

(No. 29.)



1877.

SESSION IV.

TASMANIA.

LEGISLATIVE COUNCIL.

MAIN LINE RAILWAY.

CASE AND OPINION OF COUNSEL.

Laid upon the Table by Mr. Moore, and ordered by the Council to be printed,
November 14, 1877.



Stone Buildings, 14th November, 1877.

SIR,

I HAVE the honor to forward the Opinion of Mr. Cyril Dodd on a Case put before him by me on behalf of the late Government with regard to the claim of the Main Line Railway Company against the Government.

In addition to the questions returned and answered by Mr. Dodd, I sent copies of the different Acts relating to the Railway, the Contract with the Company, the Reports of the Engineers, the Case put before Counsel by the Railway Company, and their Opinions, together with a short statement of the position taken up by myself as Law Adviser to the Government, which Mr. Dodd has not returned.

Mr. Dodd, in writing to me with the Opinion I enclose, says, "If I were in your position I would have a joint Opinion of mine and the Attorney-General of England, and then on that refuse to pay if it coincides with my own Opinion. If you telegraph to the agents it could be got at once, as I have kept the Report and the Contract, &c. for further possible service."

Mr. Dodd, in thus writing and sending his Opinion to me, is not aware of the change in the Ministry. I may add that I have read the Opinion, but feeling that it is the property of the Government, I have not shown it to any one.

I have the honor to be,

Sir,

Yours very obediently,

The Hon. the Attorney-General.

C. HAMILTON BROMBY.

Attorney-General's Office, Hobart Town, 14th November, 1877.

SIR,

I HAVE the honor to acknowledge the receipt of your letter of this date forwarding me the Opinion of Mr. Cyril Dodd on a Case put before him by you on behalf of the late Government with regard to the claim of the Main Line Railway Company against the Government. I shall be glad if you will forward to me a copy of the short statement prepared by you as Law Adviser of the Government and forwarded to Mr. Dodd, in order that the papers may be complete. I find no draft or copy in this office or in the office of the Crown Solicitor.

Will you kindly inform me what arrangements were made with Mr. Dodd as to his fees?

I have, &c.

The Honorable C. HAMILTON BROMBY.

(Signed) ALFRED DOBSON.

Counsel is requested to advise—

1. Is the Government liable to pay the guaranteed interest after the time allowed for Construction, but before the Line was completed to Launceston?
Or, was the opening of the Line to Evandale Junction without running powers over the Launceston and Western Railway such an opening as would comply with the conditions of the Contract?
2. Could the Company enforce their claim against the Government, supposing the Engineers find the line in a similar condition to that in which it was when reported on by them.
3. How far is the making of the Line of best materials, &c., and such as can be used with safety by the public, a condition precedent to the payment of the guaranteed interest?
4. Supposing Engineers prove that the Line is such that, although the train service may be carried on with punctuality, it cannot be carried on without imminent danger to those who use it, can the Company enforce their claim?
5. Supposing the Government pay the guaranteed interest, what remedy has the Government for loss through faulty construction?

6. Does the fact of the Government having contracted with the Company to carry the Mails recognize the due fulfilment of the Contract by the Company?
7. Can the Company sue for other damages caused by non-payment of interest in the event of their succeeding in asserting their right to the payment of the same?

And generally on the Case.

1. I ASSUME that Evandale Junction is the point at which the Line of the Tasmanian Main Line Railway Company joined the Launceston and Western Railway Company's Line; and so assuming, I am clearly of opinion that the opening of the Line to Evandale Junction, without running powers over the Launceston and Western Railway to Launceston, was not such an opening as would comply with the conditions of the Contract.

2. I think that, in order to obtain payment of the guaranteed interest after the period allowed for construction of the Line, the Railway Company must prove that they have done that which they contracted to do, and that it is not enough for them to prove that they have done part of that which they contracted to do. They must, therefore, in my opinion, have constructed the agreed Line in accordance with the conditions set forth in the Schedule to the Contract; and further, after having so constructed it, furnished the required accounts in the required manner, in order to have a good claim against the Governor or the Colony.

I think this would be so, even if Section 18 were not in the Contract; but that section strengthens my opinion, as does also the wording of the Acts under which the Governor entered into the Contract in question, which tend to show what the intention of the Colonial Legislature was. When I say that the wording of those Acts strengthens my opinion, I do not mean that the Contract, apart from those Acts, appear to me to be of doubtful meaning, but merely that the Acts show that the Contract was intended by the Colonial Legislature to be that which I think it is; namely, a guarantee to the Company of a dividend equal to 5 per cent. on certain capital upon a Line from Hobart Town to Launceston, or to a point on the Launceston and Western Railway, with supplemental running powers into Launceston, constructed of the best material, and in a thoroughly substantial manner according to the Contract, so long as it should be kept in good and efficient repair and working condition (for a fixed period); and not a guarantee of a like or any other amount upon a Railway of a different description, or constructed in a different or inferior, or even superior, manner. The Colony guarantee a particular undertaking to be carried out in a particular manner. Cases such as *Boon v. Eyre*, 2 Black. 1312, which is a leading Case of the class of Cases referred to in the Opinions before me, in my judgment, are not in point. They relate to property obtained by one individual from another, and sought to be retained without payment, and not to Cases of what I may fairly term quasi-suretyship, or of guarantees of the success of commercial undertakings. Even, however, in contracts for the sale of goods it is quite clear that if there is a sale of a described article, the vendor cannot substitute for the agreed article one somewhat similar; and as Lord Blackburn in *Bower v. Shand*, L.R. 2 App. Cas. at p. 480, puts it,—“If the description of the article tendered is different in any respect it is not the article bargained for, and the other party is not bound to take it.” In a case such as the present there is no “taking” by the Governor or the Government of the Line, and nothing in my judgment to give rise to any legal or equitable liability, or duty, to pay the interest whilst the Line is in an improper condition and not according to the Contract. In answer then to this question, I say that I am of opinion that the Company cannot enforce their claim if the Line is in the condition stated in the Report.

3. The above answer answers this question.

4. If there is imminent, or even unreasonable danger to those who use it, in the use of it I am of opinion that interest cannot be claimed for the period during which it is in such state.

5. This is a question of considerable difficulty, as the Government would be at the same time paying as though the line were duly constructed, and claiming damages on the ground that the line was not, in fact, duly constructed. If, however, the Government do pay, which I do not advise, then probably their best remedy would be under the Main Line Amendment Act, (34 Vict. No. 13.). This, however, is a point into which I have not gone fully, as the inconsistency of paying as though the Colony had got what it required, whilst taking proceedings on the ground that it has not, is so apparent, that it can hardly be adopted with safety. I would further add, that I do not myself see how damages can be given to compensate the plaintiffs in any suit that can be brought on the contract, or the Governor or Colony, in any proceedings under the Main Line Acts for the risk alleged to exist, or for any damage which may accrue to passengers in consequence of the state of the line, although, of course, the Government is deeply interested in the safety of the colonists, —that interest being incapable of being assessed in money.

6. I think not.

7. The damage must be limited to the unpaid interest, and to interest upon each instalment of such interest from the period when such instalment became due. Any damages beyond the above would, upon the facts before me, be too remote.

CYRIL DODD.

2, *Harcourt Buildings, Temple, September 6th, 1877.*

Stone Buildings, 16th November, 1877.

Sir,

I HAVE the honor to enclose a copy of the statement which I sent to Mr. Dodd with the questions put for his opinion.

Mr. Dodd in a letter to me which accompanied his Opinion states that the fee is Ten Guineas.

I have the honor to be,

Sir,

Yours very obediently,

C. HAMILTON BROMBY.

The Hon. the Attorney-General.

Attorney-General's Office, 7th July, 1877.

You will receive herewith some printed matter containing a copy of a Contract made between this Government and the Tasmanian Railway Company, also a Report of three Engineers on the Line after it was partly finished, and the case on behalf of the Company put before their Counsel with their opinions.

The position that the Government has taken is, that with such a report before it, it cannot recognise the Line as the one bargained for at all, and therefore that no interest is due.

Will you send me your opinion professionally on the questions that I will send you separately?

I send the opinion of their Counsel for your assistance. I should be glad to have your opinion by return of Mail if possible.

Address to the Attorney-General, and send amount of your fee.

(Signed) C. HAMILTON BROMBY.

CYRIL DODD, *Esq., Harcourt Buildings, Temple.*