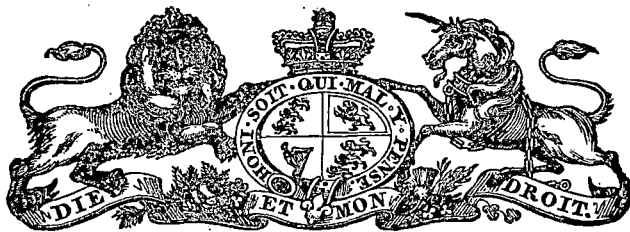


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1878.

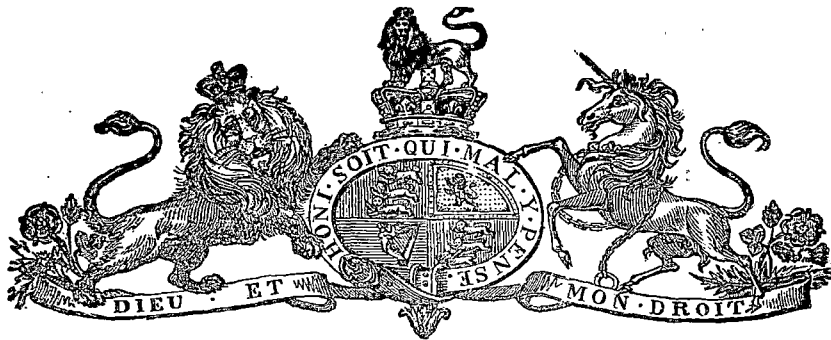
T A S M A N I A.

LEGISLATIVE COUNCIL.

MAIN LINE RAILWAY:

**CASE AND OPINION OF MESSRS. HOLKER, BENJAMIN, AND
CYRIL DODD.**

Laid upon the Table by Mr. Moore, and ordered by the Council to be printed,
August 27, 1878.



MAIN LINE RAILWAY.

34 Vict. No. 13.

AN ACT to amend "The Main Line of Railway Act."

[18 October, 1870.]

WHEREAS it is expedient to amend "The Main Line of Railway Act:" Be it therefore enacted by His Excellency the Governor of *Tasmania*, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:—

PREAMBLE.
33 Vict. No. 1.

1 It shall be lawful for the Governor in Council to cause a Contract on behalf of this Colony to be entered into with any person or Company for the construction, maintenance, and working of a Main Line of Railway between *Hobart Town* and *Launceston*, or between *Hobart Town* and any point on the *Launceston* and *Western* Railway, in consideration of the Governor of this Colony guaranteeing to such person or Company interest at the rate of Five Pounds per centum per annum upon any sum of money, not exceeding in the whole the sum of Six hundred and fifty thousand Pounds, which the said person or Company may actually expend in the construction of the said Main Line of Railway; such guarantee to be payable in such manner as to secure to the said person or Company interest at the rate aforesaid upon the actual expenditure within such limit as is hereinbefore expressed.

Power to contract.

2 Such guarantee shall continue for Thirty years from the date at which the said Line shall be opened for traffic, provided that such person or Company shall continue to work and maintain the said Line in an efficient manner during the said period; and in such Contract it shall be lawful for the Governor to guarantee interest at the rate aforesaid upon the amount expended for the purposes of such construction during a period not exceeding Four years from the date of the Contract, and before the said Line is open for traffic.

Duration of guarantee.

3 In such Contract provision shall be made, amongst other things:—

Matters to be contained in Contract of

1. For compelling the construction of the said Railway by a route which shall keep as near as may be practicable to existing centres of population;
2. That the said Railway, together with all Stations, Rolling Stock, and all other works connected with such Railway, shall be constructed of the best materials and in a thoroughly substantial manner; and all Bridges on the Line shall be constructed according to the regulations as to strength of the *English* Board of Trade;
3. That should the profits of the Railway arising from the traffic thereon amount in any year to less than Five Pounds per cent., the Government guarantee shall be payable for such year only to the extent of the difference between such profit and Five Pounds per centum on the cost of construction as before limited:

Compelling construction of the said Railway, and the manner of construction, and the manner of working the same.

4. That when in any year the profits of the said Railway arising from the traffic thereon amount to Six pounds per centum or under, the entire amount of profits for such year shall be retained by the Company :
5. That when in any year the profits of the said Railway arising from the traffic thereon shall exceed Six Pounds per centum, the Government shall be entitled to receive and shall receive from the person or Company One-half of all such profits over Six Pounds per centum, and so in any succeeding year until all moneys which have been paid by the Governor in Council under the guarantee hereinbefore contained shall have been paid ; after that time all profits shall belong to the Company :
6. That the gauge of the said Railway shall be not less than Three feet six inches :
7. That the weight of rails to be used in constructing and working the same shall be not less than Forty pounds to the yard :
8. That whenever such Railway is completed and opened for traffic, at least Four trains daily shall run upon the said Line throughout its entire length ; namely,—Two daily Trains from *Hobart Town* to the opposite Terminus, and Two daily Trains from the opposite Terminus to *Hobart Town* ; and such Trains shall be of such capacity and shall start at such hours as the Governor in Council may from time to time determine :
9. That the minimum average speed at which such trains shall travel shall be, for one daily train each way Twenty-three miles an hour, and for the other daily train each way Ten miles an hour, including all stoppages and detentions :
10. That the maximum fare for passengers travelling on the said Railway shall not exceed Three Pence per mile for First Class passengers, and Two Pence per mile for Second Class passengers ; and the rate for Goods shall not exceed that charged from time to time upon the Government Railways in *Victoria* : Provided that when in any year the profits of the said Railway arising from the traffic thereon shall exceed Ten Pounds per cent. upon the actual outlay, the Governor in Council shall have power to reduce the fares for passengers, so as such reduction shall not diminish the profits of the Railway below Ten Pounds per cent. :
11. That the said person or Company shall carry all Mails to and from all places along the Line upon such terms as may be from time to time agreed upon :
12. That the said Line may with the sanction of Parliament be purchased by the Governor in Council at any time after the Line shall have been opened for traffic, upon giving Twelve months notice to the person or Company ; the price to be fixed by a majority of Five Valuers, Two to be named by the Governor in Council, Two by the person or Company, and One to be chosen by the Four Valuers first appointed.

Contract to contain other provisions.

4 The said Contract shall contain all such other stipulations and provisions as the Governor in Council may think necessary to secure the efficient construction, working, and maintenance of the said Railway.

Company to be bound to keep Railway in repair.

5 The said person or Company shall be bound at all times to keep the said Railway and whole undertaking in good and efficient repair and working condition ; and in case it shall appear to the Governor in Council, upon the report of any officer appointed for the purpose, that the works in any part are not in good and efficient repair and working condition, it shall be lawful for the Governor in Council, after such notice as to him shall seem fit and proper, and on default by the said person or Company, to direct the necessary repairs and works to be performed at the cost of the said person or Company by persons to be appointed by the Governor in Council in that behalf ; and the cost of executing such repairs and works, and all charges connected therewith, shall and may be recovered from the said person or Company at the suit of the Minister of Lands and Works before any Court of competent jurisdiction.

If Company guilty of breaches of Contract or of Act, the Attorney-General

6 If the said person or Company shall be guilty of any breach of any of the conditions, provisions, or stipulations of the said Contract, or of the Main Line of Railway Act, or of this Act, the Attorney-General may, when and so often as any

such breaches may happen, apply to the Supreme Court for a Rule calling upon the said person or the Manager of the said Company to show cause, on a day to be mentioned in such Rule, why the said Contract should not be rescinded, and why any lease or leases which may have been granted in pursuance thereof should not be declared forfeited upon such grounds as may be set forth in such Rule; and such Rule may be served upon such person or the said Manager or other person having the management of the affairs of the said Company in *Tasmania*, either personally or by leaving the same at the last known place of business of the said Company in *Tasmania*, and being so served or left as aforesaid, such Rule shall be deemed for all purposes to have been duly served on such person or Company as the case may be.

may move Supreme Court to rescind Contract or declare leases forfeited.

7 If on the hearing of such Rule the Court shall be satisfied, either by affidavit or otherwise, that the said person or Company has been guilty of any of the breaches of the conditions, provisions, or stipulations in the said contract or of the Acts set forth in the said Rule, the said Court may, and is hereby authorised and empowered to order and declare such contract to be rescinded and such lease or leases to be forfeited, and thereupon (except as hereinafter mentioned) such contract and lease or leases shall become absolutely null and void: Provided that the Court upon the hearing of any such Rule may, if it shall consider that the justice of the case would be met by so doing, instead of ordering the rescission of the said contract and the forfeiture of the said lease or leases as aforesaid, order the said person or Company to pay to the Colonial Treasurer such a sum of money as the said Court may consider reasonable by way of penalty for the breach of any of the conditions, provisions, or stipulations of the said contract or of the said Acts. And the said Court may also make such order as to the costs of the proceedings as it may think fit; and any order so to be made for the payment of any sum of money or costs as aforesaid may be enforced in the same manner as may for the time being be provided for the enforcement of decrees and orders of the said Court in its Equitable Jurisdiction.

Supreme Court may declare Contract rescinded or leases forfeited, or may order Company to pay a sum of money to Colonial Treasurer.

8 The said Court may from time to time adjourn the hearing of any such rule to show cause as aforesaid, and may give to such person or Company such time as to the Court may seem reasonable for the purpose of enabling such person or Company to file such affidavits as may be considered necessary in opposition to the ground set forth in the said rule, and any affidavits that may have been filed in support thereof, and may also allow further time to the Attorney-General to file any affidavits in reply as to the Court may seem expedient; and the said Court may also, if it shall see fit, direct the truth of the grounds set forth in the said rule to be decided otherwise than by affidavit, and for that purpose may direct one or more issue or issues to be tried by a jury in the like manner as issues directed by the Court in its Equitable Jurisdiction are tried.

Court may adjourn the hearing, and may grant time to file affidavits;

and may order issues to be tried by a Jury

9 If the said Court shall order the said Contract to be rescinded, and the said lease or leases to be forfeited as hereinbefore mentioned, it shall nevertheless be lawful for the Governor, with the advice of the Executive Council, on the address of both Houses of Parliament, to waive such rescission and forfeiture upon the payment of such sum or sums of money, and upon such other terms and conditions as by such address may be suggested; and upon payment of such sum or sums of money, and compliance by such person or Company with such other terms and conditions as aforesaid, the said Contract and lease or leases shall be of the like force and effect as if such order of the Court had not been made.

If Court order Contract to be rescinded, &c., Governor in Council may waive same upon address of Parliament.

10 Sections One and Two of "The Main Line of Railway Act" are hereby repealed.

Repeal.

11 This Act and "The Main Line of Railway Act" shall, save as altered or amended by this Act, be read and construed together as one Act.

Acts to be read together.

12 This Act may be cited as "The Main Line of Railway Amendment Act."

Short title.



C O N T R A C T .

This Contract made the 15th day of August, A.D. 1871, between His Excellency CHARLES DU CANE, Esq., Governor of Tasmania, by and with the advice and consent of his Executive Council, for and on behalf of the Government of Tasmania, and in respect of the acts and observances herein expressed to be obligatory upon the Governor and Council or the Government, and hereinafter called "The Governor," of the one part, and the Tasmanian Main Line Railway Company, Limited, for and in respect of the acts and observances herein expressed to be obligatory upon the Company, and hereinafter called "The Company," of the other part, ~~Witnesseth~~ that in pursuance and exercise of the powers given by the Acts of the Parliament of Tasmania, 33 Vict. No. 1, passed the 22nd October, 1869, the short title whereof is "The Main Line of Railway Act," and 34 Vict. No. 13, passed the 18th October, 1870, the short title whereof is "The Main Line of Railway Amendment Act," and which two Acts are hereinafter referred to as the Main Line Railway Acts, and in pursuance and exercise of all other powers given or reserved to or possessed by the Governor of Tasmania in that behalf and for accomplishing and carrying into effect the objects and purposes authorised or contemplated by the said Acts, it is agreed as follows:—

1. The Company shall 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 at the foot hereof, which construction, maintenance, and working are included in the expression "the said undertaking" herein used.

2. The Governor may add to, alter, and vary the said conditions mentioned in the said Schedule, but so that the conditions as so added to, altered, or varied shall not be more onerous upon or less advantageous to the Company than the conditions as set forth in the said Schedule.

3. The conditions as so set forth, or as so added to, altered, or varied, shall be treated and considered as part of the Contract, and fulfilled by the Governor and Company accordingly.

4. The Governor hereby confers upon the Company all rights, powers, privileges, and immunities, and guarantees to the Company all benefits which, by the said Main Line Railway Acts or any Acts incorporated therewith, or by the Act 33 Victoria, No. 21, passed 22nd October, 1869, or otherwise howsoever the Governor is authorised to confer, create, use, exercise, delegate, or guarantee for the purposes or in reference to the said undertaking and the connection thereof with the Launceston and Western Railway, with running powers over the said last-mentioned Railway, and also power to lay down an additional rail or rails, and to execute and do all such works as may be necessary to connect such Main Line of Railway with the said Launceston and Western Railway, and including especially the leases of Crown Lands which the Company may require for the purposes of the said undertaking.

5. 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 this Contract, and for a period of Thirty years from the opening of the entire Line for traffic; and such Interest will be payable as follows:—

The Company shall pay into the Bank of New South Wales in London, or some other Bank approved of by the Governor, to the credit of the Company, the money raised by them for the construction of the said Railway as the progress of the works may require; and such sums, of not less than £25,000 in amount, shall bear Interest at the specified rate from the date at which they are paid in.

Not more than £250,000 shall be paid into the said Bank in any one year, and no greater sum than £100,000 shall be kept idle at the Bank for a period exceeding Three months.

The Company shall with each payment forward to the Colonial Secretary, to his office in Hobart Town, a receipt from the Manager of the said Bank showing that the money has been duly paid to the credit of the Company; and before the Interest is actually paid by the Governor, shall produce to him or whom he may appoint vouchers or documents showing that the money (within the limitation named) has been actually expended for the purposes of the construction of the said Railway. The Interest will be paid in cash quarterly to the Company's Bankers in Hobart Town.

6. No sum shall be payable for guaranteed interest for any period during which the Company do 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.

7. The main object for which the Company has been formed having been the construction, maintenance, and working of the said Railway, there shall be allowed as forming the first instalment of the cost of construction a sum of £25,000, but no more, which sum it is agreed shall be deemed to cover all preliminary expenses, including the expenses of the formation of the said Company, the negotiation with the Governor, and all engineering and other expenses, prior to the 1st day of January, 1871.

8. After the entire Line is opened for traffic, the Company shall furnish to the Governor at the close of each quarter (viz. on the 31st day of March, the 30th day of June, the 30th day of September, and the 31st day of December in each year) an Abstract of their receipts and expenditure for the preceding quarter so far as the same can be made up in the Colony; and the Governor shall be bound to pay to the Company in Hobart Town quarterly, within Fourteen days next after the delivery of each of such Abstracts, such amount of money as will with the profit (if any) of the preceding quarter make up interest at the rate of £5 per cent. per annum on £650,000 (or such less sum as the said Railway and works may cost), and so on from quarter to quarter.

9. Any accounts not adjusted by the Company in any one quarter shall be brought into account in the succeeding quarter, or as soon as the same can be adjusted in the Colony.

10. The Company shall provide satisfactory vouchers or other evidence of all payments made by them when required so to do by the Governor or whom he may appoint.

11. So long as the Governor shall be liable to pay and shall be called on to pay interest as hereinbefore agreed, the Governor may appoint some person or persons with full power to enter upon the Offices and Stations of the Company, and to examine and audit all Books and Accounts of the Company, so as to check any such Abstract as hereinbefore mentioned; and the Company shall furnish every facility for the purpose of verifying any such Abstract.

12. If the profits of the undertaking for any quarter reach an amount equivalent to interest at the rate of £5 per cent. per annum on the outlay (limited as aforesaid), the Governor shall not be bound to make any contribution in the nature of guaranteed interest for that quarter, unless in respect of some account which has not been adjusted in a previous quarter, and in respect of which the Governor is liable to pay interest.

13. If in any quarter the profits of the undertaking reach but do not exceed a sum equivalent to Six Pounds per cent. per annum on such outlay, the Company is to retain all such profits. If the profits exceed £6 per cent., the Company shall pay to the Governor one-half of all profits over £6 per cent., and so in every quarter until the Company shall have repaid to the Governor, without interest, all moneys which the Company may have at any time previously received from the Governor on account of the Guarantee hereinbefore contained: when and so soon as all moneys which have been advanced or paid by the Governor for interest have been repaid to the Governor, the profits of the said undertaking shall not be divisible, but shall belong exclusively to the Company; but this clause shall not prejudice the authority of the Governor to reduce the fares, which is hereinafter contained.

14. If in any quarter during the said period of 30 years the profits of the said undertaking shall not reach an amount equivalent to £5 per cent. per annum on such limited outlay as aforesaid, then (notwithstanding the Governor may not have been liable to pay, and may not have paid any contribution on account of the previous quarter,) the liability of the Governor to pay or make up the rate of interest to £5 per cent. shall again arise or revive, and so on from time to time during the whole of the said stipulated period of 30 years; the true meaning and intention of this Agreement and of the contracting parties being that the Company may at all times during the said period receive interest, at the rate of at least £5 per cent. per annum upon the money expended by them (limited as aforesaid to the said sum of £650,000), either from the profits of the undertaking or from the Governor.

15. All profits arising during the period of construction from the working of sections or portions of the Line which may be opened for traffic shall (until the whole line shall be opened for traffic) belong exclusively to the Company.

16. The Company shall be bound at all times from and after the completion and opening of the said Railway to keep and maintain the same and the Rolling-stock, and generally the whole undertaking, in good and efficient repair and working condition.

17. The undertaking, with all its incidents, benefits, and privileges, both existing and prospective, may be purchased by the Governor at any time after the Line shall have been opened for traffic, upon giving Twelve Months notice in writing to the Company both in London and in Tasmania, at a price to be fixed, failing agreement, by a majority of Five valuers, Two to be named by the Governor, Two by the Company, and One to be chosen by the Four valuers first appointed.

18. The obligations of the Governor and Company under this 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*.

19. This Contract is made subject to the provisions of "The Main Line Railway Acts" of the Parliament of Tasmania hereinbefore recited; and each of the contracting parties agrees to abide by such provisions, save so far as they may be herein expressly modified, or they may hereafter be altered, added to, or varied by mutual consent.

20. Nothing in this Contract contained shall be deemed or construed to impose a personal obligation upon the Governor, who contracts for and on behalf of the Colony of Tasmania and under the authorities aforesaid.

21. Both parties hereto will from time to time do all such acts, matters, and things, and execute all such grants, demises, deeds or instruments, as may be necessary or desirable for giving full and complete effect to this Agreement and every part thereof.

22. This Contract will be executed by the Governor as aforesaid in Tasmania, and a counterpart thereof will be executed by the Company in London; but the date of this Contract shall for the purposes of this Agreement be deemed and taken to be the day on which the said counterpart shall be executed by the Company in London.

23. All Notices required or which may be necessary by this Contract to be given by the Governor to the Company, or by the Company to the Governor, may be served on the Governor by leaving the same with the Colonial Secretary for the time being of Tasmania at his Office in Hobart Town aforesaid; and may be served upon the Company by leaving the same at their Office in Hobart Town aforesaid, or at their Office in London, or by serving the same on one of the Directors of the Company for the time being resident in London.

24. All powers herein or in any Act referring to this Railway contained, given, or reserved to the Governor or the Governor in Council shall and may be exercised by the Governor for the time being or the Officer administering the Government of Tasmania from time to time by and with the advice of his Executive Council as the case may require.

25. The Company shall, before receiving any Interest under this Agreement, be incorporated in Tasmania, or otherwise made capable of suing and being sued in Tasmania.

Signed, sealed, and delivered, by the above-named CHARLES DU CANE, Esquire, Governor of Tasmania, at a meeting of the Executive Council held at Hobart Town this day, the same being signed in the presence of and by and with the advice of us the Members of the said Council.

CHARLES DU CANE. (L.S.)

J. M. WILSON, *Colonial Secretary.*
THOS. D. CHAPMAN, *Colonial Treasurer.*
W. R. GIBLIN, *Attorney-General.*
HENRY BUTLER, *Minister of Lands and Works.*
J. A. DUNN, *M.E.C.*

J. B. DAVISON, *Secretary.* (L.S.)

The Seal of the said Company was affixed hereto in the presence of the undersigned, in pursuance of an order of the Board, the fifteenth day of March, 1872.

G. W. BROWN, 12, *Spring Gardens.*

THE SCHEDULE REFERRED TO IN THE FOREGOING CONTRACT.

The route of the said Railway shall keep as near as may be practicable to existing centres of population; but the Company shall have full power to alter or vary the route as their Engineer may advise to be necessary or advantageous, having reference to the exigencies of construction, or difficulties of route, or prospects of traffic.

The exact points of the Termini of the said Railway shall be fixed by the Company.

The Company shall also have the right to run into the Launceston and Western Railway at any point they may consider most advantageous, and to lay down a rail or rails upon that Line from the point of junction to the Terminal Station at Launceston, so as to allow the Company's Rolling Stock to run over that portion of the Launceston and Western Railway.

The Works shall be commenced within Six calendar months after the date of this Contract, and after commencement shall be diligently prosecuted until completion.

The whole of the said Works shall be completed and the said Railway opened for traffic throughout within the period of Four years from the date of the Contract, under a penalty of £20 for every day's delay beyond that period, unless it can be shown that the delay has arisen from strikes or other circumstances beyond the reasonable control of the Company.

The said Railway, together with all Stations, Rolling Stock, and all other Works connected with such Railway, shall be constructed of the best material, and in a thoroughly substantial manner.

The gauge of the Railway shall be 3 feet 6 inches.

The Bridges shall be constructed of brick, stone, iron, or timber, as the Company's Engineer may determine; but in any construction the Bridge to be so designed and built as to have a strength sufficient

to bear a strain without breaking four times greater than can be put upon it with the heaviest Rolling Stock on the Line, or otherwise so as to comply with the regulations as to strength of the English Board of Trade.

The weight of the Rails shall average forty pounds to the yard.

The Sleepers shall not be less than 6 feet 6 inches in length by $8 \times 4\frac{1}{2}$ inches in breadth and depth, and to be half round or squared timber, and fastened with dog spikes or other equally efficient fastening.

The Ballast of the Line shall not be of less width than 8 feet 6 inches, nor of less depth than 18 inches from top of rail.

No curve on the said Railway shall have a less radius than four chains, and no gradient shall be steeper than 1 in 40.

The Station Buildings shall be built of brick, stone, iron, or wood, and with such offices and accommodations as the Company's Engineer may consider necessary.

When the said Railway is completed and open for traffic, at least four Trains shall run daily upon the said Line throughout its entire length; namely,—Two Trains daily from Hobart Town to the opposite Terminus, and two Trains daily from the opposite Terminus to Hobart Town; and such Trains shall be of such capacity and shall start at such hours as the Governor may from time to time determine, having reference to the exigencies of a single Line of Railway, and the general convenience in the working of the Railway as well as regards the Company as the Public.

The minimum average speed at which such trains shall travel shall be for one daily train each way 23 miles an hour, and for the other daily train each way 10 miles an hour, including all stoppages and detentions.

The maximum fare for passengers travelling on the said Railway shall not exceed Three-pence per mile for First Class Passengers, and Two-pence per mile for Second Class Passengers, and the rate for goods shall not exceed that charged from time to time upon the Government Railways in Victoria: Provided that, when in any year the profits of the said Railway arising from the traffic thereon shall exceed £10 per cent. upon the actual outlay, the Governor shall have power to require the Company to reduce the fares for passengers so as such reduction shall not diminish the profits of the Railway below £10 per cent.

All first and second class passenger carriages are to be covered, and to contain seats for all passengers.

All tolls for passengers or goods to be charged equally to all persons, and at the same rates, without preference, favour, or otherwise.

Children under 3 years of age accompanying passengers by such train to be taken free of charge, and children of 3 years and upwards, but under 12 years of age, at half the charge for an adult passenger.

Each First Class Passenger to be allowed 75lbs., and each Second Class Passenger 56lbs. of luggage free, not being merchandise or goods carried for profit or hire; any excess of luggage to be charged by weight, at a rate not exceeding the lowest rate of charges for passengers' luggage by other trains on Victorian Lines of Railway.

The Company shall carry all mails to and from all Townships, Stations, and places along the Line upon such terms as may from time to time be agreed upon between the Governor and the said Company, and until otherwise agreed it is stipulated as follows:—

Every train to carry mails if required to do so by the Postmaster-General.

The mails to be accompanied by a Guard, or to be without a Guard, at the option of the Postmaster-General.

The Postmaster-General may require the whole inside of a carriage to be exclusively appropriated for the purpose of carrying mails.

The Postmaster-General may require separate carriages for the purpose of sorting letters during transit.

Mail-guards are to be deemed Second Class Passengers.

The Company to receive such remuneration for the mail service as may be agreed on, and in case of difference to be settled by arbitration.

The mail service not to be suspended or postponed by reason of the amount of remuneration not having been fixed upon, or of the award not having been made.

The amount of remuneration for mail service may again be considered when it has been in force for three years.

The Postmaster-General may put an end to mail services on giving three months' notice.

The Company may establish, work, and use for their own profit a line of Electric Telegraph upon the Railway.

Government Messages shall have priority, if required; and subject to the use of the Company, and to the priority (if any) claimed by the Governor, the Telegraph to be open for receiving and sending Messages by all persons alike, without favour or preference.

The Governor may erect a Telegraph along line of Railway for Government use only, on reasonable compensation to Company.

The amount in case of difference to be settled by Arbitration; and, subject to a prior use for Government purposes, the Railway may use the Telegraph on terms to be agreed upon with the Governor, or in case of difference to be arbitrated.

Any reference to Arbitration of any dispute between the Governor and the Company shall, where not otherwise provided, be carried out in the manner provided by *The Lands Clauses Act* (21 Vict. No. 11, Secs. 14 to 26 inclusive), so far as the said provisions can be applied.

Witnesses—

J. M. WILSON.
THOS. D. CHAPMAN.
W. R. GIBLIN.
HENRY BUTLER.
J. A. DUNN.

CHARLES DU CANE.

GEORGE SHEWARD.

Ex parte THE GOVERNMENT OF TASMANIA *Re* THE TASMANIAN
MAIN LINE RAILWAY COMPANY, LIMITED.

CASE

For the opinion of Counsel upon the construction of a Contract entered into between the Governor of Tasmania and the Tasmanian Main Line Railway Company, Limited, and as to certain matters in dispute between the Government and the said Company.

COUNSEL will receive herewith copies of the following documents:—

1. The Act of Parliament of Tasmania, 33 Victoria, Number 1, called "The Main Line of Railway Act."
2. The Act of Parliament of Tasmania, 34 Victoria, Number 13, called "The Main Line of Railway Amendment Act."
3. The Contract dated the Fifteenth day of August, 1871, made between the Governor of Tasmania of the one part, and the said Company of the other part. (This Contract, by Section 22, is deemed to be dated upon the Fifteenth day of March, 1872, the day upon which it was executed in London.)
4. Report upon the Construction of the Railway by Mr. W. H. Greene, C.E., dated Ninth of April, 1874, and reply of Mr. Grant, C.E., the Chief Engineer of the Company, thereto.
5. Further Report by Mr. Greene, dated Twelfth of August, 1875, and reply of Mr. Grant thereto.
6. Report upon the Construction of the Railway by Messieurs W. Mason, C.E., H. C. Mais, C.E., and H. C. Stanley, C.E., dated Fourteenth of June, 1876.
7. Reply of Mr. Grant to the Report of Messieurs Mason, Mais, and Stanley, dated Fifth of July, 1876.
8. Correspondence containing Contract as to the conveyance of Mails for the Government by the Company.
9. Extracts from opinion and supplemental opinion of Mr. W. Cracroft Fooks, Q.C., given by him to the Railway Company, dated Twelfth of February, 1877.
10. Case submitted by the Railway Company to Messieurs E. D. Holroyd, R. B. Miller, and A. Dobson, Barristers-at-law, and their opinions thereon.
11. Case submitted by the late Attorney-General on behalf of the Crown to Mr. Cyril Dodd, Barrister-at-Law, and Mr. Dodd's opinion thereon.

By the Contract dated the Fifteenth day of August, 1871, (document Number 3), made (in pursuance of certain powers given by the Acts of Parliament of Tasmania, intituled "The Main Line of Railway Act," (document Number 1), and "The Main Line of Railway Amendment Act," (document Number 2), respectively), between the Governor of Tasmania on behalf of the Government of Tasmania of the one part, and the Tasmanian Main Line Railway Company, Limited, of the other part, it was agreed, *inter alia*, that the Company should construct, maintain, and work a Main Line of Railway between Hobart Town, (the capital city of Tasmania, situated at the South of the Island,) and Launceston, (situated at the North of the Island), or between Hobart Town and any point on the Launceston and Western Railway, with running powers (conferred by Act of Parliament, 33 Victoria, Number 21,) over that Railway to Launceston, subject to the conditions in the Schedule to the Contract.

The Launceston and Western Railway belongs to the Government, and from the Township of Evandale this Railway runs for some miles along one of the routes which would be suitable for a railway constructed from Hobart Town to Launceston.

Section 5 of the Contract provides that the Governor shall guarantee to the Company interest at the rate of Five Pounds per centum per annum upon the money actually expended for the purposes of con-

struction of the Railway, up to and not exceeding the sum of £650,000, during Four years of the period of construction, and for a period of Thirty years from the opening of the entire Line for traffic in manner therein mentioned; and by Section 6 it is provided that no sum shall be payable for guaranteed interest for any period during which the Company do not continue to maintain and work the said Railway in an efficient manner.

It is provided by Section 3, sub-section 3, of the Act of Parliament, 34 Victoria, Number 13, that the said Railway, together with all stations, rolling stock, and all other works connected with such Railway, shall be constructed of the best materials and in a thoroughly substantial manner; and that all bridges on the Line shall be constructed according to the Regulations as to strength of the English Board of Trade. This proviso is embodied in the Schedule to the Contract.

It is expressly provided by Section 18 of the Contract, that the obligations of the Governor and Company 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*.

The Schedule to the Contract contains the conditions and specifications under which the Railway is to be constructed.

While the Railway was in process of construction the Government applied to the Colony of Victoria for the services of a skilled Engineer, in order that a thorough inspection should be made of the works so far as they had been carried out; and Mr. W. H. Greene, who was accordingly sent over to Tasmania, furnished two Reports. Upon reference to these Reports, (Documents Numbers 4 and 5,) which were made during the actual process of construction, Counsel will see that the Company failed to fulfil the conditions of the Contract in many respects.

The Government paid to the Company interest at the rate of Five Pounds per cent. upon various sums, amounting to £650,000, which the Company alleged to have been expended by them during the period of Four years of construction as required by Section 5 of the Contract. This interest, which was paid only for the period of construction, amounted in the whole to the sum of £87,576 15s. 4d., but the payments were made under a special form of receipt, and without prejudice to any question at issue between the Government and the Company.

The Company having constructed a Railway from Hobart Town to Evandale (a point on the Launceston and Western Railway Line), opened it for traffic on the Thirteenth of March, 1876, alleging that it was constructed according to the conditions of the Contract, and at a cost of £650,000. The Government contend that the opening was premature, and that the Line then was and still is in an unfinished state. The Company further alleged that they were not bound to avail themselves of running powers over the Launceston and Western Railway, so as to run their trains into Launceston; and that they were not bound to run to Launceston at all.

From the Thirteenth of March to the First of November, 1876, they merely ran the train from Hobart Town to Evandale, being a distance eleven miles short of Launceston.

On the First of November, 1876, the Company ran their Railway through to Launceston; and by Agreement of that date, the Company were empowered to use running powers over the Launceston and Western Railway for the period of Twelve months from the Thirtieth day of October, 1876; and this Agreement provided for the mode in which the compensation payable by the Company to the Government for the exercise of such running powers should be assessed. It was further provided that the Agreement was made upon the express condition that it should not operate as an admission by either party that the conditions of the Contract had or had not been fulfilled, or as a waiver of any right then possessed by either party thereto or to the said Contract.

In June, 1876, the Government desired, with the permission of the Company, to appoint a Board composed of Civil Engineers, who were conversant both with broad and narrow gauges, to inspect the whole of the works and rolling stock of the Main Line Railway Company from Hobart Town to Launceston. The Government applied to the neighbouring Colonial Governments in order to obtain the services of their most competent Engineers; and eventually a Board was formed composed of the Chief Engineers of Government Railways of the Colonies of South Australia and Queensland respectively (Messieurs H. C. Mais and H. C. Stanley), and of the Chief Assistant Engineer of New South Wales (Mr. William Mason). By reference to the Report of the Board of Inspection thus formed, dated Fourteenth of June, 1876, (Document Number 6), it will be seen that the Engineers were unanimously of opinion that "*the general conditions of the Contract, as far as the Construction and Maintenance of the Line is concerned, have not been complied with; and that the speed at which the express trains are run (namely Twenty-three miles per hour, as required by the Contract,) is very excessive, and, in the present condition of the permanent way, dangerous.*"

The Company have continued to run trains daily (Sundays excepted) from the First of November, 1876, along the whole Line from Hobart Town to Launceston up to the present time. It is assumed, for the purposes of this Case, that two trains have run daily from Hobart Town to Launceston and from Launceston to Hobart Town at the speed required by the Contract; namely, Twenty-three miles and Ten miles respectively.

On the Thirty-first of May, 1876, the General Manager of the Company (Mr. C. H. Grant) wrote

to the Colonial Treasurer, representing that the Line must be closed unless pecuniary assistance was immediately given to him; and on the Fifth of June, 1876, the sum of £3000 was advanced by the Government to the Company upon loan. By the Agreement under which this loan was made, it was expressly provided that the loan should not operate as an admission by the Government or the Company that the conditions of the Contract had or had not been fulfilled, but the respective rights and liabilities of the Government and the Company were to remain as if such Agreement had never been executed. The Government subsequently advanced further sums by way of loan to the Company upon precisely the same conditions as above stated for the purpose of keeping the Railway running, and the loans amount in the whole to the sum of £24,200 up to the present date. Parliament has further authorised a sum of £4500 to be advanced upon the same conditions.

In the month of April, 1877, the Government entered into an arrangement with the Company for the conveyance of Mails between Hobart Town and Launceston and all post stations along the line, for the sum of £2000 per annum. No formal contract was entered into, but Counsel will see the nature of the Agreement from a perusal of the letters contained in document Number 8. The mails have since been carried under this Agreement by the Company. It is submitted that the Agreement cannot be construed in any way as an admission by the Government that the Company have fulfilled their Contract.

The Railway has been productive of benefit to the Colony, inasmuch as it has been used by the public for passenger traffic and for the conveyance of large quantities of goods and produce. During the time the Railway has been running no accident has occurred attended with actual loss of life, although the trains have frequently run off the rails, and passengers have been seriously injured. In consequence of the faulty construction of the Line very many persons are deterred from travelling upon it. If the public had complete confidence in the safety of the Railway the benefit conferred upon the Colony by it would be considerably greater than at present, and the traffic receipts would be thereby largely increased. It will be seen that by the terms of the Contract the amount of profit realized by the Railway goes in reduction of the interest payable by the Colony.

The Company have sent in quarterly, up to the present time, a claim for interest on £650,000, alleging that this sum has been *bonâ fide* spent upon the Railway, and that they have completed their Contract. The Company obtained the opinion of Mr. W. Craycroft Fooks, Q.C., (Document Number 9), upon certain points connected with the matters in dispute; but the case submitted to Mr. Fooks has never been published, and only a portion of his opinion has been furnished to the Government. The Company also prepared a case upon which they obtained the opinions of Messieurs E. D. Holroyd, R. B. Miller, and Alfred Dobson. Copies of the case and opinions (Document Number 10) are forwarded to Counsel so that he may see clearly what the contention of the Company is in point of law, but of course Counsel will be guided as to facts only by the Case which is now submitted to him. Mr. Cyril Dodd, of Number 2, Harcourt Buildings, Temple, has given an opinion on behalf of the Government (upon a Case submitted to him by the late Attorney-General) at variance with the above-mentioned opinions, and this opinion is also placed before Counsel (Document Number 11).

The Government *have always refused* to pay the interest on £650,000, because they do not believe that any such sum has been spent upon the construction of the Railway, and they *have always refused* to pay any interest whatever, because they contend that the Company instead of constructing the Railway bargained for seek to impose upon the Government a very inferior article of a Railway which in many important particulars has not been constructed according to the Contract, and which would require a considerable outlay in order to put it into the condition required by the Schedule to the Contract. As regards the curves upon the Railway, the Schedule provides that no curve shall have a less radius than four chains; and it appears from the Report of the Board of Inspection under the heading of General Remarks (Document Number 6) that the curves vary from five to eighty chains. The Government, however, contend that although it is provided that no curve shall have a *less* radius than four chains, it is the duty of the Company to construct the curves with such a radius as is consistent with a safe and efficient Railway service at the Contract speed, namely, twenty-three miles an hour.

On several occasions His Excellency the Governor and suite have, by the express wish of the Company, travelled upon the Railway free of charge, and free passes have been issued by the Company to Members of Parliament. Some Members have used their passes, and others have refused to do so preferring to pay their ordinary fare. It would, of course, be supposed that no further reference would have been made by the Company to that which was a very natural and ordinary courtesy shown to the Representative of Her Majesty and to the Members of the Legislature, and Counsel would not be troubled with any allusion to this trifling matter were it not for the fact that the Company have actually sought to make some capital out of it, and have paraded the "free passes" before that portion of the English public which is connected with the Railway. Neither the Government nor the public have, except as above mentioned, used the Railway gratuitously, the Company having received full remuneration for all services rendered by them. The Government therefore contend that although the Railway has been of benefit to the Colony, it has never been accepted or acknowledged in any way as having been constructed according to the Contract.

On the Twenty-ninth of July, 1876, the Company commenced an action against the Government under the Crown Redress Act of this Colony, by a Supplication setting forth the conditions of the Contract, alleging that the Company had fulfilled all such conditions, and claiming interest on the sum of £650,000. The Crown pleaded a general plea that the averments and statements contained in the Supplication were not true. Notice of trial was given by the Company for the Twenty-second of August; but, as this only gave the Crown two weeks after issue joined to enable them to obtain the evidence of skilled witnesses (namely, Messrs. Greene, Mais, Stanley, and Mason,) from the neighbouring Colonies, an application to

postpone the trial to the October Sittings of the Court was made, and an order to postpone was accordingly granted. In September, 1876, however, the Company abandoned all proceedings and obtained a rule to discontinue the action upon payment by them of all costs.

Counsel will observe that various authorities are quoted in the Opinions laid before him; and he will advise as to what bearing, if any, such cases have upon the questions at issue between the Government and the Company.

Counsel's attention is now called to a question affecting the route chosen by the Company for the construction of their Railway. This matter (in which the people living in the Districts of Green Ponds, Bothwell, and Oatlands are more especially interested than the general public) will be briefly noticed, so that Counsel may not be embarrassed with the consideration of too many questions. It is provided by Section 3, subsection 1, of 34 Victoria, Number 13, that in the Contract provision shall be made for compelling the construction of the Railway by a route which shall keep as near as may be practicable to the existing centres of population. The Contract (which can only be made in pursuance of the above-mentioned Act) provides, in the first section of the Schedule, "that the route of the said Railway shall keep as near as may be practicable to existing centres of population, but the Company shall have full power to alter or vary the route as their Engineers may advise to be necessary or advantageous, having reference to the exigencies of construction, or difficulties of route, or prospects of traffic." The towns of Oatlands and Green Ponds (situated on the Main Road from Hobart Town to Launceston) form two important centres of population, and Oatlands is one of the largest inland towns. The Company constructed their Railway far away from Green Ponds, and the Line runs four or five miles distant from Oatlands. The Company allege that the route chosen by them is the only practicable one within the meaning of the Contract, and that the Railway could not have been taken through Green Ponds and Oatlands except at an enormous outlay. On the other hand it is urged, in the interest of the inhabitants of the above-mentioned towns, that the Contract was *ultra vires* of the Act of Parliament, in that it gave too great a power to the Company to vary the route; and that, even taking the Contract as it is, the Oatlands route is reasonably practicable. Mr. Greene, in his Report, (Document Number 4), says that no Line which would fulfil the Contract obligations as to speed could be constructed *via* Upper Bagdad, Constitution Hill, &c. (meaning the above-mentioned route past Green Ponds and Oatlands) for One million pounds sterling—and, therefore, that this route cannot be considered as reasonably practicable within the meaning of the Contract. Counsel is not in a position to advise as to disputed questions of fact, and is only asked to advise as to the construction to be put upon the words used in the Schedule of the Contract as to route. Since the date of Mr. Greene's Report (including the period while the Railway was in process of construction) up to the present time, the Government have not formally complained of the alleged diversion of route; Counsel's attention is called to the subject in questions 9, 10, and 11, *infra*.

Counsel is requested to advise—

1. Assuming that the Report of the Board of Engineers (Document Number 6) correctly represents the present condition of the Railway and works, are the Government bound to pay to the Company the guaranteed interest or any portion thereof in accordance with the Eighth Section of the Contract?
2. Are the Government entitled to have the Railway constructed in *strict* accordance with the Contract and Schedule before they can be compelled to pay the guaranteed interest or any part thereof, or would the Company be entitled to such interest notwithstanding that they have failed to perform the Contract in *some* respects? What amount of latitude (if any) would be allowed to the Company as regards the breach of the Contract conditions?
3. Considering the facts detailed in this Case, have the Government received a substantial part of the consideration for which they bargained under circumstances sufficient to raise an implied promise to pay the interest or any part thereof, or have they done anything which could be construed as an admission that the Company have fulfilled their Contract, or are entitled to the interest or any part thereof?
4. Assuming the train service to be carried on with punctuality, but that the use of the railway is fraught with danger to the public in consequence of its imperfect construction, can the Company, having regard to Clause 6 of the Contract, recover the interest or any part thereof?
5. Was the running of the Railway from Hobart Town to Eyandale a compliance with the conditions of the Contract entitling the Company to interest; or should the Company have run trains through to Launceston?
6. Assuming that the Company have been guilty of breaches of the Contract within the Sixth and subsequent Sections of the 34 Victoria, Number 13, could the Government *now* obtain the re-scission of the Contract under those sections?
7. Assuming that the Government are liable to pay the interest notwithstanding that there have been breaches of the Contract, what remedies have they for such breaches, and what would be the measure of damages? Would the fact that the maintenance of the railway would be rendered more costly by reason of the imperfect condition of the line be an element in considering the damages?
8. If the Government give notice to the Company, under Clause 17 of the Contract, to purchase the undertaking, &c., will the position of the Government be thereby prejudiced; or on the other hand will such a notice be legally binding upon the Company, and at the same time leave the Government free to contend that the Contract has not been fulfilled?

As to the Route question.

9. Is the provision in the Schedule to the Contract as to route *ultra vires* of the Act of Parliament, 34 Victoria, No. 13?
10. Assuming that the provision is not *ultra vires*, what kind of construction does Counsel put upon the words "having reference to the exigencies of construction, or difficulties of route?"
11. Assuming that the Company have committed a breach of contract by having constructed the Railway along the present route, have the Government condoned such breach? If not, what remedy has the Government for the breach, and what defence would such breach afford to an action for the interest?

Re TASMANIAN MAIN LINE RAILWAY.

Ex parte THE GOVERNMENT OF TASMANIA.

COUNSELS' OPINION ON CASE.

(1.) WE are of opinion that the Government is bound to pay the guaranteed interest from the date at which the Line was opened for traffic from Hobart Town through to Launceston. This appears to be the 1st of November, 1876.

The facts as stated to us show that the reception of traffic upon the Line was assented to by the Government and the Colony, and that the Railway Company were permitted and encouraged to work and continue working the Line for the benefit of the Colony, and assisted by loans of money and by the subsidy afforded them for carrying the Mails,—so that in our judgment the Line was recognised as the Line bargained for, though no doubt all rights to complain of its defects were reserved. This being so, we are clearly of opinion that the Government cannot, after thus availing itself of the service as actually rendered, insist upon the defective state of the road as a ground for refusing payment of the interest or of any part of it.

The general conduct of the Government, and of the Colony, must be considered in weighing the importance to be attached to the formal protests. (*Davenport v. The Queen*, L. R. 3, App. Cas. 115. 131. 132.)

A sufficient remedy, it may be observed, is provided by "The Main Line Amendment Act," 34 Vict. No. 13, Sec. 5, 6, 7, *et seq.*

(2.) This is answered above. Clause 6 of the Contract provides for a cesser of interest in certain events, and upon such events happening the Government would be justified in preventing the working of the Line, and in suspending payment of interest.

(3.) We think that such consideration has been received, and that the facts constitute a sufficient admission that the agreed Line has been made, but made in a defective manner.

(4.) We think that the Government could in such case prevent the Line being used, and that they would then be justified in refusing payment of the interest. We do not, however, think that the Government can continue to make use of, and permit the Colony to make use of, the Line, and at the same time refuse to pay the interest.

(5.) We are of opinion that the Company were bound to run through to Launceston.

(6.) We think the Court has power now to rescind the Contract; but we should not expect that the Court would, having regard to the fact that benefit has been derived from the Line, and to the lapse of time, and the other circumstances of the case, exercise such power. Indeed we may say that, in our judgment, such power ought not, upon the facts before us, to be exercised.

(7.) Sect. 5 of the Amendment Act, 34 Vict. No. 13, affords a complete remedy.

Other remedies are given by the subsequent sections of the same statute.

Under Section 9 of the above statute the Court is not to give damages, properly so called, but is to inflict a penalty the amount of which is to be that which may appear to the Court reasonable.

In considering what would be reasonable we think regard should be had to the fact that the maintenance has been rendered more costly, owing to the imperfect condition of the Line, and the amount of the guarantee by the Government thus improperly augmented. Further non-repair being a continuing breach, we are of opinion that a succession of penalties could be inflicted, so as practically to compel the Company to put the Line into a proper state of repair.

If, however, instead of taking the steps pointed out by the statute an action were brought upon the Contract, there is more difficulty as to the proper measure of damages.

In assessing damages in such action regard should be had to the fact of the maintenance of the Line being more costly owing to its imperfect condition, and to the further fact that a succession of actions could be brought.

No doubt the Sections of the statute 34 Vict. No. 13, were drawn to obviate the difficulties which would arise if the only remedy had been by action independent of the statute.

(8.) We are of opinion that it will not.

It is impossible we think now to contend that the Line has not been opened.

In giving such a notice there should be an express reservation of all rights for past breaches, so as to avoid misconstruction.

(9.) We are of opinion that it is not.

(10.) These words allow the expense, the facility of obtaining material and labour, the engineering difficulties, and indeed all the elements proper to be considered to be taken into consideration in the choice of the route between the appointed termini.

They have special reference to the evident contemplation of the Legislature that the cost would not exceed £650,000.

(11.) The assumption here suggested cannot be entertained. Even if we are wrong in the 9th answer still there has been no *breach of Contract*. The Governor and Council may have acted in excess of their powers in making the Contract, but it can be no breach of Contract to make the road in accordance with the Contract. If there has been no breach there cannot have been condonation. This question seems based on a misapprehension of the legal effect which would follow if it were determined that the public authorities had acted *ultra vires*.

(Signed) JOHN HOLKER.
J. P. BENJAMIN.
CYRIL DODD.