(No. 69.)

1878.

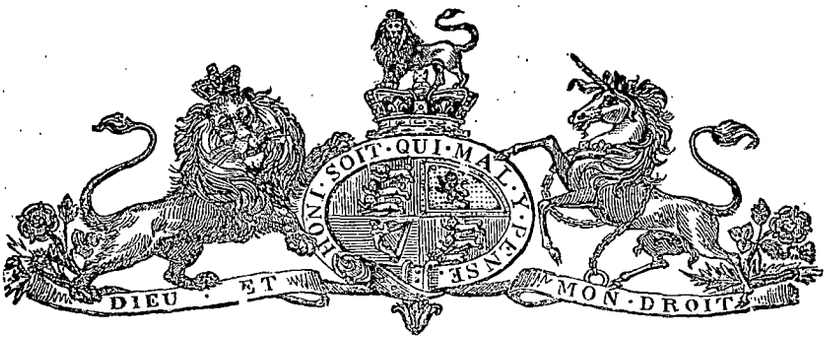
TASMANIA.

HOUSE OF ASSEMBLY.

MAIN LINE RAILWAY ROUTE:

CASE AND OPINION.

Laid upon the Table by the Colonial Treasurer, and ordered by the House to be printed, July 30, 1878.



Hobart Town, 30*th November*, 1877.

SIR,

AT the request of the Oatlands Railway Rate Committee, I enclose for your information a Case and Opinion of Council touching the deviation of the Railway from the route laid down by the late Mr. Wylie, and trust that the information thus afforded will assist you in protecting the Contract Rights of the Colony in this most important particular.

I have the honor to be,
Sir,
Your most obedient Servant,
ALFRED PILLINGER.

The Hon. the Colonial Treasurer.

CASE.

ON the 15th of August, 1871, a Contract was made between His Excellency CHARLES DU CANE, Esquire, then Governor of Tasmania, for and on behalf of the Government of Tasmania, of the one part, and THE TASMANIAN MAIN LINE RAILWAY COMPANY, LIMITED, of the other part, for the purpose of constructing, maintaining, and working a Main Line of Railway between Hobart Town and Launceston.

This Contract (a copy of which accompanies the Case) it will be observed was made—as it states—in pursuance and exercise of the powers given by the Acts of the Parliament of Tasmania, 33 Victoria, No. 1, passed the 22nd October, 1869, intituled "The Main Line of Railway Act," and 34 Victoria, No. 13, passed the 18th October, 1870, intituled "The Main Line of Railway Amendment Act," 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.

By the last-mentioned Act, 34 Victoria, No. 13, sub-section 1 of section 3, it is enacted that in the Contract provision *shall* be made, amongst other things, "*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.*"

By section 4 of the same Act it is provided, that "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."

If the 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.

The foregoing are the principal *sections of the Act* which bear upon the present case. But Counsel's attention is now particularly directed to the following clauses in the Contract:—

The first clause of the Contract stipulates—"That 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 of such Contract."

The 18th Clause of the Contract provides that the obligations of each of the contracting parties are to be correlative and dependent.

The 19th Clause states that "The Contract is made subject to the provisions of 'The Main Line Railway Acts' of the Parliament of Tasmania, *and each of the contracting parties agrees to abide by such provisions, save so far as they may be in such Contract expressly modified*, or they may thereafter be altered, added to, or varied by mutual consent.

The sections and clauses of the Contract have hereinbefore been fully set out in order to lead up to the first clause of the Schedule, to which Counsel's attention is most particularly drawn, and upon the construction of the words therein used Counsel's Opinion is chiefly sought—this clause states:—
"*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 Engineer may advise to be necessary or advantageous, having reference to the exigencies of construction or difficulties of route, or prospects of traffic.*"

As Counsel is probably aware, from the time the Company commenced to construct the line objections have been preferred respecting the non-fulfilment of the terms of the Contract; and in 1873 Parliament considered the subject of that importance that it instituted a special inquiry to be made into the matter, and the Select Committee appointed 3rd July, 1873, consisted of the following Members of the House of Assembly, namely—Messrs. Hodgson, Moore, Belbin, Millar, Douglas, Swan, and Castley. This Committee sat for twenty-one days; and the records of the Proceedings of the House show that many very experienced and important witnesses were examined, including Mr. Giblin who drew the Contract, Messrs. Chapman and Butler, Members of the Government who entered into the Contract; and also Mr. Audley Coote, the Agent of the Company, and Mr. Grant, its Engineer. Mr. D. Climie, who had made a survey of the routes, also was examined. On the 28th of October, 1873, the Committee brought up this Report. "After having prosecuted their examination carefully, and at considerable length," the result that the Committee came to fully bore out that the terms of the Contract had not been observed by the Company, and a very careful decision was given on the question of *route*, which forms the principal point in the Case now being submitted for Counsel's opinion—a decision, be it observed, which clearly demonstrated that the route as originally surveyed by Mr. Wylie, the Company's Engineer, preparatory to the signing of the Contract, or even the formation of the Company, should have been the one that ought to have been adopted as fulfilling the terms and spirit not only of the Contract itself, but of the Acts of Parliament in pursuance of which such Contract was made.

It is requested that Counsel may carefully peruse the Report of the Committee, and also the evidence of the various witnesses examined before such Committee. The Correspondence, especially the communication from Mr. Grant, may also be perused with advantage, volume 26, 1873, of the House of Assembly Journals containing the Report, Examination, and Correspondence.

From a consideration of the before-mentioned Sections and Clauses, and a careful perusal of the before-mentioned documents, it will be easily conceived that the Landholders and Residents of the Oatlands District have a very grave cause of complaint. Oatlands is recognised, without doubt, as the largest Inland Town of the Colony. It was always contemplated that the Township should enjoy the facilities of the Railway, especially being one of the largest "centres of population" on the Main Road from Hobart Town to Launceston; and an actual survey of the District of Oatlands by such a very able and experienced Engineer as Mr. D. Climie shows very conclusively to any one but a prejudiced mind that the original route as surveyed by Mr. Wylie is the one that should have been adopted, and which the Township and Colony had a right to expect the Company would have taken. Not only from the evidence before the Committee does this appear to have been the original intention of the Contracting Parties, but the Prospectus of the Company (also contained in Journal herewith), clearly states that the line "starting from Hobart Town will pass through Oatlands." Could anything be plainer?

The true reasons why the Company abandoned Wylie's route and took the Jerusalem one are to a certain extent conjectural; but there is little doubt that the "exigencies of construction, difficulties of route, or prospect of traffic" influenced but little the Company when adopting the latter line.

The Oatlands District feeling they had been grossly deceived, that a cruel and grievous wrong had been done them by the changing of the route, petitioned Parliament in June, 1873, "to enforce that portion of the Contract which provides that the line should be carried as near as practicable to the present centres of population;" but beyond the appointing of the Select Committee little else had been done in the matter.

On behalf of the Landholders and Residents of Oatlands, the following questions are submitted to Counsel for his careful consideration and opinion:—

1. Do the foregoing Clauses of the Main Line Railway Contract read subject to the sub-section 1 of section 3 of "The Main Line Railway Act," 34 Victoria, No. 13, compel the Company to construct the Main Line Railway along a route keeping as near the centres of population as practicable?
2. In the event of it being shown that the Company have not constructed a line as near the centres of population as practicable, does this divergence from such route constitute a breach of the Main Line Railway Contract?
3. Having reference to foregoing Section, and in the event of the Company having committed a breach of the Contract, have the Oatlands District as a body, whose Contract Rights are affected, power to move the Attorney-General to take action in the mode prescribed? And failing that power:
4. Does the Act empower the Oatlands District of themselves and independently of the Attorney-General to take action, and if so, how?
5. What are the remedies which the District have, or what course would Counsel advise should be adopted in order to have the Contract carried out according to its terms?
6. Does the first Clause of the Schedule to the Contract in any way modify the terms of the Act or the Contract, so as to enable the Company's Engineer himself to fix any route *he* might deem advisable, and is the question of the exigencies of construction, difficulties of route, or prospects of traffic one solely left for him to decide; and do the words of such Clause justify the Company in adopting an entirely new route, such an one as the Jerusalem one followed by the Company, instead of that of Wylie's nearest the existing centres of population, as indicated in the sub-section 1 of section 3 of 34 Victoria, No. 13, if it can be shown that Wylie's route is practicable?
7. Are the conditions contained in the first Clause of the Schedule *ultra vires?*

And generally on the Case.

OPINION.

OPINION of Mr. C. H. BROMBY *on Case submitted by Messieurs* GILL & BALL, *Solicitors, ex parte the Landholders and Residents of Oatlands District and the Tasmanian Main Line Railway Company.*

1. I AM strongly of opinion that the Clauses of the Contract referred to in the first question put to me, read subject to Sub-section 1 of "The Main Line of Railway Amendment Act," do compel the Railway Company to construct the Railway as near to the centres of population as practicable. Assuming, for the present, that the Governor had power under this Sub-section to enter into a Contract with such a condition as that contained in the first paragraph of the Schedule of the Contract, and assuming that the Town of Oatlands was at the time of the execution of the Contract a centre of population within the meaning of the Act and Contract, the only question that arises on this part of the case is as to the meaning of the words "as near as may be practicable," as used in "The Main Line of Railway Amendment Act," and modified by the provisions of the Contract itself. In their ordinary acceptation, these words would mean as near as the Line could be carried without such unreasonable difficulty or expense as would render the construction of the Line of so costly a character that the Company could not be reasonably expected to undertake it under their Contract; but in the Schedule to the Contract these words receive a very important modification, and the Company have power given to them to alter the route, on the advice of their Engineer; and, in giving this advice, the Engineer may take into consideration the exigencies of construction, the difficulties of route, and the prospects of traffic. Though this discretion so given to the Engineer is large, I am clearly of opinion that he must exercise it reasonably. If he sees that by altering the route any extraordinary engineering difficulties may be avoided, or any very large expense may be saved, or that in all probability a large amount of traffic will be obtained, he would be justified in advising the Company to alter the route; but still not to alter it so that it would go unnecessarily away from the centres of population. It must be taken that the Engineer has advised the Company to alter the route so as to take it from a centre of population, and that the Company have acted on his advice; and the question is, has the Engineer, in so advising, exercised a reasonable discretion,—having regard to the three matters above mentioned? This is a question of fact; and the only evidence before me on the subject is that given before the Select Committee in 1873, which I shall now consider.

Mr. Wylie, the Engineer, being dead, the evidence of the Honorable T. D. Chapman and the Honorable H. A. Butler, as to admissions made to them by Mr. Wylie, are very important. From the evidence of these gentlemen, given before the Select Committee in 1873, it is clear that Mr. Wylie was of opinion that a route through Oatlands was not only practicable, but more practicable than the Jerusalem route; and the fact that, in the Prospectus issued by the Railway Company in 1872, it is stated that the Line would pass through Oatlands, is strong evidence that Mr. Wylie had reported this route to the Railway Company to be more practicable than that previously proposed by Messrs. Doyne, Major, and Willett. It is true that Mr. Audley Coote says he knew of no such route having been recommended to the Company; but this is not conclusive evidence that such recommendation was not made; and it is difficult to see, from the evidence before me, how the Company could have published this route in their Prospectus, as the one which would be followed, unless such a report had been made. Mr. Frith, too, considers the Oatlands route very practicable and easy. Mr. Climie strongly corroborates the opinion of these two Engineers, and undertakes that the Oatlands route could be easily carried out at a less cost than the amount upon which interest has been guaranteed by the Government. It may be said that Mr. Climie's evidence is somewhat interested, as he was instructed to survey a Line on behalf of some who were interested in showing that the Oatlands route was practicable; but I do not think that this would lessen the weight of his evidence, especially as he pledges his professional reputation on his opinion, and states that he could find Contractors ready to carry out this route for the sum mentioned. Mr. Grant's evidence, however, is all the other way. In his opinion the route followed is the only practicable one, and the Oatlands route utterly impracticable. I am not in a position to draw any distinction between the relative value of the opinions of these professional gentlemen, or what their respective standing in their profession is. Mr. Grant, having seen more of the Jerusalem route, is in a better position to speak of it than the other Engineers; and, as I suppose he must have been anxious to secure the easiest and the cheapest route, we must assume that he thoroughly believes that the route taken was the cheaper and the easier to construct of the two. Of course, there might be other reasons which would weigh with him and with the Company, but of which there is no evidence in the case put before me. We have, however, only his evidence, on one side, as against the evidence of three Engineers upon the other. It is true that Mr. Cook throws doubt on the thoroughness of Mr. Wylie's survey; but, in opposition to this, we have Mr. Wylie's statements and the fact of his having marked out his route on the chart which he gave to the Government as being a better route than the Jerusalem route, and the fact that his principals adopted that route in the map which they issued with their Prospectus. The Jerusalem route

having been already surveyed by Messrs. Doyne, Major, and Willett, it is not reasonable to suppose that Mr. Wylie would have departed from that route, and chosen another, without having first thoroughly satisfied himself that such other was more practicable.

That the amount of traffic to be obtained from the Oatlands route would be greater than that to be obtained by the Jerusalem route, Mr. Hodgson's statistics clearly prove. I can therefore, on the evidence before me, come only to this conclusion:—That Mr. Grant, in advising the Company to alter the route from that which is called the Oatlands route to that which is called the Jerusalem route, has not used a reasonable discretion either with reference to the exigencies of construction, the difficulties of route, or prospects of traffic; and, therefore, that the Company has committed a breach of the Main Line Railway Contract.

2. The answer to this question is contained in my answer to the first.

3. I am of opinion that the people of the Oatlands District have no power to compel the Attorney-General to take action in the mode prescribed by Section 6 of "The Main Line of Railway Amendment Act." This power, given to the Attorney-General to apply to the Supreme Court, is a *quasi* judicial power, which the Legislature alone can compel him to exercise.

4. I am of opinion that the Act does not give the people of the Oatlands District, of themselves, power to take any action in the matter.

5. The people of the Oatlands District have no privity of Contract with the Railway Company, and they have no remedy, in my opinion, either at Law or Equity; but they have the power, which everyone possesses, of petitioning Parliament to instruct the Attorney-General to apply to the Supreme Court to rescind the Contract.

6. The answer to this question will be found in my answer to the first.

7. On full consideration of the Case, I am of opinion that the power given to the Company to alter the route, in the first paragraph of the Schedule to the Contract, is *ultra vires* of the Governor to contract. The only power the Governor has to enter into a Contract with the Company at all is that given to him by Sub-section 1 of Section 3 of "The Main Line of Railway Amendment Act." That gives him power to contract for a Railway to take a certain route, and not for a Railway to take another and a different route. If the words in the Schedule allow the Company to take, under certain circumstances not mentioned in the Act, a different route—and I am of opinion that they do so allow—they form a Contract which the Governor had no power to enter into, and which is therefore *ultra vires*. The Company is in this position:—If the words in the Schedule give the Engineer power only to vary the Line slightly from the centres of population, he has not complied with them: if they give him power to vary the route altogether, and to any great extent, they are *ultra vires*. Whether the Colony would, after having helped to induce the public to invest money in the Company's undertaking, think it right to repudiate the Contract, on the ground that it is *ultra vires*, is of course another question.

Generally on the case, I think the best course open to the people of the Oatlands District is either privately to induce or through Parliament to compel the Attorney-General to exercise his powers under Section 6 of "The Main Line of Railway Amendment Act," and to apply to the Supreme Court to rescind the Contract; and then, if the Supreme Court does so rescind the Contract, terms might more easily be made with the Company by which the Line itself or a branch or loop Line might be taken through the Oatlands District; and that having been done, the Governor in Council might, under Section 9 of the Amendment Act, waive the rescission.

C. HAMILTON BROMBY.

Stone Buildings, 27th November, 1877.

JAMES BARNARD,
GOVERNMENT PRINTER, TASMANIA.