Hobart Town, addressed to W. Clark,

159, *Macquarie-street, Sydney.*

"WILL it be agreeable to you to visit Tasmania to make a detailed inspection of the Main Line of Railway from Hobart Town to Launceston on behalf of the Government? If so, when could you arrange to come, and on what terms?"

(Signed) THOS. REIBEY."

To this I have replied by Telegram, as follows :—

"My services at disposal of Tasmanian Government on completion of work here. Will write you by post."

(Signed) W. CLARK."

Before leaving England in September last, I was asked if I would proceed to Tasmania for the purpose of reporting to the Board of Directors of the Tasmanian Railway Company on the existing condition of their Railway before I came to Sydney.

As I was at that time under engagement with the Government of this Colony I could not comply with the request.

Subsequently I received from Mr. W. Dent copy of a letter addressed by that gentleman to the Secretary of the Company in London, copy of same I now beg to enclose herewith.

Mr. Dent is the Chairman of the Board of the Oude and Rohilcund Railway; and amongst other avocations I am, when in England, their consulting Engineer, and I feel that the above circumstances should be known to the Tasmanian Government.

I now beg to reply more fully to your Telegram.

I shall be very happy to make the detailed inspection of the Tasmanian Main Line of Railway from Hobart Town to Launceston on behalf of the Tasmanian Government when my work here is finished; this will, I expect, occupy me fully one month from the present time. I should have to communicate by Telegraph with England in order to arrange my business there, so as to admit of such protracted absence.

I think I may say that Mr. Dent would be glad that I should undertake this duty in Tasmania, and to have a fair and independent opinion on the condition of the Railway; and I may also add, that I should be unwilling to enter upon this business except with a view to a settlement of differing opinions.

My terms with the Government here are £500 (five hundred pounds) per mensem, and actual expenses from the time of my leaving England till my return. I am willing to prolong my absence on the same terms of monthly remuneration and expenses while on the business of the Tasmanian Government.

A friend, Mr. P. W. Wall, C.E., has accompanied me from England, and is assisting me here; he is a Member of the Institute of Civil Engineers, and was formerly Chief Engineer of the Calcutta and S. Eastern Railway in Bengal. His services would be very desirable, and would enable me to complete the work in Tasmania in less time than I could accomplish it alone; I would therefore further stipulate, that his services should be paid for at the rate of £200 (two hundred pounds) per mensem, and actual expenses from the date of departure from Sydney and while in the service of the Tasmanian Government.

I have, &c.

(Signed) W. CLARK.

To THOMAS REIBEY, Esquire,
Government Offices, Tasmania.

COPY of Letter from W. DENT, Esq., Director of the Tasmanian Main Line Railway Company, Limited, (and Chairman Oude and Rohilcund (India) Railway Company, Limited), to the Secretary Tasmanian Railway, and handed to W. CLARK, Esq., by the writer.

7, Palace Road, September 18, 1876.

MY DEAR SIR,

You are aware that Mr. William Clark, an eminent Civil Engineer, has been selected by the President of the Institution of Civil Engineers, at the request of the Municipality of Sydney (Government of N. S. Wales), to proceed to Sydney to arrange about their water supply and the drainage of Sydney. Now it occurs to me that it might be

well to see Mr. Sargeant, the Col. Agent for Tasmania, and ascertain if in his opinion it would be likely that the Tasmanian Government would accept Mr. Clark as *sole arbitrator* if he would do so. If this could be arranged, it would give the prospect of a speedy and fair settlement; and as the matter ought not to occupy him long, he having the Engineers' Report and Grant's reply before him, I have no doubt he (Mr. Clark) would be able to find time to do this business on his arrival at Melbourne before proceeding on to Sydney. If that were not feasible, he would arrange to make a special visit from Sydney for the purpose.

Mr. Clark leaves England by the *Northumberland* direct for Melbourne, on Monday next, 25th instant; and if there were any chance of this arrangement being approved, it would be worth while to telegraph to Tasmania on the subject.

In any case Mr. Clark would make an admirable referee if Government insisted on having their own arbitrator.

Yours, &c.
(Signed) WM. DENT.

P.S.—Mr. Clark's address is 9, Victoria Chambers, Westminster.

To J. B. DAVISON, Esq., *Secretary Tasmanian Railway*.

True Copy.—W. CLARK.

By ELECTRIC TELEGRAPH.

27. 3. 1877.

THANKS for letter of 21st instant. Will reply by post.

THOS. REIBEY.

W. CLARK, C.E., 159, *Macquarie-street, Sydney*.

Colonial Secretary's Office, 6th April, 1877.

SIR,

THE Government having appointed an Engineer thoroughly conversant with railway construction, the time has arrived when they are in a position to inspect the Main Line Railway with the view of arriving at a final adjustment of the differences between the Government and the Company as to the due fulfilment on the part of the latter of the conditions of the contract between the Governor and the Company.

The Company cannot more anxiously desire to arrive at an equitable settlement of the various points at issue than the Government; and I am, therefore, now induced to enquire whether you are prepared on behalf of the Company to proceed in accordance with the terms of your letter of the 6th September last, wherein you propose that:—

"1st. The Government to forthwith engage an Engineer on behalf of the Colony to examine the Main Line Railway and works, in conjunction with the Company's representative, and point out to the latter all the requirements of the Government, in order that the line may be made to fulfil their interpretation of the Contract."

"2nd. The Company's representative to immediately execute all such works and repairs (if any) as the Engineer for the Colony may show to be necessary, and reasonably required by the terms of the Contract; and with regard to all works and repairs as to the necessity for which there shall be any dispute between them, such disputes to be referred to the Chief Engineer of New Zealand, and his decision to be binding upon both parties; and the Company to execute with all reasonable speed the works and repairs which such arbitrator shall award to be necessary under the Contract."

If the proposal contained in the foregoing extract still embodies your views as to the method best calculated to attain the end so earnestly desired, I have to suggest that, instead of endeavouring to obtain the services of the Engineer-in-Chief of New Zealand, the possibility of which is questionable and serious delay unavoidable, Mr. W. Clark, an Engineer of eminence recommended by the British Government to the Government of New South Wales, where he is now engaged in connection with the Water Supply of Sydney, be jointly appointed as sole referee upon all matters that may not admit of a satisfactory settlement by yourself and the Government Engineer.

It would of course be necessary that any decision of Mr. Clark should be given only after personal inspection of the line and stock, &c.; and that the necessary legal instrument, rendering his decisions binding upon both the Government and the Company, should be duly executed by the contracting parties.

Trusting that you will favour me with a reply at your earliest convenience, as Mr. Clark's stay in Sydney is very limited,

I have, &c.

(Signed) THOS. REIBEY.

C. H. GRANT, Esq., *Manager Tasmanian Main Line Railway*.

*Tasmanian Main Line Railway Company, Limited,
General Manager's Office, Hobart Town, 6th April, 1877.*

SIR,

IN replying to your letter of this date I have the honor to express my satisfaction, which I believe will be fully shared in by the Tasmanian Main Line Railway Company, Limited, that the Government have taken the necessary practical measures for arriving at a final adjustment of the differences between the Government and Company.

It is most gratifying to learn that the Government now anxiously desire to arrive at an equitable settlement of the various points at issue, and with that object in view are prepared to take the only possible course thereto, being that submitted in my letter to you of the 6th September last, and which your appointment of a Chief Engineer for the colony now renders possible.

You desire to be informed whether the Company would object to the substitution of Mr. W. Clark, C.E., as sole referee upon all matters on which the Chief Colonial Engineer and myself may disagree, in the place of the Chief Engineer of New Zealand, whose services may not be available, while negotiating for and procuring him would cause serious delay. In reply, I must acknowledge that if the services of Mr. Clark can be immediately procured, his substitution for the Engineer-in-Chief of New Zealand would be beneficial to both parties; the clear understanding being that he shall be jointly appointed, and not be merely a nominee of the Government; also, that he should be consulted, and give his final opinion upon every practical question that is in dispute between the Government and Company, after the Chief Colonial Engineer and myself have arranged such matters as we can agree upon.

With this object in view the Company will give Mr. Clark and his assistants every facility for a personal inspection of the line.

As regards the preparation of a legal instrument rendering the decision of the referee binding upon both the Government and the Company, I have instructed the Company's solicitors to consider how far this can be legally done. In any case the reference will bear the whole moral force of our full assent,—that of the Government on behalf of the Colony, and of myself as representing the Main Line Company, even though made without prejudice to our respective principals.

Your letter does not allude to the other condition stipulated for in my letter of the 6th September, and to which the preceding two were subject, viz., the payment of the guaranteed interest now due, amounting to the sum of £22,428 6s., after deducting all sums advanced on loan.

On this point the Chairman of the Company has lately addressed you in most urgent terms; and you have had the opinion of one of the most eminent counsel on railway matters at the English bar, to show that it is both absolutely illegal, and grievously unjust, to continue withholding the interest so fairly earned.

My advices by the last two English mails indicate that the settlement by a reference now proposed will be too late to save the Company from utter collapse, unless I am enabled within the next week to telegraph that the interest has been paid.

Further and more hostile proceedings were being taken in the English Courts by those who had a deep personal interest in ruining the Company; and there is too much reason to fear that the delay of the Colony in facing its engagements will entirely destroy and clear away the property of many whose savings, invested in the faith of a British colonial public undertaking, were faithfully expended in and for the benefit of Tasmania.

I therefore sincerely trust that, while the agreement for a reference under Mr. Clark is carried out, the primary condition of the payment of the guaranteed interest will also be fulfilled.

I have, &c.

(Signed)

CHARLES H. GRANT.

Hon. THOS. REIBEX, M.H.A., Premier and Colonial Secretary.

Colonial Secretary's Office, 7th April, 1877.

SIR,

I HAVE the honor to acknowledge the receipt of your letter of yesterday's date, and in reply desire to express my satisfaction at your prompt concurrence in the proposed joint appointment of Mr. W. Clark as sole Referee in all matters in dispute between the Government and the Main Line Railway Company which may be submitted to him for decision upon the failure of a satisfactory solution by yourself, on behalf of the Company, and the Government Engineer.

The Government now await the result of your reference to the Company's Solicitor as to the validity of any legal instrument that may be prepared binding the Government and the Company to abide by the decision of the Referee; and I shall be glad if you will, at as early a date as possible, enable me to lay before the Law Officers of the Crown the opinion of the Company's Solicitor on this point for their consideration, as the Government cannot consent to seek the assistance of Mr. Clark unless the finality of his award is absolutely binding upon both the Company and the Government.

You remark that my letter of the 6th instant does not allude to the other condition contained in your letter of the 6th September, namely, the payment of the guaranteed interest.

This subject was not referred to by me when treating of the question of the final settlement of the points at issue respecting the due construction of the line in the terms of the Contract, as, in the opinion of the Government, it must form matter for separate and independent consideration.

Whatever decision may be arrived at as regards the payment of the interest claimed, or any portion of it, at the present time, it is more likely to hasten the satisfactory settlement of existing differences of opinion as respects the fulfilment of the Contract if the two subjects are dissevered and kept entirely distinct.

I have, &c.

(Signed) THOS. REIBEY.

C. H. GRANT, *Esq.*, *Manager Main Line Railway.*

*Tasmanian Main Line Railway Company, Limited,
General Manager's Office, Hobart Town, 9th April, 1877.*

SIR,

I HAVE the honor to acknowledge the due receipt of your letter of the 7th instant, and in accordance with your instructions have communicated with the Main Line Railway Company's solicitors as to the validity of any legal instrument that may be prepared, binding the Government and the Company to abide by the decision of Mr. W. Clark, jointly appointed, as sole referee.

Upon this point the Company's solicitors are clearly of opinion that no "absolutely binding" legal document can be prepared, since neither the Government, nor myself, as representing the Company, are, either by the law or the Contract, empowered to sign away any of the Contract rights or conditions; and it is extremely doubtful whether any such could be surrendered unless under the authority of Acts of Parliament passed both by the Tasmanian and British Legislatures.

On the other hand the moral power of both parties is unquestionable; because I feel sure that any Tasmanian Parliament will fully endorse the action of the Executive Government in the settlement of a question that is of such vital interest to the Colony; while the approval of the Company has been given in letters, from which I have the honor to quote, as hereunder.

The Secretary (Mr. J. B. Davison), writing me under date of the 24th November, states:—

Your letter (No. 122, Printed Correspondence), as well as the Company's petition, presented to the Legislature by Dr. Butler, are quite in accord with the general views of the situation held on this side, and I believe will be satisfactory to all parties if carried out; but, for reasons which have been explained, [the total absence of legal authority] the Directors cannot delegate to you powers to carry out all the proposals therein submitted.

Again, on the 22nd December, he further states:—

I have already informed you that your letter to the Colonial Secretary contains propositions that would be satisfactory to all parties on this side for the solution of the difficulties with the Government.

The Directors wish you to persevere with your propositions of the 6th September, omitting the 3rd condition, now fulfilled; of course, preserving all the Company's rights under the Contract.

I notice that a great deal has been said in Parliament, and in the press, about your having no power to concede permanently and finally any Contract rights of the Company. I may add that the Directors have no power to concede any of these rights without the consent of the bond and shareholders, and they will struggle hard before conceding anything. You have already given a practical proof that the Company can fulfil the Contract, and it only remains for the Government to do the same.

It is not for the Company now to make any proposition that would modify the Contract, which we maintain has been fulfilled; but if the Government have any requirements that can be reasonably demanded, under the Contract, let them state what they are. Hitherto the demands of the Government have been most indefinite; they employed Engineers accustomed to the construction of railways costing at least double the amount guaranteed to us, who naturally condemned the line, as not being equal to their standard, after we had expended more than the £650,000; but they did not give any statement that would guide us as to what they would accept. I am requested again to press upon you the importance of obtaining some such statement from the Government, or their Engineer.

On the 19th January last he writes :—

The Directors think it essential that you should continue to press for a more definite reply to your letter of the 6th September last, (No. 122, Printed Correspondence), the Colonial Secretary having promised, in his reply of the 8th September, that the subject should receive the earliest and prompt consideration of His Excellency's responsible advisers; but a considerable time has elapsed without any further notice being taken.

And lastly, in a letter dated the 16th February, received by the last Mail, he states :—

Whatever concessions the Government may require, if you consider them fair and reasonable, you might give a conditional assent to them, or accept them without prejudice; and I have no doubt they would be confirmed from this side.

The Chairman of the Company (Mr. G. Sheward) in addressing you officially, under date of the 16th February, thus concludes his letter :—

The Directors and the Committee of Debenture holders desire me to express the hope that an amicable settlement of all matters in dispute may be speedily arrived at.

While, therefore, neither the Government nor myself have the power to make an agreement that would be "absolutely binding," I trust I have shown that any amicable arrangement I may enter into with the Government would be approved by my principals, and consequently there is every inducement to proceed thus far in the matter.

It is with much regret that I notice your refusal to entertain the question of the payment of the guaranteed interest, so long overdue, in connection with a proposal to submit other differences to a Referee; but having in my last letter fully stated the extreme hardship and injustice that is done the Company by this protracted delay, I must, for the present, leave its consideration in your hands.

I have, &c.
(Signed) CHARLES H. GRANT.

The Hon. the Colonial Secretary.

Colonial Secretary's Office, 11th April, 1877.

SIR,

I AM in receipt of your letter of the 9th instant, in reply to mine of the 7th.

You state that the Company's solicitors are clearly of opinion that no "absolutely binding" legal document can be prepared, since neither the Government nor yourself, as representing the Company, are, either by the law or the Contract, empowered to sign away any of the Contract rights or conditions; and that it is extremely doubtful whether any such could be surrendered, unless under the authority of Acts of Parliament passed both by the Tasmanian and British Legislatures.

It appears to the Government that you have misapprehended the objects contemplated by the appointment of Mr. Clark as ultimate referee.

The Government have never intimated any desire to "sign away any of the Contract rights or conditions," neither are they prepared to "surrender" any themselves, or to seek such surrender from the Company.

On behalf of the Company you have constantly affirmed that the conditions of the Contract have been faithfully fulfilled. To this the Government, guided by the opinion of competent engineers, have demurred, and the present proposal, based on your letter of the 6th September last, is distinctly restricted to the settlement of the differences existing between the Government and the Company as to the fulfilment by the Company of the conditions contained in the Contract.

Within the limits of the Contract, the Government are prepared to bind themselves to abide by the decision of Mr. Clark upon matters which may remain in dispute after a detailed inspection of the line by the Government Engineer on behalf of the Government, and yourself on behalf of the Company; but unless such decision is made legally binding upon *both* parties to the Contract, the reference would, in the opinion of the Government, be practically valueless, however great the moral weight of your individual assent might be.

I have, &c.
(Signed) THOS. REIBEY.

C. H. GRANT, *Esq., Manager Tasmanian Main Line Railway.*

*Tasmanian Main Line Railway Company, Limited, General Manager's Office,
Hobart Town, 11th April, 1877.*

SIR,

I HAVE the honor to reply to your letter of this date, in which you state that, within the limits of the Contract, the Government are prepared to bind themselves to abide by the decision of the Mr.

Clark they have nominated as arbitrator, upon matters which may remain in dispute, after a detailed inspection of the line by the Government Engineer on behalf of the Government, and by myself on behalf of the Company.

On the part of the Company, and to the fullest extent of my powers, I have the honor to state that I adopt the exact proposal of the Government, it being clearly understood between us that the appointment of Mr. Clark as "ultimate referee" shall be mutually made, and so explained to him, and that every question or dispute at issue between the Colony and Company shall be referred to and finally and conclusively determined by him.

I have, &c.

(Signed)

CHARLES H. GRANT.

The Hon. the Colonial Secretary.

Colonial Secretary's Office, 14th April, 1877.

SIR,

I HAVE the honor to acknowledge the receipt of your letter of the 11th instant, in reply to mine of the same date, in which you inform me that, on behalf of the Company, and to the fullest extent of your powers, you adopt the exact proposals of the Government, it being clearly understood that the appointment of Mr. Clark as ultimate referee shall be mutually made and so explained to him, and that every question or dispute at issue between the Colony and Company shall be referred to him, and finally and conclusively determined by him.

Allow me to remind you that, as stated in my letter of the 11th instant, the reference to Mr. Clark is distinctly restricted "to the settlement of the differences existing between the Government and the Company as to the fulfilment by the Company of the conditions contained in the Contract."

The Government are not prepared at the present time to submit any other questions or dispute at issue between the Colony and Company to Mr. Clark as ultimate referee.

As I stated in my letter of the 7th instant, the question of the payment of the guaranteed interest is one which must form matter for separate and independent consideration. It is not of a nature requiring as a matter of necessity the services of a professional Engineer in its solution, and the Government deem it desirable that if you are prepared to concur in the proposals contained in my letter of the 11th instant, your acceptance should clearly recognise the limit as regards the nature of the questions to be referred to Mr. Clark.

Awaiting your reply,

I have, &c.

(Signed)

THOS. REIBEY.

C. H. GRANT, Esq., *Manager Tasmanian Main Line Railway.*

*Tasmanian Main Line Railway Company, Limited, General Manager's Office,
Hobart Town, 14th April, 1877.*

SIR,

It is with great regret that in doing myself the honor to reply to your letter of this date I feel unable to accept the terms you propose, on account of their extremely inequitable character.

You state that the reference to Mr. Clark is to be distinctly restricted to the settlement of the differences between the Government and the Company as to the fulfilment by the Company of the conditions contained in the Contract.

I would ask what interest the Company can have in such an arbitration; or for what reason they should engage in it? They fulfilled the Contract up to the 13th March, 1876, and received the guaranteed interest; while looking at the actual facts, they feel entirely at a loss to conceive how it can reasonably be asserted that the Contract since that date has not been fulfilled. On the other hand, they are advised by numerous counsel of eminence in their profession that both legally and equitably the Government have violated the Contract.

It is of no interest to the Company that Mr. Clark, or others, should be brought here to pick out and record trifling imperfections, should any exist; but it is *absolutely necessary to their very existence as a Company* that the Government should at once fulfil their contract obligations.

If then the Company are willing to surrender their position under the Contract and consent to a reference on matters which have already been decided by experience and facts, it is surely a very small matter that the Government should also consent to refer their proceedings to the same

authority; for although it may not be a matter of necessity that the payment of the guaranteed interest should be referred to a professional engineer, it is incontestable that any decision thereon must necessarily be arrived at on *purely engineering considerations*; and that no one is so fitted on every ground to act as arbitrator on this question as a properly qualified engineer.

If the Government are willing to act mutually and equitably, the Company will gladly concur in the appointment of Mr. Clark to settle "the differences existing between the Government and the Company as to the fulfilment by *the Government and Company respectively* of the conditions contained in the Contract;" but I am at a loss to understand why Mr. Clark should be brought here to give an opinion on mere matters of detail, when there is no condition, or even a promise from the Government that they will surrender their extremely illegal and inequitable position, nor make any endeavour to save the Company from the impending annihilation which is solely due to their action.

If the Government are willing to pay the interest at once—even under protest—the Company will consent to the reference in the exact terms you desire to impose.

I have, &c.

The Hon. the Colonial Secretary.

(Signed) CHARLES H. GRANT

Colonial Secretary's Office, 17th April, 1877.

SIR,

I HAVE the honor to acknowledge the receipt of your letter of the 14th instant, in which you inform me that you are unable to accept the terms proposed in my letter of that date for an ultimate reference to Mr. W. Clark of all questions in dispute between the Government and the Main Line Railway Company as to the fulfilment by the latter of their Contract obligations, such questions so to be referred being, as suggested in my letter of the 7th instant, as to matters which would not admit of a satisfactory settlement after an inspection of the line by the Government Engineer and yourself jointly.

You ask, "what interest the Company can have in such an arbitration, or for what reason they should engage in it?" I reply, in order to decide by a final reference to an independent professional engineer of undoubted eminence the question whether the Government or the Company are correct in their directly antagonistic opinions as to the fulfilment by the latter as to their Contract obligations.

The Government decline to accept as their guide the legal opinion of counsel upon an *ex parte* statement of the Company; and until it is shown by a professional inspection of the line (to be accepted by both parties as final, so far as regards the faithful fulfilment by the Company of the conditions of the Contract) that the constant averment by the Company that the conditions of the Contract have been fulfilled, it cannot be said that the Government have violated the terms of the Contract.

The Government have no desire that Mr. Clark "should be brought here to pick out and record trifling imperfections;" nor will the terms of the proposal contained in my letter of the 11th instant bear such a construction.

The Government maintain that the line is faulty in construction, and that it does not fulfil the conditions of the Contract. This position is fortified by the professional opinion of colonial engineers of high standing, and under such circumstances the Government are debarred from taking any action which would involve a surrender of their Contract rights.

It is evident that, until the all-important issues involved in the diverse opinions of the Government and the Company upon the construction of the line according to the Contract have been finally settled, the Government cannot consent to admit or liquidate the claim of the Company for interest; and they will much regret if, by an adherence to the objections you have raised, the opportunity should be lost of arriving at an amicable settlement of the differences between the Government and the Company as to the due construction of the line in the terms of the Contract.

I have, &c.

(Signed) THOS. REIBEY.

C. H. GRANT, Esq., Manager Tasmanian Main Line Railway Company.

*Tasmanian Main Line Railway Company, Limited, General Manager's Office,
Hobart Town, 18th April, 1877.*

SIR,

I HAVE the honor to acknowledge the receipt of your letter of the 17th instant, and much regret to find that you continue to take such a partial and one-sided view of the controversy between

the Government and the Company; desiring to limit the reference you propose to a possible, but presumed default of the Company in some minor items of contract, while the settlement of the infinitely more serious default of the Government is left wholly unprovided for.

I cannot but think that any reference of the nature you propose would be greatly vitiated for want of mutuality, and in the end prove acceptable to neither party. As before stated, the Company have no interest whatever in getting the opinion of an independent Engineer, however eminent in his profession, on the question as to whether or not they have fulfilled their Contract obligations. They have proved this by the irresistible logic of facts, and only desire that the Government should, however tardily, fulfil their undeniable obligations under the Contract, and pay the money due.

You state that the Government decline to accept the legal opinion of counsel on an *ex parte* statement of the Company, and wish the Company to prove their case by concurring in a professional inspection of the line, to be accepted by both parties as final, so far as regards the faithful fulfilment *by the Company* of the conditions of the Contract. I again ask, to what end does this lead? The Company are nauseated by inspections of every kind, and by *ex parte* exaggerated reports, and have no desire to furnish two more battledores to the political shuttle-cock of the guaranteed interest, unless in some degree assured that it will end in the Government finally taking both a moral and legal view of their duties under the Contract.

The Government maintain that the line is faulty in construction, and that it does not fulfil the conditions of Contract, on the *ex parte* statements of Colonial Engineers; and you contend that therefore the Government are debarred from surrendering their contract rights; but most of the opinions of these Colonial Engineers have been entirely falsified by experience, and the Government still neglect their imperative duty under the Contract of stating what it is they object to.

On the other hand the Company, as previously frequently mentioned to you, are advised by many legal authorities, both English and Colonial—of which the last opinion only was sent you, on account of its greater detail—on a full consideration of all the conditions, and not simply “a case,” that the Government have violated their Contract since the 21st March, 1876; while this opinion was officially communicated by the Government to the House of Assembly, as being that of two of the most esteemed and reliable legal authorities of this Colony, who have always been professionally opposed to the Company, and could not have formed their views on an *ex parte* “case” or opinions.

Since, therefore, each party directly and distinctly charges the other with breach of contract, is it reasonable that one side only should be tried?

The legal contention of the Company is that the Government should pay the interest, and all contingent expenses consequent on their default, and should they have any complaint against the Company must proceed against them according to the law and the Contract. Why, therefore, should the Company wholly surrender this position without even the *promise* of any resulting benefit?

They do so to a most serious extent in consenting to *any* reference whatever, and it would be in the highest degree unreasonable to expect them to enter upon an arbitration that did not embrace the whole case.

Having put the facts thus plainly before you, I will, on behalf of the Company, make one more effort to meet your desires, and agree to the appointment of Mr. Clark, on the condition—of which the equity cannot, I think, be questioned—that he be also required to determine whether the Contract was reasonably completed by the Company on the 15th March, 1876; and if not, to state precisely the nature and amount of damage sustained by the Government, and recoverable from the Company, by reason of their default; and further that the imputed breach of contract by the Government be immediately referred to the Law Officers of the Crown in England, on “a case” agreed upon, and stated by the Attorney-General and Solicitor-General of this Colony, together with the Company’s Solicitors.

It appears to me impossible that a *bonâ fide* settlement of the matter can be arrived at on any fairer terms; and that either side rejecting them would be open to the imputation of desiring to make “the worse appear the better cause,” as demanding arbitration simply as a hopeful means of escape from an untenable position; or refusing it from the conviction that they have not acted honestly throughout the Contract.

I have, &c.

(Signed) CHARLES H. GRANT.

The Hon. THOS. REIBEX, M.H.A., Premier and Colonial Secretary.

Colonial Secretary's Office, 18th April, 1877.

SIR,

IN reply to your letter of this day's date, I cannot but express my surprise and regret at the general tone you have thought proper to adopt in your communication. Several paragraphs are conceived in a spirit manifestly antagonistic to the prospects of an amicable adjustment of differences existing between the Government and the Company, and contain matter irrelevant to the question at issue.

Without unnecessary repetition, I have only to state that my letters of the 7th and 11th instant clearly set forth the proposals of the Government for a speedy and final settlement of the differences between the Government and the Company as to the due fulfilment of their Contract by the latter.

If you are in earnest in your desire for such a settlement, I cannot understand why you should hesitate to agree, inasmuch as I am at loss to comprehend any more honorable or just mode of procedure than that already indicated, and one from which the Government decline to depart, as proposed in the latter portion of your letter now under acknowledgment.

I have, &c.

(Signed) THOS. REIBEY.

C. H. GRANT, Esq., *Manager Tasmanian Main Line Railway.*

*Tasmanian Main Line Railway Company, Limited, General Manager's Office,
Hobart Town, 19th April, 1877.*

SIR,

I HAVE the honor to acknowledge the receipt this day of your letter of the 18th instant, and much regret you should consider any expression I have used as being antagonistic to the prospects of an amicable settlement of differences existing between the Government and Company; such settlement being most ardently desired by the Company.

Unfortunately I am unable to discover from any of your letters, including those of the 7th and 11th instant, that the enquiry by Mr. Clark into the proceedings of the Company only will have the slightest effect in securing to the Company that justice they so reasonably demand, and of which the payment of the guaranteed interest is the principal consideration.

In your letter of the 11th instant you state that, "within the limits of the Contract, the Government are prepared to bind themselves to abide by the decision of Mr. Clark," &c., but the inspection, or arbitration, proposed by the Government is necessarily *outside of the Contract*, and only proposed as furthering the views of the Government. In other words, it possibly may be of advantage to the Government, but you have not alluded to one single consideration that might make it beneficial to the Company.

It is surely the duty of the Company,—before voluntarily consenting to be tried on the Contract,—at least to see that it ensures the award being carried out; whereas there is nothing to show that the Government will then undertake any of their responsibilities under the Contract, which the Company consider they have hitherto most grievously neglected.

It may appear to you an "honorable and just mode of procedure" to advocate one side only of Contract obligations, but I am sure you will pardon the other side for not viewing the matter in that light; and it would therefore appear that there is nothing but a strict legal interpretation of the Contract, on both sides, to fall back upon, however prejudicial the consequences may be to the Colony, or absolutely ruinous to the Company.

Recurring to your letter of the 7th instant, I notice your statement that the payment of the guaranteed interest "must form matter for separate and independent consideration. Whatever decision may be arrived at as regards the payment of the interest claimed, or any portion of it, at the present time, it is more likely to hasten the satisfactory settlement of existing differences of opinion, as respects the fulfilment of the Contract, if the two subjects are dissevered, and kept entirely distinct."

I do not dissent from this dictum, but would add that the payment of this interest (which the Company would consent to receive under protest, although contending it is legally due,) would withdraw the obstacles to the satisfactory settlement of the differences you refer to; and as you so clearly state that the Government are willing to deal with the payment of the guaranteed interest, independently of the reference to Mr. Clark, they now most earnestly commend this matter to your serious consideration.

I have, &c.

(Signed) CHARLES H. GRANT.

The Hon. the Colonial Secretary.

Colonial Secretary's Office, 21st April, 1877.

SIR,

I HAVE the honor to acknowledge the receipt of your letter of the 19th instant.

It is a source of sincere regret to the Government that, on behalf of the Company, you should reject the reference to Mr. Clark as proposed by the Government; but as I gather from your letter that such is your decision, I can see no sufficient object in replying at length to the respective paragraphs in your communication, and continuing a correspondence which, from the tone of several of your remarks, is not calculated to remove or lessen the difficulties surrounding the questions at issue between the Government and the Company.

I have, &c.

(Signed) THOS. REIBEY.

C. H. GRANT, Esq., *Manager Tasmanian Main Line Railway.*

*Tasmanian Main Line Railway Company, Limited, General Manager's Office,
Hobart Town, 23rd April, 1877.*

SIR,

I TRUST that you will not consider it presumption on my part, after the due receipt of your letter of the 21st instant, which apparently closes all negotiation on the subject of the reference to Mr. W. Clark, if I conclude the correspondence on the part of the Main Line Railway Company by a short statement of the matters on which we join issue.

Your first proposal of the 6th instant was apparently based on and assenting to my letter of the 6th September; but, unfortunately, the only condition in which the Company had any interest (viz., the payment of the interest) was ignored.

This fundamental objection to the reference was pointed out by me in reply, and then it transpired that the Government desired a partial reference, which, in effect, would be merely an opinion couched in general terms as to the fulfilment by the Company of the conditions named in the Contract. You however abstained from stating that the Government would accept or act upon the views of Mr. Clark, except as "within the limits of the Contract;" whereas, the reference to Mr. Clark is acknowledged by both sides to be legally outside the Contract.

Furthermore, you would not consent to allow Mr. Clark to state his award in such a manner that it could be practically dealt with either by the Government or by the Company; consequently his services, while unnecessary and wholly useless to the Company, would not afford the Government the detailed information necessary for arriving at a prompt settlement of all questions.

Adverting to your reference to the tone of my remarks, I have to express sincere regret if anything I have written can be thought to reflect personally upon yourself or the Government; since, while feeling most strongly that the Company have not been treated with that justice which, as between man and man, they could enforce in the courts of law, nevertheless I have earnestly desired in discussing the matters at issue to address you in perfectly respectful and becoming language, and have to thank you for the extremely courteous replies you have vouchsafed to my communications.

I have, &c.

(Signed) CHARLES H. GRANT.

The Hon. the Colonial Secretary.

Hobart Town, 6th April, 1877.

SIR,

WE have the honor to submit for the consideration of the Government the draft of the agreement which has been prepared by the Hon. Mr. Giblin on behalf of the Company, with the consent of the Attorney-General, with the view of finally settling all disputes between the Government and the Company upon the basis of Mr. Grant's letter of 6th September, 1876. Mr. Giblin had instructions to insert all necessary clauses to protect the rights of the Colony under the Contract, and to show clearly on the face of the agreement that in paying the guaranteed interest under protest the Government do not either waive or prejudice any of the objections which they have taken to the performance of the Contract by the Company. These instructions have been most thoroughly and efficiently carried out, and we trust that the terms of the agreement will meet with the immediate concurrence of the Government.

We received by the English mail, delivered on Tuesday, two opinions of Mr. Wm. Crockett Fooks, Q.C., of London, who is a most eminent barrister, and has had a very large experience in preparing and advising upon the construction of contracts. We send herewith copies of these

opinions for the information of the Government, and trust that after these have been perused the Executive will at once pay the guaranteed interest due to the Company up to the 31st March last, in terms of the Agreement now forwarded,—for to delay the payment for another unnecessary hour will be inflicting upon the Company a legal as well as a moral wrong.

You will observe that Mr. Fooks is clearly of opinion that the Colony are legally bound to pay the interest which they guaranteed to pay upon the line being constructed and opened for traffic; and that it is a violation of fundamental principles of law for the Government to make a few alleged defects in the construction of the railway an excuse for totally repudiating the guarantee of the Colony. Mr. Fooks has evidently given the subject his most careful attention, and considered the case in all its bearings; and we have the authority of the secretary to the Company for saying that Mr. E. T. Baldwin, another barrister at the English Bar, Mr. Castle Smith, solicitor to the Standard Assurance Company, who are very large bondholders, and several other influential solicitors, have all advised that the position hitherto taken up by the Colony in withholding the guaranteed interest cannot be justified.

The Agreement sets out what we have so fully explained personally to the Members of the Executive, namely, the great danger that exists of the proceedings for liquidation being continued; and this means the total collapse and ruin of the Company; and we regret to inform you that the last letters received by Mr. Grant on Tuesday advise us that further proceedings are threatened, and that the Company may be liquidated at any moment unless a telegram is received in London that the interest has been paid.

We have never failed to point out both to your Government and that of your predecessors in office that the Colony has various remedies under the Contract abundantly sufficient to protect all its rights, and ensure the faithful performance by the Company of all its Contract obligations; and we think it is to be deeply regretted that instead of availing themselves of these remedies, the Government have (in spite of the efficient rendering of the train service for nearly 13 months, the fulfilment of the speed, and the complete refutation thereby given to the reports of the inspecting Engineers) taken up a position which is now pronounced by the most competent authorities to be not only utterly at variance with the principles of equity and justice, but a violation of law and a gross breach of the obligations imposed upon the Colony by the Contract.

We do trust, Sir, that you will give this matter your best and immediate attention, and that the Government will at once pay the guaranteed interest, for which a full consideration has been rendered by the Company to the Colony; for we feel sure that to longer withhold it is (to quote the words used by the secretary of the Company in his letter to you, dated the 16th day of February last,) “a violation of the principles upon which all business between contracting parties throughout the world is conducted.”

We have, &c.

(Signed) DOBSON & MITCHELL.

The Hon. the Colonial Secretary.

[Draft.]

An Agreement made the day of April, A.D. 1877, BETWEEN The Honorable CHARLES MEREDITH, Colonial Treasurer of Tasmania (acting on behalf of the Government of Tasmania), of the one part, and THE TASMANIAN MAIN LINE RAILWAY COMPANY, LIMITED, of the other part.

WHEREAS by a certain Contract dated the Fifteenth day of August, 1871, and made between His Excellency CHARLES DU CANE, Esquire, the then Governor of Tasmania, by and with the advice of His Executive Council, for and on behalf of the Government of Tasmania, of the one part, and the said Railway Company of the other part, the said Company agreed to construct, maintain, and work a Main Line of Railway between Hobart Town and Launceston, or between Hobart Town and any point on the Launceston and Western Railway with running powers over that Railway to Launceston, subject to and in accordance with the conditions set forth in the Schedule to such Contract: AND WHEREAS by the said Contract it was (amongst other things) provided that the Governor should guarantee to the said Company interest at the rate of Five Pounds per centum per annum, payable quarterly, upon the money actually expended in and for the purposes of the construction of the said Main Line of Railway up to and not exceeding the sum of £650,000 during the period of construction and for Thirty years from the opening of the entire line for traffic, but that no sum should be payable for guaranteed interest for any period during which the Company did not continue to maintain and work the said line of Railway in an efficient manner so as to afford all sufficient station accommodation and due facilities for the passenger and goods traffic of every portion of the line: AND WHEREAS by the Schedule to the said Contract it was (amongst other things) provided that the said Railway, together with all stations, rolling stock, and all other works connected with the said Railway, should be constructed of the best material and in a thoroughly substantial manner: AND WHEREAS the said Company have constructed a line of Railway from Hobart Town to a point on the Launceston and Western Railway near Evandale, and have laid down a third rail on the Launceston and Western Railway from the Evandale Junction into Launceston; and the said Company

claim that the said Railway has cost upwards of £650,000 in its construction and equipment, and that it fulfils in every respect the conditions of the said Contract and of the Schedule thereto: AND WHEREAS the Government of Tasmania assert and contend that the said Railway does not in various respects fulfil the conditions of the said Contract and of the Schedule thereto: AND WHEREAS the said Company have been running trains from Hobart Town to Evandale Junction, and from Evandale Junction to Hobart Town, from the 15th day of March, 1876, to the 31st day of October, 1876, and the Company contend that the said trains were so run in complete fulfilment of the said Contract during the said period, and that the working expenses of the said Railway exceeded the traffic receipts during the said period, and that consequently interest at the rate of £32,500 per annum was due to the Company for the said period; and they have made demand upon the Government for payment of interest at the said rate for the quarters or parts of quarters ending the 31st day of March, the 30th day of June, and the 30th day of September during such period, but the Government deny such assertions, and have hitherto refused and declined to pay such interest, alleging the non-fulfilment by the Company of the said Contract: AND WHEREAS on the 3rd day of June, 1876, the Company being in need of funds to enable them to work the said Railway borrowed from the Government of Tasmania the sum of £3000 upon interest at the rate of £5 per centum per annum, without prejudice to all or any questions then in dispute between the Government and the said Company as to the fulfilment of the said Contract, and such sum of £3000, with interest at the increased rate of £6 per cent. from the 1st day of January last, is still due by the Company to the said Colonial Treasurer on behalf of the Government of Tasmania: AND WHEREAS on the 1st day of November, 1876, the said Company commenced to run trains from Hobart Town to Launceston, and from Launceston to Hobart Town, upon such Railway, and such trains have been kept running daily (Sundays excepted) from the 1st day of November, 1876, up to the present time, and such trains in number and speed have more than fulfilled the conditions of the said Contract and Schedule in that behalf, and the said Company have from time to time demanded payment from the Government of interest at the rate of £32,500 per annum as being due and payable under the said Contract, but the said Government, while not disputing the fulfilment of the Contract as from the 1st day of November last so far as regards the number and speed of the trains running on the said line, or as to the sufficiency of the passenger and goods accommodation of the said Railway, assert that such interest is not due and payable to the said Company, because, as they allege, the construction of the said Railway is defective and not according to the Contract: AND WHEREAS the said Company have long since exhausted all their present available funds in the construction, maintenance, and equipment of the said Railway; and on the 28th day of November, 1876, the said Company borrowed from the said Colonial Treasurer (acting as aforesaid) a further sum of £2500 for the purpose of enabling the said Company to continue to work the said Railway, and on the 5th day of December, 1876, the Company borrowed from the said Colonial Treasurer for the like purpose a further sum of £2500, and on the day of January last a further sum of £1500, and on the day of February last a further sum of £1500, and on the day of March last a further sum of £1500, all of such loans being made upon interest at the rate of £6 per centum per annum for Nine months from the 1st day of November last, and being expressly made without prejudice to all or any questions in dispute between the Government and the Company under the said recited Contract: AND WHEREAS none of the said loans have been repaid by the Company to the said Colonial Treasurer: AND WHEREAS the said Company allege that the non-payment to them during the past twelve months and seventeen days of the guaranteed interest, (amounting to £33,924 13s. 2d.), which they claim to be due and payable to them from the Government of Tasmania, has seriously injured the position and credit of the Company both in Tasmania and in England, and in particular has prevented them from paying interest upon divers large sums of money which the Company had borrowed at interest in England for the purpose of constructing the said Railway; and further, that a creditor of the Company to a very large amount had in or about the month of November, 1876, presented, or caused to be presented, to the Court of Chancery in London a petition praying that the affairs of the said Company might be immediately liquidated under the provisions of "The Companies Act, 1862," and the further consideration of such petition had been by the said Court adjourned for a period of six months upon the representation of Counsel for the Company that the Train Service was being performed satisfactorily, and in strict accordance with the Contract, and that it was expected and believed that the Government of Tasmania would before the expiration of such period pay the interest under the Contract so long as the Train Service continued to be performed, or that some amicable arrangement would be arrived at between the Government and the said Company: AND WHEREAS the Agent of the said Company in Tasmania hath, at the request and by the direction of the Board of Directors of the said Company in London, further represented to the said Colonial Treasurer that it is in the highest degree expedient and necessary for the continued existence of the Company, and to prevent ruinous loss to the creditors of the Company, and to avert the serious disappointment and injury to the Colony which would arise from the stoppage of the said Railway, the disbanding of its trained staff, and the cessation of the large and daily increasing traffic on the said Line, that the said proceedings for the liquidation in England of the affairs of the said Company should not be further proceeded with, and that if the Agent of the said Company is enabled to forthwith send to London a telegraphic message that the Government of Tasmania have paid the amount of the guaranteed interest for the first twelve months under the said Contract (even with a reservation to the Government of all their rights under the said Contract), such proceedings in London for liquidation of the affairs of the Company will be abandoned, and the said Railway will be kept open, and the said Company would be placed in a position to raise additional funds in London if required for the purpose of expending the same in putting the said Railway in a better and more efficient state than the Company contend they are bound to do under the Contract, but which additional expenditure on the Line would in fact satisfy all the requirements of the Government and put an end to all disputes between the Company and the Government: AND WHEREAS the Government are not desirous that the said Railway should be closed, and are willing to pay the amount of the guaranteed interest at the rate of £32,500 per annum up to the 31st day of March last, provided they can do so without prejudice to the right of the Governor of Tasmania to insist upon the literal and complete fulfilment

of the said Contract in every essential particular, and provided such payment does not operate as an admission adversely to the interests of the Colony of Tasmania under the said Contract; and the said Company through their said Agent have agreed to accept the payment of such interest from the Government under protest and without prejudice to the claims or position of the Governor under the said Contract, and upon the express understanding and agreement that the payment in the nature of interest agreed to be made and received shall not be or be deemed to be any admission on the part of the Government that the sum now agreed to be paid was in fact due or payable, or was recoverable at law or in equity by the Company against the Government, or the said Colonial Treasurer, or other person representing the Colony of Tasmania: AND WHEREAS it is a part of the said lastly-recited agreement that all sums of money before advanced by the Colonial Treasurer to the said Company, as and by way of loan with interest thereon at the rates such loans respectively bear from the date of the respective advances to the day of the date of these presents, shall be deducted from and retained out of the amount to be paid under this agreement: AND WHEREAS divers disputes have arisen between the Government of Tasmania and the said Company as to the manner in which the said Line of Railway has been constructed, and the Company allege that it would greatly facilitate a settlement of all such disputes if the Government of Tasmania would employ in their permanent service some skilled and competent person, being a Civil Engineer, who could discuss and arrange the matters in dispute with the resident Engineer in Tasmania of the said Company: AND WHEREAS the said Government of Tasmania some time since determined to appoint a Civil Engineer to act on behalf of the Colony of Tasmania in the direction and supervision of its public works, and amongst other things to see that the provisions of "The Main Line of Railway Act," and of all Acts amending the same, and the said Contract and of the Schedule thereto are properly and fairly carried out: AND WHEREAS the said Company are willing to do all additions, repairs, works, or alterations of works which such Engineer acting on behalf of the Colony may prove to the satisfaction of the resident Engineer of the Company in Tasmania to be fairly and reasonably necessary for the requirement of the Line and its sole and efficient working in accordance with the terms and conditions of the Contract and the Schedule thereto; but it is expedient that there should be some person to whom the said Engineers could from time to time appeal in case of difference arising between them: AND WHEREAS the Government and the Company have great confidence in the integrity, skill, and judgment of William Clark, late of London, in England, Civil Engineer, but at present temporarily engaged in the Colony of New South Wales upon special duty for the Government of that Colony; and it has been agreed that all points in difference between the Engineer of the Colony and the Engineer of the Company shall be submitted and be determined and decided by the said William Clark, and all parties are to be bound by and to abide by and carry out his decision given in writing upon any question or matter referred, after personal inspection, to him: Now these presents witness, and it is hereby mutually agreed and declared by and between the parties hereto—

1. The sum of this day paid by the Colonial Treasurer to the said Company, together with the sum of due for principal and interest upon such loans as hereinbefore mentioned, amount together to the sum of £33,924 13s. 2d., being an amount equivalent to the several sums which would have been due and payable from time to time by the Government of Tasmania to the said Company for guaranteed interest upon the said sum of £650,000 from the thirteenth day of March, 1876, to the thirty-first day of March, 1877, if the said Line of Railway had been admittedly constructed and worked in accordance with the said Contract and the Schedule thereto; and upon any settlement or adjustment of account between the Company and the Government, if the Company have established their right by legal process or otherwise to receive from the Government interest under the said Contract for the period above specified at the full rate of £32,500 per annum, then the amount now paid shall be taken and treated as full payment of such interest for the period specified; and if the Company establish their right to any lesser sum for such period, then the surplus shall be applied (in taking such account) to the payment of any interest to be hereafter earned by the said Company.

2. The said sum of is now paid by the Colonial Treasurer acting by or on behalf of the Governor and Colony of Tasmania, and such sum is received by the Agent of the said Company in Tasmania without prejudice to all and every or any questions or question in dispute between the Governor or the Colonial Treasurer or other person or persons representing or acting for the Government and the said Company under the said recited Contract.

3. In particular it is agreed that the payment hereby made and received shall not operate or be deemed or taken to operate as an admission on the part of the Government of Tasmania that such interest is in fact legally or equitably due or payable under the Contract, or that the Railway has been constructed in accordance with such Contract, or that the said Company were by such Contract authorised or entitled to run trains only to a point on the Launceston and Western Railway without exercising running powers over such last-mentioned Railway to Launceston, or that the Line of Railway is now being properly maintained or is in good and efficient order and condition; but such payment is made and received without prejudice to the right of the Government of Tasmania to hereafter insist upon any and every objection which they have heretofore made or taken, or which they may hereafter make or take, to the manner in which the said Company have carried out, or may hereafter carry out, the said recited Contract.

4. So soon as the Government of Tasmania shall appoint a Civil Engineer to act on behalf of the Colony all questions respecting the sufficiency of construction or the efficiency of maintenance of the said Railway and now in dispute, or which may hereafter be in dispute, between the Company and the Government of Tasmania shall be, with all convenient speed, settled and adjusted between the Engineer so acting on behalf of the Colony and the resident Engineer in Tasmania of the said Company; and the said Company hereby undertake and agree, immediately after any such settlement and adjustment as aforesaid, to make, at their own costs and charges, all or any new or additional works which may be deemed necessary, and to repair and make good or alter and make good, at the like cost, all or any existing works which may be from time to time found defective or in want of repair, and which the said Engineers may agree upon as being fairly and reasonably necessary for the requirements of the Line, and for its safe and efficient working in accordance with the

terms of the Contract and the schedule thereto; and in the event of the said resident Engineer of the Company refusing to assent to any demand or requirement of the said Civil Engineer acting for the Colony as aforesaid as to any matter which he may deem fairly or reasonably requisite as aforesaid for the due fulfilment of the Contract, then the same shall be referred in writing, under the hands of the said Engineers to, and the propriety or otherwise of such demand shall be determined by, the said William Clark, whose decision in writing under his hand upon any question or questions referred to him shall be final and conclusive; and the Company hereby agree to accept the decision of the said William Clark upon any matter referred to him as aforesaid, and at their own costs and charges to carry out any works which he may direct for the due fulfilment of the said Contract; and the said Colonial Treasurer on behalf of the Government of Tasmania hereby agrees to abide by the decision of the said William Clark upon all and every question referred to him as aforesaid; and upon the requirements of the said Civil Engineer acting for the Colony as aforesaid, or of the said William Clark, or of both of them as the case may be, being fully and completely carried out by the Company, the said Treasurer agrees thenceforward to pay such guaranteed interest as and when it may become due and payable under the said Contract.

5. Inasmuch as the inducement for the said Colonial Treasurer to make the payment of the said sum of £ hereby made is to preserve Railway communication between Hobart Town and Launceston, and to prevent the ruinous loss which would arise from a liquidation of the affairs of the Company in London, the Company hereby undertake and agree to continue and work the said train service as fully and effectually as the same is now being maintained for at least months hereafter; and, further, to procure the discontinuance and abandonment of the said proceedings for liquidation of the affairs of the said Company in London within three months from the day of the date of these presents.

6. No clause, matter, or thing herein contained shall operate or be construed to operate as an admission by either party to the said Contract that the conditions of such Contract have or have not been fulfilled, or as a waiver of any right now possessed by either party to the said Contract against the other of them, but all such rights and liabilities shall be and remain as if these presents had not been made or executed save in so far as is herein expressly provided or declared to the contrary. In witness, &c.

TASMANIAN MAIN LINE RAILWAY COMPANY.

COPY OPINION.

THE matters submitted for consideration in the foregoing series of questions are so much interwoven with and overlap each other, and so mix up questions of law and policy, that I have found it impossible to deal with them for any useful purpose exactly in the order in which they are presented.

The first and most serious question seems to be whether the Company are, upon the facts stated, entitled to the benefit of the guarantee on behalf of the Colony and to have it fulfilled.

Upon this question my opinion is in favour of the Company.

The Contract is of a peculiar character: it is made by the Governor on behalf of the Colony in virtue of the special authorisation given to him by the Tasmanian Main Line Railway Acts; and though it professes to be made in virtue of any other powers enabling him in that behalf, he had not, so far as I am able to discover, any other powers than those given him by the Acts which enabled him to make this particular Contract.

He contracted only "on behalf of the Colony," and the Contract must, in my opinion, be read and construed and effect given thereto as if the words "the Colony" instead of the words "the Governor" had been used in the 5th Clause, commencing "The Governor hereby specially guarantees," and again in that part of the 8th Clause, about the middle, which contains the words "and the Governor shall be bound to pay."

It must also be noted that Clause 20 expressly protects the Governor from any personal obligation.

The Contract does not profess to be entered into on behalf of the Queen, nor even on behalf of or so as to bind the Governor for the time being, whilst the interpretation given in the commencement of the Contract of the word "Governor" confines its meaning to His Excellency CHARLES DU CANE, Esq., the then Governor.

His Excellency is merely the statutory and executive hand for making the Contract on behalf of the Colony as authorised by the Main Line Railway Acts, and he seems to have done no more than was strictly within the scope of and in pursuance of the authority so conferred upon him.

Treating the Contract and giving effect thereto as if the Colony gave the guarantee and was charged with the obligation of its fulfilment, the legal principles which in my opinion apply to the construction of the Contract are those which will be found to have been established, laid down, and applied in cases of Contracts which have already been the subject of judicial decision in this country, and notably in the cases referred to in the margin. ^(*)

(*) Lucas v. Godson, 3 Bing. N. C. 509; and see Stavers v. Curling, 3 Scott, 755.

In all Contracts between parties where there are things to be done on one side in consideration of things to be done on the other, there must necessarily be mutuality and reciprocity of obligation and liability; and if one side altogether refuses and neglects to perform his part of the Contract, the other side will be justified in refusing to perform his part.

In the case also of a Contract between two parties which contains mutual obligations on each side to do several things, and which provides by words, or necessary implication, that any one or more things to be done by one side A shall be upon condition only that one or more things shall be first done by the other B, the things to be done by B must first be done by him before his being entitled to require, and as a condition precedent to his requiring the performance by A of the things which A has bound himself to do, unless A has by agreement or conduct waived the performance of the condition (*). (See the authorities cited in the margin.)

I cannot find anything in this Contract which in terms express provides, and can gather nothing from circumstances outside the Contract from which it can be implied, that it was in the intendment of the parties that the guarantee given in Clause 5 should be operative upon condition that all or any one or more of the specific things which the Company agreed to do were first done, or that except the opening of the *Line for traffic*, and furnishing Abstracts of the Receipts and Expenditure of the Company, anything was imposed upon the Company to be performed by way of condition precedent to their being entitled to the fragments in fulfilment of the guarantee as provided by Clause 8.

In thus writing I have specially considered and given all the weight which I consider to be due to the words in the 1st Clause of the Contract, which bind the Company to make the Railway subject to, and in accordance with, the conditions set forth in the Schedule; and also considered and weighed the language of the 18th and 21st Clauses of the Contract.

It appears to me that even though parts of the Railway were not on the day fixed (see the 5th Clause of the Schedule to the Contract) for completion constructed in the most substantial manner in which they could have been constructed, and even though the timber, bricks, and ballast actually used and employed in stations, bridges, and other portions of the works were not of the best materials that could have been used, and that though some of the fencing was weak and unsubstantial, and even though some of the rolling stock provided was not made of the best materials or of inferior character, the defects in any or all of these particulars form no lawful excuse to the Colony for not complying with and not fulfilling the guarantee; though if any such defects existed or exist, the Colony may be entitled to require the Company to make them good; and, moreover, the Government may, under the 5th Section of the first Main Line Railway Amendment Act, themselves make good any such defects, and recover the cost of so doing such defects from the Company. Further than that, the defects may possibly afford ground for rescinding the Contract, pursuant to Clause 6 of the same Act.

Further, too, if the Company defray the cost of remedying any such defects out of earnings at a cost beyond what would have been required for maintenance if no such defects had existed, the Colony may be entitled to deduct from the interest payable under the guarantee a sum equivalent to the extra amount so spent.

Had the contention of the Government been limited to a claim of this nature, I do not think that it could have been successfully resisted.

As regards the precise meaning of the 6th Clause of the Schedule to the Contract, and the effect thereof, I have written a supplemental opinion.

The immediate object to which, under the circumstances, the Company and its representatives should, to my mind, direct the most earnest and pressing attention is to endeavour to produce if possible an accord and common basis for action between themselves and the Colony upon the *legal interpretation and effect of the Contract* as to their respective obligations and liabilities before having recourse to anything like litigation or quasi litigation; and that the Company should, with this view, at once invite the Crown Agent for the Colonies in England to concur with them in submitting a case for counsel of eminence in whom they might both place confidence, and whose opinion might command as much weight and authority as anything short of judicial decision could carry.

There ought not to be any serious difficulty in preparing such a state of facts for the purposes of the case as both parties might agree to without prejudice and without binding themselves, except for the purposes of the case to the facts as stated or binding them to act upon the opinion which might be given.

I contemplate that an opinion so obtained would, in all probability, greatly facilitate the settlement, even if it did not of itself settle all questions in difference between the Colony and the Company upon their respective rights and liabilities, and obviate the necessity of any litigation whatever. I also contemplate that at all events such an opinion would be worth taking if it only tended, as it would in all probability do, to narrow litigation to such points only as need be litigated, and direct them into such a channel and confine them within such limits as might enable the Company and the Colony to obtain a judicial decision on

(*) *Roberts v. Brett*, 18 Com. Bench, Rep. 573, 6. N. S. 611, 11 H. Lords Cas. 337. *Stadhard v. Lee*, 3 Best & Smith, 364. *Bohn v. Spencer*, 5 Best & Smith, 753. *Prest v. Dowie*, 5 Best & Smith, pp. 20 and 33. *Ellen v. Topp*, 20 L.J., N.S. Excheqr., 241. *Carter v. Scargill*, 10 Law Rep. Q. B., 565. See also 1 Saunders' King's Bench Rep., (by Williams) p. 320, Addison's Treatise on Contracts, pp. 173—241. 664—690. (7th Edition).

points which they might be unable otherwise to dispose of with the greatest despatch, and so as to avoid the unseemly heat and acrimony of contest which the expression and upholding of antagonistic views is calculated to engender.

(Signed)

W. CRACROFT FOOKS,

49, Chancery Lane,
12th February, 1877.

SUPPLEMENTAL OPINION.

IN reference to the construction to be put upon the 6th Clause of the Schedule to the Contract, and especially the words "thoroughly substantial" and "best materials" used therein, I am of opinion that—

- 1st. The Clause both generally, and as regards the particular expressions therein above noticed, is controlled by all provisions contained in the Contract, which specifically prescribe any general or particular class, description, or quality of materials or workmanship.
- 2nd. That the expression "thoroughly substantial" should, except as so controlled, be construed as meaning "solid and strong" throughout, and not as *most substantial, lasting, or enduring*.
- 3rd. That the expression "best materials" should also, except as so controlled, be construed as meaning materials of the description and quality most suitable and serviceable for the completion and perfecting of the particular structure, work, or thing in which the materials might be applied, or of which they might form part.
- 4th. That "best materials" should be further limited to the best materials which the Company could have procured for the purposes of the Railway and Works, as progress therewith was necessitated in order to the due fulfilment by the Company of the conditions of the Contract as to progress and time of completion.
- 5th. That the word "constructed" applies both to "the Railway" and all "works connected therewith," "the stations," and also the "rolling stock," and that the expressions "thoroughly substantial" and "best materials" also have a similar threefold application.

It does not appear to me that the application or interpretation of the 6th Clause, or the words therein specially above noticed, is affected by the circumstance that the Railway which the Tasmanian Legislature had in contemplation when it authorised the Contract, and to which the Contract would probably apply, was a light Railway, or that the Railway which was the actual subject of the Contract was of that character.

Applying these views to the particular matters to which my attention has been directed as being matters on which it is expected that the Colonial Government will mainly rely in support of their contention that "the Railway, its Station, and its "works," and "Rolling Stock," are not constructed in a thoroughly substantial manner, or with the best materials,

I am of opinion as follows:—

1st. *As to Culverts or Watercourses.*

That if they are thoroughly sound and strong, capable of carrying their superincumbent weight, and of accomplishing all purposes of drainage for which they are introduced into the structure, they comply with the conditions of the Contract.

If and so far as the materials used in their construction are not of the description or quality best adapted for the purpose which could have been procured by the Company, within the time or times at which their use was necessitated, in order to comply with the conditions of the Contract as to progress and time of completion of the Railway, I am of opinion that, even though they may be suitable and sufficient, yet the Company has failed to comply with the Contract in respect of materials; but this failure does not, in my opinion, entitle the Colony to refuse the fulfilment of the guarantee into which it has entered.

I am of opinion that the mere circumstance of any materials or work being coarse, or rough, or unsightly is not material.

2nd. *As to the Bridges and Stations.*

These are to some extent regulated by special provisions in the Contract.

The use of timber is specially authorised, but no particular description of timber is designated.

The timber should have been of such description and of such quality as the Company could have procured within the time or times at which its use was necessitated by the conditions of the Contract, in respect to progress and completion, as was best suited to make sound and substantial structures. If and so far as the timber employed has not fulfilled those conditions, there has, as it appears to me, been a breach of contract on the part of the Company, though not such a breach as to deprive them of the benefit of the guarantee and the right to require its fulfilment.

3rd. *As to the Ballast.*

There is no special provision about the Ballast except that it is to be of certain depth and width.

In my opinion the Company should have used and employed the best material for ballast which was procurable from the excavations and cuttings made for the purposes of the Railway, or could have been procured from the immediate vicinity. If they did this I think that they did all that was required, and that to such extent as they have failed to do so they have not fulfilled the Contract; but this, in my opinion, ought not in point of law to deprive them of the benefit of the guarantee or its fulfilment, as I have elsewhere advised.

4th. As to the Rails.

There is no specific provision about them except that they are to weigh on the average 40lb. to the yard. They should have been of the best quality of metal of which rails of this description are composed, and so far as they are not the Company have not fulfilled their Contract; but this also would not, in my opinion, in point of law deprive them of the benefit of the guarantee or its fulfilment.

5th. As to the Fencing.

There is no provision in the Contract which specifically mentions fencing, but it is mentioned in the Main Line Railway Act, sections 8 and 15; the 19th clause of the Contract binds both parties thereto to abide by the provisions of the Main Line Railway Acts except as expressly modified by the Contract. I consider fencing, therefore, to be one of the works connected with the Railway, and that it should have been made of sufficient strength to answer the purposes for which fencing is required, and of the most suitable material which could have been procured for the purpose. So far as the fencing has fallen short of these requirements the Company have not fulfilled their Contract; but this would not, in my opinion, deprive them in point of law of the benefit of the guarantee or its fulfilment.

6th. As to Cattle Guards having been used instead of Gates.

The Contract does not specifically mention gates or cattle guards; but gates would be works connected with the Railway under Sections 8, 13, and 15 of the Main Line Railway Acts and the 19th clause of the Contract, and are subject to remarks similar to those I have made respecting fencing, though with this addition, that, as far as the Government is concerned, if they have sanctioned the substitution of gates for cattle guards they cannot be allowed to take any advantage of the substitution as being a breach of the condition of the Contract without violating fundamental principles of law.

In reference to the foregoing matters it may well be that the Colony are insisting upon the terms of the Contract with unnecessary severity and stringency, amounting to hardship in a moral aspect. But this cannot affect the construction and interpretation of the Contract, or the effect to be given thereto in point of law; nor can it affect the question, except in the moral aspect of the case, that the Company, though legally entitled so to do, may not have thought it right to apply a similar amount of stringency and severity in their dealings with Messrs. Punchard and Clark.

It should also not be omitted from view that the construction of a Railway is continually progressive from the commencement to the final completion of the works; that it is not necessarily completed in all parts at one and the same time, but that it may be completed in parts at different periods, so that the whole may be completed on the day fixed for opening the Railway for public traffic.

As the several parts are completed and the permanent way laid, they are often made available for the transport of material and other purposes in constructing other parts, thus necessarily causing a certain wear and tear and deterioration of parts which had been in the first instance, before the day of opening for public traffic, thoroughly substantial and of the best materials.

These considerations may, as it appears, have a good deal of bearing on the points connected with the alleged want of substantiality and inferiority of materials, and I throw them out for those who may be conversant with the facts properly to apply the observations.

WM. CRACROFT FOOKS,
49, Chancery Lane,
12th February, 1877.

(Copy.)

1, Copthall Buildings, E.C., London, 13th February, 1877.

DEAR SIR,

If any use is to be made of the opinions, we recommend that the opinion on the first part should be confirmed by that of the Attorney-General, unless indeed Mr. Fooks' suggestion that the Crown Agent of the Colonies should be asked to concur in stating a joint case can be carried into effect.

Yours truly,

WILSON, BRISTOW, & CARPMAEL.

J. B. DAVISON, Esquire.

Colonial Secretary's Office, Hobart Town, 23rd April, 1877.

GENTLEMEN,

IN reply to your letter of the 6th instant, I have the honor to state that the Government have carefully considered the proposed agreement submitted to them on behalf of the Main Line Railway Company, and also the legal opinion of the Company's counsel, a copy of which you have been good enough to forward to Government.

The Government are unable, as at present advised, to consent to all the terms of the proposed agreement; but if the Company are prepared to allow the Government Engineer to inspect the line, and to point out to Mr. Grant what improvements are, in his opinion, necessary to put the line in such a condition as to fulfil the terms of the Contract under which it was constructed, and if such improvements are considered by the Company unnecessary, the Government are prepared to agree to refer that question to the final arbitration of Mr. William Clark.

At the same time the Government cannot agree to allow Mr. Clark to decide, what must be more a legal than an engineering question, namely, the payment of interest alleged to be due.

While the Government do not deny that a train service has been rendered between Hobart Town and the Eyandale Junction for twelve months, and between Hobart Town and Launceston for a shorter period, at the speed stipulated for by the Contract, they cannot agree with or approve of the terms used in parts of your letter, neither do they feel in any way called upon to endorse the opinion of the Company's counsel (being in ignorance even of the case placed before him), or the strong, though one-sided, statement of the Company's secretary.

I have, &c.

(Signed) THOS. REIBEY.

Messrs. DOBSON & MITCHELL, *Macquarie-street.*

Colonial Secretary's Office, 24th April, 1877.

SIR,

I HAVE the honor to acknowledge the receipt of your letter of yesterday's date, in reply to mine of the 21st.

I have, &c.

(Signed) THOS. REIBEY.

C. H. GRANT, *Esq., Manager Tasmanian Main Line Railway.*

Tasmanian Main Line Railway Company, Limited,

113, Cannon-street, London, 16th February, 1877.

SIR,

ALTHOUGH this Company's representative in Hobart Town, Mr. C. H. Grant, has from time to time brought under your notice, and that of your predecessor in office, the injustice with which the Company conceive they have been treated by the Government of Tasmania, more especially since the opening of the railway throughout on the 13th March last, I am requested by the Board, and with the concurrence of the committee of debenture-holders of the Company appointed to consult with and assist the Board, to address you direct, to respectfully submit the following remarks for the consideration of the Government:—

1. Immediately after signing the Contract with the Government in London, the Company entered into a contract with Messrs. Edwin Clark, Punchard, & Co. for the construction and equipment of the railway in such a manner as to fulfil all their engagements with the Government; and bearing in mind that the railway was to be constructed for, and to be worked by, the Company, the Directors appointed Mr. Grant, a gentleman of great practical experience in such matters, and personally known to most of the members of the Board, to act as their agent and superintend the execution of the Contract in Tasmania; while Mr. H. L. Smith, a Civil Engineer of high position, has from the commencement acted as consulting engineer, to advise the Board on this side as to engineering matters, as well as to look after the material shipped by the contractors; and the Directors have generally taken every proper precaution in their power to ensure the Contract being carried out in its integrity.

3. The details of the Contract clearly show that only a light narrow gauge railway had to be constructed, capable of being worked at a maximum speed of 23 miles per hour; which was to be considered the crucial test as to construction.

3. The railway was opened throughout on the 13th March last, and having since been worked in such a manner as to more than fulfil all the material conditions of the Contract, the Colony has received full consideration for the interest guaranteed; and the moment the railway ceases to be worked efficiently, the Government have a remedy in their own hands under the 5th Section of the first Main Line Railway Amendment Act.

4. The exercise of the running powers over the Launceston and Western Railway, and the completion and opening of the Company's Launceston Station, have been delayed owing to circumstances beyond the control of the Company, which have been frequently pointed out by Mr. Grant.

5. The Directors have not failed to notice the prejudice that has been created in the Colony against the Company and the railway. Remarks have been made in the House of Assembly, and in the Press, in condemnatory terms of the sharp curves, narrow gauge, light rails, &c., all of which were duly authorised by the Contract; and thus before the line was half finished a strong feeling against it was raised in the minds both of the public and the Members of the Ministry, whilst the publication of the *ex parte* and untested statements of the Inspectors appointed by the Government, many of which have since been disproved, has inflicted serious injury on the credit of the Company.

6. The statement in the House of Assembly by the Hon. the Colonial Treasurer that it was unnecessary to raise special taxes to meet the guarantee, because the railway could not be worked at the Contract speed, and the Company would not be able to fulfil their engagement and claim the interest, amounted to a foregone conclusion that has never been justified.

7. The actual results in respect to the traffic receipts of the railway are so greatly disappointing when compared with the estimate of traffic contained in the Report of the Royal Commissioners (1868), upon the faith of which, together with the guarantee, the Company were induced to enter into the Contract for the construction of the railway, that the Directors feel the Company are entitled to some consideration from the Government for publishing so misleading a document.

The Directors having taken the opinion of Mr. W. C. Fooks, Q.C., upon all points of difference between the Government and the Company, in which he states in reply to the question, "as to whether the Company are upon the facts stated entitled to the benefit of the guarantee on behalf of the Colony, and to have it fulfilled," that his "opinion is in favour of the Company," and the Company are advised that the Government are acting illegally in withholding payment of the guaranteed interest, for which a full consideration has been given, and the position assumed by the Government is a violation of the principles upon which all business between contracting parties throughout the world is conducted.

It is scarcely necessary that I should repeat the numerous details of grievances suffered by the Company, which have been already fully submitted to the Government by Mr. Grant, and which the Directors trust may have the immediate and earnest consideration of the Government in conjunction with this letter.

In conclusion the Directors and the committee of debenture-holders desire me to express the hope that an amicable settlement of all matters in dispute may be speedily arrived at, in order that the honor and credit of the Colony may be maintained, and the absolute ruin of the Company averted.

I have, &c.

(Signed) GEO. SHEWARD, *Chairman.*

The Hon. the Colonial Secretary.

Colonial Secretary's Office, 14th April, 1877.

SIR,

I HAVE the honor to acknowledge the receipt of your letter of the 16th February last, in which, after stating the views of the Directors of the Main Line Railway Company upon the present relative positions of the Company and the Government, you conclude by expressing the hope of the Directors and the Committee of Debenture-holders that an amicable settlement of all matters in dispute may be speedily arrived at.

Allow me to assure you that the Company cannot more earnestly desire a settlement of all existing differences between the Government and the Company, as to the due fulfilment by the latter of the Contract obligations, than the Government of the Colony; and a correspondence is now proceeding with Mr. Grant, based upon the 1st and 2nd paragraphs of the proposal contained in his letter of the 6th September last, which I trust may tend to a final solution of the questions at issue.

I have, &c.

(Signed) THOS. REIBEY.

GEO. SHEWARD, *Esquire, Chairman of the Tasmanian
Main Line Railway Company (Limited), 113, Cornhill, London.*

MAIN LINE RAILWAY.

In continuation of Paper No. 24.

[Laid upon the Table by Mr. Crowther, and ordered by the Council to be printed, May 2, 1877.]

Tasmania,
Colonial Secretary's Office, 2nd May, 1877.

SIR,

I HAVE the honor to forward herewith, for your perusal, copy of a correspondence between the Government and Mr. C. H. Grant, the Manager of the Main Line Railway, originating in the desire of the Government to adopt means for a final settlement of existing disputes as to the due fulfilment by the Company of their Contract obligations.

The Manager having declined to limit the questions to be submitted for your arbitration to such as relate to the faithful construction of the Line in terms of the Contract, the Government are reluctantly compelled to abandon the hope of arriving at a final and satisfactory termination of this long-pending and vexatious matter through the agency of your professional inspection and decision; a result they regret the more as the suspense involved most injuriously affects the interests of the Company and the Colony, and retards the development of traffic along the Line.

I have, &c.

(Signed) THOS. REIBEY.

WILLIAM CLARK, *Esquire, C.E.,*
Sydney, New South Wales.

MAIN LINE RAILWAY CORRESPONDENCE.

*In continuation of Paper No. 24.**Hobart Town, 1st May, 1877.*

SIR,

WE have the honor to acknowledge the receipt of your letter of the 23rd ultimo, and are glad to receive your assurance that the Government admit "that a Train Service has been rendered between Hobart Town and the Evandale Junction for twelve months, and between Hobart Town and Launceston for a shorter period, at the speed stipulated for by the Contract." You state in your letter that the Government do not feel called upon to endorse the opinion of the Company's counsel, as they are in ignorance of the case placed before him. It is apparent, on the face of Mr. Fooks' opinion, that he has advised simply upon the construction of the Contract, having before him, as he had, the reports of the four inspecting Engineers, and having been informed that the Government based their refusal to pay the guaranteed interest upon the statements contained in such reports. If you desire it, we shall only be too happy to show to the Crown Solicitor the case submitted to Mr. Fooks.

We notice that you do not in any way deny the correctness of Mr. Fooks' opinion as to the obligations and duties which he advises the Government are bound to fulfil; and we therefore assume that the Law Officers of the Crown are not prepared to take exception to the legal principles which he so clearly lays down; and having carefully studied the authorities which he quotes, we are at a loss to conceive how the correctness of those principles can be questioned.

As our instructions from the Board of Directors are to try every means of inducing the Government to pay the interest so justly and fairly earned by the Company, and now legally due to them, before taking proceedings for its recovery, we prepared a case for the opinion of Mr. R. B. Miller (of Launceston) and Mr. Alfred Dobson as to the construction of the Contract and the legal obligations of the Government and the Company thereunder, and we now send for the information of the Government copies of such case and of the opinions of Mr. Miller and Mr. Dobson thereon. You will observe that the Tasmanian counsel both thoroughly concur in the opinion of Mr. Fooks, and point out in the clearest way the illegality and unfairness of the Colony in repudiating its covenant to pay the interest when they have, since the 13th March, 1876, had rendered to them by the Company a more advantageous Train Service than they stipulated for, and have therefore received and accepted the benefits for which they contracted to pay.

We would commend the three Opinions now before you (which so clearly point out the inconsistent and illegal position the Colony are now placed in) to the most earnest and immediate consideration of the Government, and trust that the Executive will at once recognise their legal obligations and pay in the course of the week the arrears of interest due to the Company; for it seems to us that, if the Government are still unprepared to perform their guarantee when the consideration for it has been faithfully rendered, the shareholders and bondholders in England can only assume that the Government intend to persist in treating the Contract obligations of the Colony with indifference, and the lawful and honest claim of the Company with contempt.

We have the honor to be,

Sir,

Your obedient Servants,

DOBSON & MITCHELL.

The Hon. the Colonial Secretary.

FORWARDED to the Hon. the Attorney-General with the Opinions referred to of Messrs. R. B. Miller and Alfred Dobson.

THOS. REIBEY.

2nd May, 1877.

This letter has not been acknowledged.

CASE for the Opinion of Counsel upon the construction of the Contract between the Government of Tasmania and the Tasmanian Main Line Railway Company, Limited, and as to the legal obligations of each party thereunder.

COUNSEL will receive herewith copies of the Contract and Acts of Parliament incorporated therewith, the Reports of four Engineers who inspected the Railway on behalf of the Government and the replies of the Company's Engineer (Mr. Grant) thereto, and some of the correspondence that has taken place between the Government and the Company.

The Company constructed the Railway, and spent in and relating to such construction a sum exceeding £650,000, and on the 13th March, 1876, they opened the Line for public traffic; between that day and the 31st October they ran their trains between Hobart Town and a point on the Launceston and Western Railway called Evandale Junction, which latter place is 11 miles from Launceston, but from the 1st November last the trains have run between Hobart Town and Launceston and *vice versa*. On two occasions during the period of construction, the Government, with the consent of the Company's Engineer, (for they had no right to do so under the Contract), employed Mr. Greene, Civil Engineer, of Victoria, to inspect and report upon the works, and again in the month of June, 1876; and three months after the Line had been constructed and opened for traffic they appointed three Engineers, Messrs. Mais, Mason, and Stanley, to inspect the Railway under the 5th Section of "The Main Line of Railway Amendment Act" (see page 91 of Acts herewith), and to report to the Government whether the Line was "in good and efficient repair and working condition." The three last-named Engineers made their report, pointing out what they considered certain defects then existing in the Railway, and advised that the Company had not performed their Contract.

The Government could not compel the Company to allow the construction of their Line to be inspected, so they sent the three Engineers upon the works under the Repairing Section before named; yet they never attempted to carry out the provisions of the Section, but, resting upon the Report of the Engineers and the advice therein contained, they refused to pay the guaranteed interest upon the ground that the Company had not performed their Contract. The Company assert, however, that they have performed their Contract, and constructed the Railway in accordance with the stipulated conditions; and have, since the 13th March, 1876, rendered to the Colony the full train service required by the Contract, and have performed with punctuality and safety the speed of 23 miles an hour.

The General Manager of the Company, Mr. Grant, has from time to time sent in the quarterly accounts and vouchers required by the Contract, and claimed from the Government the interest due thereunder: the Government have always refused, and still refuse, to pay the interest or any part thereof, but the reasons for such refusal have never been clearly made known to the Company other than the very vague and general one,—viz., "that the Company have not performed their part of the bargain, inasmuch as they have not constructed the Railway of the best materials, and in the most substantial manner, in accordance with the Contract conditions."

Although the substantial defence of the Government to the claim of the Company for interest is that the latter have not constructed the Line according to the Contract, they have up to the present moment wholly neglected to point out or inform the Company what they object to, or which portions of the Railway they require to be altered to make it fulfil their idea of the Contract standard, and the Company are now, and have always been, greatly embarrassed by this neglect on the part of the Government; and at the present moment it is feared that Counsel cannot as efficiently as he otherwise would apply the principles of law applicable to this case without knowing the exact points relied upon by the Government as their defence.

Counsel is here referred to the letter of Mr. Innes, then Colonial Treasurer, to Mr. Grant, dated 5 July, 1876, in which he refused to advance any money for keeping open the Railway for the reasons therein stated, and it is presumed that the refusal of the Government to pay the interest was for the same reasons, all of which are based upon the Reports of the four Engineers, but the Government, as before stated, alleged no grounds for their refusal other than that the Company had not performed their Contract.

It should here be stated that the Government have always contended that the Company were bound under the Contract to run their trains through to Launceston, and that between 13th March and 1st November, 1876, they were not rendering to the Colony the train service stipulated for in the Contract because they delivered their traffic to the Launceston and Western Railway at Evandale, and did not run through to Launceston. Counsel's attention is not however directed to this point, because the Government cannot reasonably try and take advantage of it now that the through service is performed; but even if they did, the Company are quite satisfied with their own interpretation of the Contract; and, moreover, they can show most conclusively that they were prevented from running into Launceston by the 13th March, 1876, in consequence of the delay caused by the Government in not answering letters and approving plans sent in by the Company in reference to this matter.

The Company are advised by their English Counsel, Mr. W. C. Fooks, Q.C., a copy of whose opinion is forwarded herewith, that the Government are "violating fundamental principles of law" in withholding the guaranteed interest from the Company; and he is of opinion that although it is a condition precedent that the Company, before claiming their guaranteed interest, must construct a Railway open it for traffic, and continue to perform the train service, yet that it is not a condition precedent that the whole

of the Line should be constructed of the best material and in the most substantial manner to entitle the Company to recover the interest: yet he points out that the Company have broken their contract wherever they have used bad materials and put in defective work, but says that the Government have their remedy against the Company in respect of such breach of contract, but are not entitled to refuse payment of the guaranteed interest.

It is most important for both the Government and the Company to know if Mr. Fooks' opinion correctly sets forth the legal construction of the Contract; for if so the Government will be saved from the discredit of longer repudiating a legal obligation of the Colony, and the Company will receive at once the interest on their £650,000 worth of Debenture Bonds, the withholding of which has ruined the credit and position of the Company, and brought them to the verge of liquidation.

It will be seen from the twelfth, thirteenth, and fourteenth sections of the Contract that the Government have a substantial interest in the receipts of the Railway; for whenever those receipts pay the whole of the working expenses and maintenance of the Line and leave a balance, such balance is to be retained by the Company as part of the guarantee of £32,500 a year, and to the extent of this balance in any given year the guarantee of the Colony would of course be reduced. The Government may therefore contend that by reason of the defects in construction the maintenance of the Line and its working expenses will cost an annual sum above the average and far greater than would be required if the Line had in the first instance been properly constructed by the Company. Under sections 8, 9, 10, and 11 of the Contract the Government have the fullest power to enquire into, examine, and check the expenditure for maintenance, &c.; and when they discover that moneys are being taken from the receipts to supply defects and make additions to the Railway which should be done at the expense of the Company out of their capital account, then, but not till then, it is presumed that the Colony would have sustained damage by the alleged breaches of Contract by the Company, but for this damage would they not have their remedy upon proof of their case? It will be seen that the Colony cannot sustain any damage in the manner just alluded to until the receipts of the Railway exceed what would be a fair and average sum for maintaining and keeping in repair the Line, and as the revenue derived from the traffic has not for the past year ending 13th March last been sufficient to maintain and work a well-constructed Railway of the length and description of the Main Line, it is difficult to see how the Colony can have suffered any damage as yet; but Counsel is requested to give full consideration to this view of the matter, which has always been relied upon by the Government.

Counsel will observe that by section 18 of the Contract the obligations of the Governor and Company are to be correlative and dependent. Mr. Fooks is of opinion that, notwithstanding this section, the conditions which the Government allege have not been performed are not conditions precedent, and it would appear that this opinion is borne out by decided cases. In *Stavers v. Curling*, 3 Scott, 740, 6 L.J., C.P. 41, the defendants covenanted that "on the performance of the before-mentioned terms and conditions they would pay a certain sum to plaintiff." It was urged by Counsel, that unless the above words were sufficient to create a condition precedent, no language would create one; but Tindal, C.J., said, "that the question as to whether a covenant is dependent is to be determined by the *intention* and meaning of the parties as it appears on the instrument and by the application of common sense to each particular case, to which intention when once discovered *all technical forms of expression must give way*." Again, in *Ritchie v. Atkinson*, 10 East, 307, (an action for freight), the plaintiff agreed to ship a *complete cargo* of hemp, and deliver same in London; plaintiff only shipped *half* a cargo, and left the rest of the defendant's hemp lying in lighters at the port of shipment, and yet the plaintiff was held entitled to recover freight for the *short cargo* at the stipulated rate.

The words used in the agreement in the last cited case constituted technically a condition precedent that a *full cargo* should be delivered; but the Court held that the question whether a condition is precedent depends *not on any formal arrangement of words*, and that the breach by the plaintiff was one which might be *compensated for in damages*, and they therefore left the defendant to his cross action.

In *MacAndrew v. Chapple*, 1 L.R., C.P. 643, Willes, J., says:—"In the present case I apprehend the breaches resolve themselves into such delay as can be *compensated for by damages*. The object of the voyage was in no sense frustrated." Counsel is also referred to the two cases of *Simpson v. Crippin*, 8 L.R., 2 B. 14, and *Bradford v. Williams*, 7 L.R., Ex. 260, as showing the principles upon which the Court acts.

It is submitted upon the authorities that if the Government wish in the face of the Line having been constructed and opened for traffic, and the speed and train service stipulated for in the Contract having been properly performed for more than 13 months, to argue that the *whole* of the materials used and work done should be in strict accordance with the Contract conditions, then that they will have to show—1st. That the conditions in respect of which breaches are complained of go to the very root or essence of the Contract; 2nd. That the breaches of Contract by the Company are such as cannot be compensated for in damages; and 3rd. That the Colony have received no part of the consideration for their guarantee.

Applying the above principle to the present case it is submitted—1. That the breaches complained of by the Government, so far as the Government have vouchsafed to disclose such breaches, do *not* go to the root of the Contract; and even if they exist the Colony have got substantially what they bargained for. Can it be said that if one bridge were badly built the Company are to lose the benefit of the whole Contract? Or even assuming that several miles of the permanent way are laid down with rails not according to the Contract, can it be contended that the Government are therefore entitled to refuse to carry out their guarantee to pay interest on the sum of £650,000 *bonâ fide* spent by the Company in constructing a railway for the Colony?

2. The breaches complained of by the Government, so far as can be ascertained, are such as may be compensated for in damages: for, even if new rails had to be laid down for half the line, and certain culverts had to be rebuilt, and certain bridges repaired and altered (and this is taking a hypothetical and extreme case), the Government would be able to sue the Company for breach of Contract, and the measure of damages could be ascertained to a shilling.

3. There is no doubt that the Colony has received not only a part of the consideration but all the benefit which could accrue from a regular and well-conducted train service. Such has been the use of the Railway by the public that Page's day coach is taken off the main line of road; and lately the Government have agreed in writing to enter into a Contract with the Company for the conveyance of the Mails between Hobart Town and Launceston, to take effect from the 1st May next. The whole of the travelling public—including His Excellency the Governor, our Judges, and Members of Parliament—use and travel by the Railway; and it has brought to market hundreds of tons of produce and goods which would otherwise never have left the country; and, in many respects, has admittedly conferred great benefits upon the Colony. In return for the train service performed by the Company since 13 March, 1876, with one train running daily at 23 miles an hour, and the other at 14½ miles instead of 10 as required by the Contract, the Government have paid nothing; for, although they have lent the Company sums amounting in all to £12,500, they have insisted upon the Company paying interest on such loans. The question then arises, is the Colony justified in treating the Company in this manner, and in continuing to withhold the interest?

The Company's Solicitors regret that the Government have not enabled them to state precisely and authoritatively what the defence of the Colony is in detail, and they are therefore obliged to put Counsel to the trouble of perusing the numerous documents sent herewith; he is, however, requested to give every consideration and the fullest weight to the reasons (so far as he can ascertain them) which have induced the Government to take up their present position.

Counsel is requested to advise—

1. Are the Government, upon the true and legal construction of the Contract, bound to pay the Company interest at the rate of £32,500 a year so long as they render to the Colony the full train service required by the Contract, and maintain the Railway in good and efficient repair and working condition, notwithstanding that the Company may have committed some breaches of the Contract in constructing the Line; or is it the legal duty of the Government to pay the guaranteed interest, and have recourse to their specific remedies under the Contract compelling the Company to remedy the breaches complained of?

2. If Counsel is of opinion that Government can legally withhold the interest, will he state fully the grounds upon which they are entitled to take up this position, and point out what breaches of Contract complained of by the Government (so far as Counsel can gather from this case and the documents sent herewith) go to the route of the Contract, and which of them cannot be compensated for in damages.

3. Are the Government justified in withholding payment of the interest on the plea that by reason of the Line being imperfectly constructed the maintenance and repair will be more costly, and thus deprive the Colony of the interest they have in the traffic receipts under Sections from 8 to 14 of the Contract, when such loss (if any can be proved to exist) can be compensated for by requiring the Company to defray the costs of all renewals and repairs caused by defective construction out of their capital account after the Government have looked into the Company's annual expenditure and adjusted the disbursements between capital and revenue?

OPINION OF MR. ALFRED DOBSON.

1. I HAVE perused the accompanying case, and the documents forwarded therewith, including the very able opinion of Mr. Fooks, in which he has advised upon some of the questions now under consideration.

The answer to the first question depends upon whether the conditions to be performed by the Company are to be considered as conditions precedent. After a careful perusal of the cases cited by Mr. Fooks, and of many other authorities, I adhere to the opinion which I formerly expressed when in conference with Mr. Grant and Mr. Dobson, namely—that in the present case there are three principles which would guide the Court in determining whether the conditions to be performed by the Company are conditions precedent. If it can be shown (and from a perusal of the case and documents I am of opinion that it *can*),—(1.) That the conditions of which a breach is complained do not go to the root of the Contract, or in other words that the covenants alleged to be broken by the Company go only to *part* of the consideration. (2.) That the Colony have received a substantial part of the consideration for which they bargained, under circumstances sufficient to raise an implied promise to pay for the work done; and (3.) That the Colony have a remedy by a cross action to recover damages for the breaches complained of,—then it appears to me to be clear beyond doubt that the conditions to be performed by the Company are not precedent to their right to sue under the Contract for the guaranteed annual interest of £32,500. The authorities (especially the case of *Ritchie v. Athinson*) cited in the case submitted for opinion sustain the principles above laid down. I may also mention the case of *Boon v. Eyre*, 2 Black, 1312, which is very frequently cited in modern cases upon the subject of conditions precedent. In that case A. by deed conveyed a plantation to B., together with the stock of negroes upon it, in consideration of an annuity of £160 for life, and A. covenanted that he had a good title to the plantation, and that he was lawfully possessed of the negroes. B. covenanted

that A. well and truly performing everything on his part to be performed, he, B., would pay the annuity. A. afterwards brought an action for the annuity, and B. set up the defence that A. was not legally possessed of the negroes, and so had not a good title to convey; but the Court held the plea to be bad, and said that if it were allowed, any one negro not being the property of A. would bar the action. Mr. Justice Williams in his remarks upon this case, says—"It appeared that as A. had conveyed the plantation to B., and so had in part executed his covenant, it would be unreasonable that B. should keep the plantation, and yet refuse payment because A. had not a good title to the negroes." Many cases might be quoted to show that the parties, in cases where they have had the benefit of a substantial part of the consideration, are left to their cross action to recover any damages they may have sustained by reason of the partial non-performance of the contract by the other parties.

My attention is called to Section 18 of the Contract, by which it is expressly declared that the obligations of the Government and the Company are to be correlative and dependent. It may be argued that these words are clear and unambiguous, and that the Court is bound to give effect to them without stopping to consider how far they may be reasonable or not, (see *Stadhard v. Lee*, 32 L.J., Q.B. 74.). There are many cases however which show that even where parties to a Contract have expressly agreed that certain conditions shall be precedent, the parties may by their subsequent conduct—as for example by receiving part of the consideration—preclude themselves from treating such conditions as precedent.—See *White v. Beelon*, 30 L.J., Ex. 373, where this principle is very clearly laid down. In the above case the defendant had received part of the consideration, and Bramwell, B., commenting on this fact, says, "It seems to me that as to that which I might have made a condition precedent at one time if I had thought fit, I am precluded by my own conduct at another time from making a condition precedent." In *Ellen v. Topp*, 20 L.J., Ex. 246, Pollock, C. B., referring to *Williams' Saunders*, says, "When a person has received a part of the consideration for which he has agreed to make a return, it would be unjust because he did not actually have the whole that he should enjoy that part without paying anything for it. And therefore the law obliges him to perform his part, and gives him a remedy for any damages he may have sustained from not having received the whole consideration."

The principle laid down in the above authorities may easily be applied to the case before me. It appears that the Company have actually fulfilled all the most important obligations imposed upon them by the Contract. They have constructed a railway between Hobart Town and a point on the Launceston and Western Railway, and, as I am informed, with the gauge, curves, gradients, and weight of rails in accordance with the specification, and at a cost of £650,000 and upwards; they have equipped the line, and they opened it for traffic on the 13th March, 1876, and since that time to the present day they have rendered the train service required by the contract. The express train has performed the contract speed of 23 miles an hour with reasonable punctuality, and the goods train has been running at a speed $4\frac{1}{2}$ miles an hour faster than is provided for by the Contract. For some months I am informed that the goods trains ran over 6 miles an hour above the specified rate of 10 miles. The Colony have therefore received substantially what they bargained for, namely, railway communication both for passengers and goods between Hobart Town and Launceston. It therefore appears that the breaches of Contract complained of by the Government (so far as the nature of such breaches can be ascertained) cannot be said to go to the root of the Contract.

In coming to this conclusion, I have taken into consideration the reports of Mr. Greene and the other Engineers, and the correspondence with the Government. Even if the construction of the line is found to be defective in many respects, it would, in my opinion, be impossible to argue in the face of the facts alluded to above that the defects are such as go to the root or essence of the Contract; or, in other words, that the Colony is deprived of the substantial consideration bargained for. I do not gather from the case or documents that it is even alleged by the Government that there are any defects which cannot be remedied and compensated for in damages. I may mention that a perusal of the authorities cited in Mr. Fooks' opinion, and in the case submitted to me, will show that defendants have in vain attempted to resist the performance of their part of a Contract by showing that the plaintiff has not fulfilled all the conditions which he stipulated to fulfil, and this has happened in many cases where the defendant has received a considerably less substantial performance of the Contract than the Government have received in the present case. It seems to me, further, that the Colony have not merely had the benefit of the Railway, but that they have received that benefit under circumstances sufficient to raise an implied promise to pay the guaranteed interest. The use of the line by the Government and the public generally are strong facts to show this. I understand that the Government send their paupers, their prisoners, and stores by the line, and that they have recently entered into an agreement with the Company that the Railway shall, from the 1st day of May next, carry all mails between Hobart Town and Launceston and intermediate places. The Government can hardly contend that the Company are to continue this service for 30 years, and get nothing for it under the Contract, because (although they perform the service) their Railway in some parts exhibits bad workmanship, and is, in some respects, composed of defective material. Apart from the facts which show that the Colony have, by their conduct, accepted the benefits conferred by the Railway, there is evidence before me that they have acknowledged in so many words that the line is constructed. Three Engineers were appointed by the late Government to inspect the Railway and to report upon "*its efficient repair and working condition*." The fact of the Engineers going upon the line for this purpose is strong evidence to show that the Government admitted, not only that the line was constructed, but that it was substantially constructed, or, at all events, substantially constructed in most respects. It does not appear from the papers before me how the Government explain away the legal effect of the inspection by the Engineers.

The use of the line by the public generally, and the great benefit that the Colony has derived from the Railway, seem to be well-established facts, and it is presumed that so great are the benefit conferred by the Railway that the Colony cannot now do without it. Moreover, it is in evidence in the correspondence

before me that the Government have, with the sole object of preserving the train service for the benefit of the Colony, been advancing to the Company, by way of loan, since the 1st day of November last, sums at the rate of £29,800 per annum, or within £2700 of the full amount of the annual interest guaranteed by the Colony.

I am of opinion that the above facts, and other facts mentioned in the case, show conclusively that the Colony has knowingly accepted such benefits as are conferred by the Railway, and that being so the law implies a promise on the part of the Colony to pay the interest. According to the principle so clearly laid down by Bramwell, B., in the case of *White v. Beeton* (antè), the Government are now "precluded by their own conduct" from treating the obligations of the Company as conditions precedent.

Judging from the correspondence, the Government appear to be under the impression *that so long as they withhold payment of the interest they will guard themselves from recognising in any way the construction and working of the Line.* I think, according to the doctrine of *White v. Beeton* and other cases, that this contention of the Government is erroneous. A man may recognise the performance of a contract in many other ways than by paying money in respect of it, and in no other way can he so effectually do so as by knowingly availing himself of the benefit of a performance or a substantial performance on the part of the other party to the contract.

It should not be forgotten that the Government, who have always contended that certain defects exist in the construction of the Railway, would not, by paying the guaranteed interest, preclude themselves from bringing a cross action in respect of such defects.

It appears to me to be clear beyond doubt that if the Government paid the interest they would be in a position to sue the Company the next day in respect of any defect existing in the construction of the Railway. See *Davis v. Hedges*, 6 L.R., Q.B., 687.

Upon the first question, therefore, I come to the conclusion that the Company are entitled to sue the Government for the guaranteed interest, and that a plea by the Government, raising as a defence the existence of the breaches of contract of which they complain, would be demurrable. But the further question arises whether the Government would have to pay the *whole* of the interest and resort to a cross action to recover damages for the breaches complained of, or whether they would have the option of giving in evidence such breaches and so reducing the amount claimed for interest?

As a rule, in actions for work and labour done the defendant (in order to avoid what is called circuity of action) may show in reduction of the price agreed to be paid that the subject matter of the contract is diminished in value by reason of the incomplete and inefficient execution of the work by the plaintiff; but the case now under consideration differs altogether from the class of cases alluded to above. In the present case an action would be brought by the Company, not for the contract price (say £650,000), but for breach of covenant on the part of the Government for the non-payment of an *annual* sum covenanted to be paid in respect not only of the construction but of the running and maintenance of the Railway.

I am of opinion that the Government could not in such an action give in evidence, in reduction of the amount of guaranteed interest, the damages sustained by the breaches complained of, and that they would have to resort to a cross action.—See the Rules laid down in *Charles v. Alton*, 23 L.J., C.P., p. 197, as to pleading in order to avoid circuity of action.

In fact so long as the Company continue to provide an efficient train service they are entitled (subject to the remarks in answer to the third question *infra*) to be paid the guaranteed interest. It might, however, be contended on the part of the Government that they have not had such an efficient and well-conducted train service as they might have had if the Railway had been constructed properly; and if the Government are in a position to show that they have only had a benefit represented by a sum less than the £32,500 per annum instead of a benefit represented by the whole of the guaranteed interest, then the balance or difference might perhaps be set off in an action for the interest, or rather evidence of such loss sustained by the Colony might be given in reduction of the interest claimed. This position, even if tenable, would be an awkward one for the Government to take up. They would have considerable difficulty in proving such a case, or in showing how such damages should be apportioned, or by what standard they are to be ascertained; and I doubt whether the Law Officers of the Crown would advise the Government to defend an action upon such grounds.

2. I am of opinion, for the reasons above stated, that the Government cannot legally withhold the interest, and it is therefore unnecessary to answer further the second question.

I may mention, however, that I have not overlooked the evidence of Mr. Greene given in his Report, that the speed of 23 miles an hour could not be attained upon the Railway, nor the statements of three other Engineers to the effect that it was dangerous for the Railway to run 23 miles per hour in its then present condition. The last statement is very vague, but the words "in its present condition" seem to imply that, in the opinion of the three Engineers, the running of the trains at 23 miles an hour might be made safe if the line were put in good repair. The Government have the fullest power to insist upon this being done at the cost of the Company under the 5th Section of Main Line Railway Amendment Act. Whatever may be the opinion of the Engineers however, it appears that, for 13 months and upwards, the Contract speed of 23 miles an hour has been run safely and with punctuality.

3. The fact that the Government anticipate that the Company will spend a portion of the receipts of the Line, which would otherwise go to reduce the £32,500 a year guaranteed by the Colony, in making

good defects in original construction of the Line, will not justify the Government in withholding payment of that part of the interest already due to the Company. It seems obvious that any objections on such a ground are altogether premature. Until the receipts of the Line reach a sum equivalent to what would be a fair cost for paying the ordinary and proper expenses of repairing, maintaining, and working the Railway (and I understand that for the past year the receipts fall short of this by more than £8000), the cost sustained by defective construction, and the use of bad materials, must fall entirely upon the Company, and the matter does not at present concern the Government. If, however, in any given year it is proved that the Company have *actually spent* profits, to which, under the Contract, the Government are entitled, in making good defects in construction, then the Government would be justified in deducting an equivalent amount from the interest,—in other words the Government would be entitled to set off against the particular amount claimed by the Company for interest a certain liquidated and ascertained sum of money which had been received by the Company on behalf of the Government, but which had been improperly expended for purposes of construction. But this question cannot—for the reasons above pointed out—affect the right of the Company to receive the interest due up to the 31st March, 1877.

In conclusion I may say that, as the case presents so many points for discussion, I have felt constrained to write upon it at considerable length, though in doing so I have refrained from commenting upon many cases and many facts which might, I think, have been noticed with advantage did space permit.

It appears to me that, inasmuch as the Government and the Colony have, by their conduct, accepted and are daily availing themselves of the benefits conferred by a Railway constructed at a cost of over £650,000, and inasmuch as they refuse to pay even a shilling in return for those benefits, they are (to quote the language of Mr. Fooks) “violating fundamental principles of law.”

(Signed) ALFRED DOBSON,
67, Macquarie-street, 26th April, 1877.

OPINION OF MR. ROBERT BYRON MILLER.

I THINK the Government is, upon a fair and reasonable construction of its Contract with Main Line Company, under a legal obligation to pay the interest guaranteed by Clause 5 of the Contract in these emphatic terms—“The Governor hereby *especially* guarantees to the Company Interest at the rate of £5 per cent. per annum, upon the money actually expended in and for the purposes of the construction of the said Main Line of Railway, up to and not exceeding the sum of £650,000, during Four years of the period of construction, commencing from the date of the Contract, and for a period of Thirty years from the opening of the entire line for traffic, &c.” In arriving at my opinion, I have carefully considered the object of the Contract, the intention of the parties as to the manner of effectuating the object as set out in the Contract, Schedule, and the several Acts of the Legislature incorporated with and forming part of such Contract, the mutuality and dependency of the stipulations as to the rights and obligations of the contracting parties, and the remedies provided for enforcing such rights and obligations, and lastly the acts of the Government and Colony of Tasmania subsequent to the construction of the line in recognition of the completion of the work and acceptance and enjoyment of the benefits stipulated for.

The Contract is so anomalous that it would be difficult indeed to find any decision upon an instrument sufficiently similar in its terms and circumstances to render such decision obviously applicable, and it is only by the collection of principles laid down in various cases that we can arrive at the legal rules which should govern the construction of the present Contract. Searching with this object, I find it laid down—“That conditions are to be construed to be either precedent or subsequent *according to the fair intention of the parties, to be collected from the instrument*, and that technical words if there be any to encounter such intention should give way to that intention. (*Porter v. Shepherd*, 6 T. Rep. 668.) That where mutual covenants go to the whole of the consideration on both sides, they are mutual considerations the one precedent to the other, but when the covenants go only to a part *and where a recompence may be had in damages* then the defendant has a remedy upon his covenants, and shall not plead it as a condition precedent, (*Boone v. Eyre*, H.B., 173.) That where a covenant for the performance of various acts and duties by one party constitutes the consideration for a subsequent covenant by another party, it is not (in all cases) essential that there should be an exact performance of the precedent covenant in every minute particular in order to create a liability upon the subsequent covenant, (*Campbell v. Jones*, 6 T.R., 573.) That every contract is to be interpreted in connection with the surrounding circumstances, and the act done by the contracting parties in fulfilment of the contract may be regarded in order to see what interpretation they themselves have put upon it, and what conditions have been waived or performed, and the construction of the instrument may thus be varied by matter *ex post facto* (*Clarke v. Westropp*, 18 C.B., 784. (*Purt v. Dowie*, 32 Law J., Q. B., 179.) That where a stipulation in the nature of a condition precedent has been partially performed, it ceases to be available as a condition, and becomes a stipulation by way of agreement for the breach of which compensation must be sought in damages. (*Behn v. Burness*, 32 Law J., Q. B., 179.)

In applying these general principles, it must be borne in mind that the object of this Contract was to provide the inhabitants of Tasmania with the use of a Railway between Hobart Town and Launceston, which should at a certain rate of speed convey passengers, goods, and mails between those Towns; but as they were unwilling or unable to construct and maintain such a Railway at their own cost, they contracted to pay for the benefits conferred by a guarantee of a moderate rate of interest to the capitalists who would

undertake the risk of so costly a work. Under these circumstances, it is scarcely reasonable to suppose, notwithstanding the technical stringency of the 18th Clause, and other portions of the Contract, that the parties contemplated that when the work should be completed so as to confer upon the Colony the advantages stipulated for, if some of the conditions in the Schedule should not be fully complied with, the Colony might take advantage of such breach of conditions to escape from its obligation of guarantee altogether, although for any loss occasioned by the breach of any of the stipulations as to the construction of the line the Colony might be compensated in damages, and had under the 5th Section of the amended Act, and the 6th and 16th Clauses of the Contract, the most ample means of compelling the Company to maintain and work the line in an efficient manner.

It is to be remarked that the Contract (clause 5) makes the payment of interest concurrent with and dependent upon the Company's expenditure and construction, thus affording evidence that perfect compliance with the conditions as to the mode of construction could not have been intended to be a condition precedent to the payment of the guaranteed interest, since some of the breaches of the stipulations of the scheduled conditions pointed out by the Government Engineers in their Report must have occurred during the period of construction when interest was clearly payable and was in fact paid. My opinion so far has been based upon the construction of the instrument only, a question necessarily attended with some difficulty; but assuming that the conclusions I have arrived at as to the legal operation of the instrument are erroneous, the subsequent conduct of the parties has established the Company's right to the payment of interest upon the clear and undoubted basis of the recognition of the Company's performance by the Government, and the acceptance and enjoyment by the Colony of such performance.

The Contract in the name of the Governor is entered into by him simply as the agent and on behalf of the inhabitants of Tasmania, who are the persons intended to reap the benefit of the construction of the Railway, and out of whose pockets the payment of the guaranteed interest is to come. Now as a fact all classes, the Governor in his official and private progresses, the Judges and Officers of the Supreme Court on their way to and from circuit, the Members of the Legislature when attending Parliament, professional men, merchants, visitors, including Governors of neighbouring Colonies, naval officers, &c., have for the last 13 months habitually used the Railway as their mode of transit between Hobart Town and Launceston, although they had the option of excellent coach accommodation upon a first-rate road; very large quantities of goods have been conveyed during the same period, and already some of the natural resources (such as bark, coal, stone, &c.) of the districts through which the Railway runs have been made available, whilst the contract time or speed test, which has been treated as the touchstone to try the question of the Company's performance, has been more than maintained. Does not all this constitute an acceptance and enjoyment by one party of the benefits of the performance by the other, in a more or less perfect manner, of his undertaking, which it would be manifestly unfair should be accepted and enjoyed without payment of any compensation? But I find, in addition, that although the 5th clause of the Main Line Amendment Act presupposes a performance by the Company of the Contract to construct before any operation can be given to it on May 27th, 1876, the Governor in Council exercised his power under that clause by giving notice to the Company of his intention to appoint certain Engineers to inspect the state of *repairs* of the Line, thus recognising that the Company had, as far as construction and maintenance up to then went, performed the obligation which was the consideration for the guarantee. And again, a few days ago, the Governor in Council contracted with the Company for the conveyance of mails as provided for in the schedule. Can it therefore be contended for one moment the Colony has not accepted and largely enjoyed benefit from the Company's performance of its Contract, or that such performance has not been so distinctly and officially recognised by the Governor in Council as to bring the dispute between the contracting parties within the operation of the principles laid down in the case of *Graves v. Legg*, 9 Ex. Ch. 709, (recently affirmed and acted upon in *Bettini v. Gye*, Law Rep. Q. B., part 4, 76,) that when a person has received part of the consideration for which he entered into the agreement, it would be unjust that because he had not the whole he should therefore be permitted to enjoy that part without either payment or doing anything for it, therefore the law obliges him to perform the agreement on his part, leaving him his remedy to recover any damage he may have sustained in not having received the whole consideration? Mr. Sergt. Williams goes on to observe, that it must appear on the record that the consideration was executed in part: this may appear by the instrument declared on itself, whereby a valuable right part of the consideration is conveyed, as in *Campbell v. Jones*, or *Boon v. Eyre*, or *by averments in pleading*. *When that appears it is no longer competent for the defendant to insist upon the non-performance of that which was originally a condition precedent, and this is more correctly expressed than to say it was not a condition precedent at all.*

In conclusion I will add, that I have in considering the questions submitted to me treated them upon the supposition that there may possibly exist grave objections to the manner in which the Company have constructed their Line, although no detailed objections have yet been furnished by the Government to the Company: whether they exist or not is a matter of evidence upon which I am not called upon to advise, but as I have before remarked, if they exist, the Government would have a clear remedy in damages for any loss which the Colony has hitherto sustained, and the most ample power under the Contract of remedying defects for the present and for the future.

ROBERT BYRON MILLER.
30th April, 1876.

Hobart Town, 4th May, 1877.

SIR,

WE have the honor to forward herewith copy of a letter received this morning from Mr. E. D. Holroyd, the eminent Barrister practising at the Victorian Bar, together with copy of his Opinion upon the same Case as was submitted to Mr. Miller and Mr. Alfred Dobson. A copy of this Case was forwarded to you on the 1st inst.

You will notice that Mr. Holroyd, after devoting five days of unremitting attention to the matter, has advised that the Government are not justified in withholding from the Company the interest guaranteed by the Contract; and Mr. Holroyd's great reputation and experience are so well known to you that we need not point out the great weight which ought to be attached to his opinion. The Company have now gone to great expense, (the fee paid to Mr. Holroyd alone being £53 16s. 3d.)—which, under the circumstances, they ought not be called upon to bear,—in procuring the best legal opinions they could obtain at the Bars of England, Victoria, and this Colony; and as all the Barristers who have been consulted have, independently of each other, advised in favour of the Company's claim to interest, we trust that the Government will at once pay the arrears now due.

We shall esteem it as a favour if you will, as soon as possible, have the Opinions of Mr. Holroyd, Mr. Miller, and Mr. Alfred Dobson printed and circulated for the information of the Government and the Members of Parliament.

We have the honor to be,

Sir,

Your obedient Servants,

DOBSON & MITCHELL.

The Hon. the Colonial Secretary.

16, Temple Court, 30th April, 1877.

DEAR SIRS,

Re T.M.L.R. CO.

I SEND you my opinion in this case which proved a tougher piece of work than I at first imagined it would, as it occupied my unremitting attention for five days. It is longer than I could have wished, but having regard to your note I thought it better to be explicit than too concise. If you deem it advisable to publish the opinion I think it should appear what materials were laid before me.

Yours faithfully,

(Signed) E. D. HOLROYD.

Messrs. DOBSON and MITCHELL, Hobart Town.

MR. HOLROYD'S OPINION.

Upon precisely the same Case and Documents as were submitted to Mr. MILLER and Mr. ALFRED DOBSON.

1. In my opinion the Railway as constructed ought to be of the class intended by the Contract, and capable of conveying the traffic to be carried over it at the prescribed speed and without unusual risk. If it is so, then I think the Government is bound to pay the guaranteed interest while the Line is efficiently maintained and worked pursuant to the 6th Clause. I do not agree with the extreme view which I understand the Government to take, that to entitle the Company to the benefit of the guarantee all the conditions of the Contract must have been fulfilled. For such breaches of the conditions of construction as are not of vital importance, having regard to the above definition of what the Railway ought to be, I think the Government must resort to its remedy by action, or to the specific remedy provided by the 6th Section of 34 Vict. No. 13. (the Amendment Act), if under the circumstances disclosed by the papers that remedy can now be pursued. I shall state as clearly as I can my reasons, premising that in interpreting the Agreement between the parties I have not lost sight of the Acts under which it was made and which are incorporated with it.

By the first Clause of the Contract the Company undertakes to construct, maintain, and work a certain Railway in accordance with scheduled conditions. By Clause 5 the Government guarantees interest at a certain rate on the money expended during four years of the period of construction and for 30 years from the opening of the entire Line for traffic. These two Covenants are independent of each other. The Covenant to construct, maintain, and work the Railway in accordance with the scheduled conditions is the consideration for the guarantee; but the performance of this Covenant is not made a condition precedent to the performance of the guarantee; and it could not be so intended, for part of the interest guaranteed is payable before the Line is completed. (*Pordage v. Cole*, 1 Wms. on Saund., 549 and Notes; *Lidthorp v. Brunel*, 4 Exch. 826; the *Eastern Counties Railway Company v. Philipson*, 24 L.J., N.S., C.P. 140; *Terry v. Dantze*, 2 H. Bl. 389.) On the other hand the guarantee is complete in itself; and as regards the 30 years' interest contains a clear condition precedent; namely, that the entire Line shall be

open for traffic before the payment commences. The opening of the Line necessarily implies that it shall have been constructed, but not that the scheduled conditions shall have been exactly or even substantially fulfilled in its construction. According to authority where one party covenants to do a thing in a certain way and the other covenants simply to pay a price for the thing when done, and the thing is done but not in the manner prescribed; so that a breach of contract has been permitted, the party injured cannot refuse to pay the price unless his object in entering into the contract has been frustrated by the breach, but he must resort to his remedy in damages. If his main object is not defeated, damages, it is considered, would be a sufficient compensation. (*Davidson v. Gwynne*, per Lord Ellenborough, 12 East, 388; *Jarrabochia v. Hickie*, 1 H. & N., 183; *Freeman v. Taylor*, 8 Bing., 124; *Ellen v. Topp*, 6 Exch., 424, 441; *Graves v. Legg*, 9 Exch. 709, 716, 717; *M'Andrew v. Chapple*, L.R., 1 C.P., 642, 648; *Simpson v. Crippin*, L.R., 8 Q.B., 14, 16.) No person was appointed by this Contract to determine when the Line was fit to be opened, but the main object of the Government in entering into the Contract was, as I suppose it would be conceded, to get a light class of Railway, indicated by the gauge, constructed with reasonable solidity, having regard to its character, and sufficient for the traffic which was likely to be placed upon it. Whether the Railway when finished came up to this standard is a question of fact which unless admitted can only be determined by the evidence of skilled witnesses. Similar questions of fact may have to be determined on every periodical demand for the payment of interest; for the 6th Clause makes it a condition precedent to payment that the Line shall be maintained and worked in an efficient manner, so as to afford all sufficient station accommodation and facilities for the passenger and goods traffic. If the Line has been properly finished (properly—that is, in the way indicated) since it was opened, I think the claim for interest should begin to run from the time when it was so finished, the previous opening having in that event been premature.

The 18th Clause of the Contract may at first sight appear inconsistent with my interpretation of it. That Clause provides that “the obligations of the Governor and Company under the Contract are to be correlative and dependent, the fulfilment of the obligations of the Governor being dependent upon the fulfilment of the obligations of the Company, and *vice versa*.” And it might therefore be contended that as the performance of the scheduled conditions which relate to construction of the Railway is an obligation of the Company, the duty of the Government to pay the guaranteed interest does not arise until that obligation has been fulfilled. But if that were so, then supposing the Railway to have been properly constructed and maintained, and the Government through some oversight to neglect the payment of interest accrued, the Company by parity of reasoning would be meanwhile absolved from its obligations as to the amount of fares and tolls, the rate of speed, the carriage of mails, and even the running of any trains at all. Such a conclusion would be absurd; and if the Clause could have no other meaning it might be rejected as repugnant to the intention of the parties, which is to be collected from the whole instrument, and not from any particular part of it. (*Stavers v. Curling*, 3. Bing., N.C. 355, 368; *Boone v. Eyre*, 1 Wms. on Saunders 553, edit. 1871; *Ellen v. Topp*; *Graves v. Legg*; *M'Andrew v. Chapple*, *ubi sup.*; *Newson v. Smythies*, 28 L.J. N.S. Exch. 97.) But, in my opinion, the 18th Clause merely governs the order of time in which corresponding obligations are to be performed. Where, from the nature of the case, although not so expressed, one ought to precede the other, the performance of the latter is excused until the first is performed. For illustration, the Company is bound by Clause 10 to provide vouchers and other evidence of its payments when required, and by Clause 11 to permit its books and accounts to be examined for the purpose of checking the abstract of receipts and expenditure to be furnished under Clause 8. The Government is bound to pay the guaranteed interest for the current quarter within 14 days after the delivery of the abstract, but no time is fixed within which the vouchers are to be provided, or the accounts examined. However correct the abstract might be, it would be most unjust to hold the Government liable for a breach of its obligation to pay the interest until the vouchers had been provided, and a reasonable time allowed for examining the Company's books.

2. As far as I can form an opinion upon the facts I think the Government ought not to withhold the interest, assuming as the Case directs that the Line is efficiently maintained and worked. But as I cannot pretend to decide between contending Engineers, I think it necessary to answer the second question. Taking the Report of Messrs. Mason, Mais, and Stanley as the best index of the defects complained of, there are some which, as there described, would necessarily imperil the stability or safety of the Line, and for which, therefore, no damages would compensate. These are the insufficient depth of the foundations of viaducts and bridges, the inadequate provision for carrying off the flood-waters, the improper construction of the swing-bridge over the Derwent, and the improper manner of laying the rails at the curves. I should observe that no instance is given of the insufficiency of foundations, unless the settlement of the abutment to the viaduct over the Derwent is intended to be attributed to this cause. There are other defects alleged which might or might not render the Line unfit for its purposes according to the consequences which might be expected to result from them, such as the general neglect of drainage, the inferior quality of the materials employed in various places, as timber, bricks, bluestone, rails, and ballast, and inferior workmanship. The existence of these defects is generally denied; but the probable consequence, if they existed, is obviously a question for experts. The rest of the Report deals with matters of mere repair or maintenance, or works to be provided for the accommodation of adjoining landowners, who may be left to protect their own rights.

In the dispute between the Company and the Government the Company has some points in its favour, to which, if the case came to trial, great weight would be attached. In the first place, the Government has never attempted to avail itself of the remedy which it possessed under the 6th and following Clauses of “The Railway Amendment Act” for any breaches of the contract stipulations. This remedy was peculiarly adapted to the circumstances which have occurred. The Government could have called upon the Company to show before the impartial tribunal of the Supreme Court why the Contract should not be rescinded; and the Court might have ordered either that it should be rescinded, or that the Company

should pay a reasonable sum of money to the Treasurer by way of penalty for the breaches which might be proved. Instead of availing itself of this solution of the dispute, the Government has taken quite an opposite course. It has permitted the public to have the use of the Railway since it was opened, and it has contracted with the Company for the carriage of the Mails. Although aware, according to Mr. Innes' letter, that the Line had been imperfectly constructed, it did not appoint a Board of Inspection until about three months after the opening; and it has never pointed out to the Company specifically what alterations or amendments it requires in the Line. If the Line was dangerous, one can hardly suppose that the Government would not have taken immediate steps to prevent its being used. Having so far taken the benefit of the Railway, and declined to try, in the manner prescribed by the Act, the question whether the defects are so vital that the Contract should be rescinded, or whether a penalty would meet the justice of the case, it seems very strong to say that the Government shall be allowed to urge those defects simply as a reason for refusing to pay any interest. (*Behn v. Burness*, 3 Best & Sm. 751. 758; *White v. Beeton*, 30 L.J. Exch. 373, 7 H. & N. 42; *Carter v. Scargill*, L.R. 10. Q.B. 568.) On entering into the Contract the Government must have been well aware that, in the early years of its existence, the Company would necessarily depend upon the guarantee for the maintenance of the Line, and probably to keep itself afloat. Another unanswerable fact is, that the Railway has stood the test which its principal opponent represented as crucial, and for upwards of a year has carried the traffic at the contract speed. This is very strong evidence, and to a non-professional mind would seem to dispose of the most important charges of the three Engineers with reference to the permanent way.

3. In my opinion the Government cannot refuse to abide by the guarantee on the ground that the maintenance will be rendered more costly by the originally imperfect construction of the Line. I think this circumstance would be an element in considering the damages to be awarded to the Government for the original imperfections. I ought to add that, in my opinion, it would be impossible now for the Government to get the Contract rescinded under the 6th and subsequent Sections of "The Railway Amendment Act."

(Signed) E. D. HOLROYD.
30th April, 1877.

Colonial Secretary's Office, Hobart Town, 15th May, 1877.

GENTLEMEN,

I HAVE the honor to acknowledge the receipt of your letter of the 1st instant, and in reply have to request that you will be pleased, at your earliest convenience, to forward to the Crown Solicitor a copy of the case submitted to Mr. Fooks on behalf of the Main Line Railway Company.

I take this opportunity to thank you for having supplied me with copies of the Opinions of your counsel in Tasmania.

With the correctness of the general principles of the Law of Contracts as therein laid down, I am informed by the Attorney-General that the Government cannot disagree.

I have now to intimate to you that the Government are prepared to instruct their Engineer to proceed at once with the inspection of the line under Section 5 of "The Main Line of Railway Amendment Act," for the purpose of reporting upon its working condition, and the repairs and alterations necessary, in order to bring it within the terms of the Contract.

I have, &c.
(Signed) THOS. REIBEY.

Messrs. DOBSON and MITCHELL, Macquarie-street.